

*UTI POSSIDETIS* v SELF-DETERMINATION:  
THE LESSONS OF THE POST-SOVIET PRACTICE

Thesis submitted for the degree of

Doctor of Philosophy

at the University of Leicester

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2014

## ***Abstract***

This thesis covers researches on the correlation of the principles of *uti possidetis juris* and external self-determination in case of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria. Problems on determining international boundaries of newly independent states are very complicated and such processes are closely connected to the principle of territorial integrity. However, it should not be ignorant to human rights issues, including the right to internal self-determination. In this context, research of correlation between *uti possidetis juris* and external self-determination attracts much attention, whereas almost no fundamental researches on the Post-Soviet area are currently available. Upon the USSR's dissolution the newly independent states of that area faced serious problems with determination of the state boundaries among themselves. Clashes between states and certain minority groups in the Post-Soviet area led to the sanguinary conflicts which are still awaiting their solution.

The main purpose of this thesis is to analyse the legal grounds of application of *uti possidetis* in determining boundaries of the former USSR republics and a legal evaluation of the separatist movements in their territories. Moreover, it addresses whether there is a real collision between the two principles or whether it is just a simulation for hiding third states' aggressive actions under the umbrella of self-determination.

The thesis comprises five chapters. Chapter 1 is a brief introduction to the historical legal background of the conflicts. Chapters 2 and 3 present a theoretical review of both principles' evolution and role in international law. Chapter 4 provides an analysis on the correlation of the two principles in the Post-Soviet area. Chapter 5 briefly covers the peace initiatives by various mediators and offers conflict resolution vision under international law.

The thesis refers to unique researches and reviews a substantial number of materials and documents that have been unavailable to legal experts from the West.

## ***Acknowledgment***

*First of all I would like to thank my parents and my family who supported me during my PhD researches, for their patience and understanding.*

*Above all I dedicate this work to my mother Salima who always encouraged me to complete this thesis notwithstanding my serious illness and other discouraging problems. A special mention goes to my daughter Aylin who was born during my researches. Her birth gave me a renewed vigour in overcoming all problems and completing my researches.*

*Next I would like to express my great appreciation to my supervisor, Professor Malcolm N. Shaw. I could not find proper and sufficient words to express my gratitude to Professor Shaw. I can confidently state that without his supervision, care, and continued support and attention I would never have completed this thesis.*

*I would like to express my gratitude to the Law School of the University of Leicester and especially to Mrs Jane Sowler, the Law School's Postgraduate Officer, for all their kind support and assistance provided during my PhD studies.*

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### *List of Abbreviations*

|              |   |
|--------------|---|
| ADR          | Azerbaijan Democratic Republic (1918-1920)                          |
| AFDI         | Annuaire Français de Droit International                            |
| AJIL         | American Journal of International Law                               |
| Am Soc Int L | American Society of International Law                               |
| AO           | Autonomous Oblast   |
| ASIL         | American Society of International Law                               |
| ASSR         | Autonomous Soviet Socialist Republic                                |
| BFSP         | British and Foreign States Papers                                   |
| BYBIL        | British Yearbook of International Law                               |
| CERD         | The Committee on the Elimination of Racial Discrimination           |
| CFR          | Czechoslovak Federative Republic                                    |
| CIS          | Commonwealth of Independent States                                  |
| CPPCG        | Convention on Prevention and Punishment of the Crime of<br>Genocide |
| CSCE         | Conference on Security and Co-operation in Europe                   |
| CUP          | Cambridge University Press  |
| EC           | European Communities  |
| ECHR         | European Court of Human Rights                                      |
| ECR          | European Court Reports  |
| EJIL         | European Journal of International Law                               |
| EU           | EU  |
| FRY          | Federal Republic of Yugoslavia                                      |
| HRC          | Human Rights Committee  |
| HRW          | Human Rights Watch  |

|             |   |
|-------------|---|
| ICCPR       | International Covenant on Civil and Political Rights  |
| ICG         | International Crisis Group  |
| ICJ         | International Court of Justice  |
| ICLQ        | International and Comparative Law Quarterly   |
| IDP         | Internally Displaced Persons  |
| ILA         | International Law Association   |
| ILC         | International Law Commission  |
| ILM         | International Law Materials   |
| ILR         | International Law Review  |
| ILSA        | International Law Students Association  |
| IRCC        | International Red Cross Committee   |
| J Int'l Law | Journal of International Law  |
| LNTS        | League of Nations Official Journal  |
| LQR         | Law Quarterly Review  |
| MASSR       | Moldovan Autonomous Soviet Socialist Republic of the<br>Ukrainian Soviet Socialist Republic |
| MSSR        | Moldovan Soviet Socialist Republic  |
| MTR         | Moldavian Transnistrian Republic  |
| NGO         | Non-Governmental Organisation   |
| NKAO        | Nagorno-Karabakh Autonomous Oblast  |
| OAU         | Organization of African Unity   |
| OIC         | Organisation of Islamic Conference  |
| OSCE        | Organization for Security and Co-operation in Europe  |
| OUP         | Oxford University Press   |
| PACE        | Parliamentary Assembly of the Council of Europe   |

|       |   |
|-------|---|
| PCIJ  | Permanent Court of International Justice                  |
| RBDI  | Revue Belge de Droit International                        |
| RJPIC | Revue Juridique et Politique, Indépendance et Coopération |
| RSFSR | Russian Soviet Federal Socialist Republic                 |
| SFRY  | Socialist Federal Republic of Yugoslavia                  |
| SSR   | Soviet Socialist Republic                                 |
| UN    | United Nations  |
| UNCHR | United Nation's Commission of Human Rights                |
| UNGA  | General Assembly  |
| UNSC  | United Nations Security Council                           |
| USCR  | US Committee for Refugees                                 |
| USSR  | Union of Soviet Socialist Republics                       |
| WWI   | World War I   |
| WWII  | World War II  |
| YBIL  | Yearbook of International Law                             |



## INTRODUCTION

It is a fact that a change of sovereign states' boundaries is always a painful process which has a serious political impact on the concerned parties.<sup>1</sup> It is aptly stressed by some commentators that state territory is a material basis for the existence of states and the international community in general, and special attention should be paid to the problem of state territory.<sup>2</sup> From ancient times, the change of state territories and their boundaries has been a serious problem which, before the formation of modern international law, was resolved exclusively by the use of force.<sup>3</sup>

Issues related to territorial integrity encompass certain rules that regulate the main aspects of territorial acquisitions and the stability of boundaries. One of the most problematic issues is the determination of legal grounds for the transformation of internal administrative borders into international boundaries of newly independent states within the context of preserving their territorial integrity and respecting the human rights such territories' inhabitants. It became crucial for the newly independent states of Central and Eastern Europe after dissolution of the USSR and the SFRY which led to various sanguinary conflicts over determination of the international boundaries of some former constitutional units of these socialist federations. Such conflicts between some former units and between the minority groups and the newly independent states resulted in losses of thousands of lives and gave grounds to certain powers for further speculations with numerous principles of international law to justify their illegal territorial claims and political goals. However, for the purposes of the current researches it is vital to concentrate on the legal grounds legitimising creation of newly independent

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<sup>1</sup> M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 3 EJIL 478.

<sup>2</sup> LA Timchenko and LD Timchenko, *International Law: Practice Book* (Irpen, Academy of State Tax Service 2002) (In Russian) 184.

<sup>3</sup> BM Klimenko, *State Territory: Problems of Theory and Practice of International Law* (Moscow, Mejdunarodnie Otnosheniya 1974) (In Russian) 24-25.

states rather than any related political or moral issues. Accordingly, the principle of *uti possidetis* is called to play a vital role in the legitimisation boundaries of newly independent states drawing limitations for the territorial frameworks of such states.

The main subject of this thesis is the research of the correlation of the principle of *uti possidetis* and self-determination in the Post-Soviet area in the four conflict cases of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria which are the four major evident cases representing substantial interest for the purposes of these studies.

While application of the principle of *uti possidetis* may be preceded by the self-determination of peoples, a collision between these two principles may arise upon determining territories and state boundaries of newly independent states. The problem of the correlation of these two principles is among the most complicated issues of modern international law. Even though after WWII people's right to self-determination became one of the fundamental principles of international law, its subsequent widespread use for political speculations led to the change of its initial original purpose designated in the course of the decolonisation process. It put the principle against other principles of international law. Such use of self-determination brought it in conflict with the principles of *uti possidetis* and territorial integrity.

The main research subject of the thesis encompasses issues related to the correlation of the principles of *uti possidetis* and self-determination in the Post-Soviet area. The role of the former principle presents a huge interest for international legal doctrine. Although there is a sufficient number of researches dedicated to the principle of self-determination in the doctrine of international law, the most recent events with Kosovo, the secession of Montenegro, the war and recognition of South Ossetia and Abkhazia, the separation of South Sudan and others cases have all raised the importance

of legal argumentation on the correlation of the principle of self-determination with other principles of international law including the principle of *uti possidetis juris*.

It is believed that the thesis covers most of the available Western scholarly writings related to the research area. While a considerable number of papers exist in the Western doctrine of international law, almost all of them are limited in their researches by general theoretical analysis, with little attention paid to the documentary basis and analysis of the local sources available in Georgia, Azerbaijan, Moldova, Armenia and Russia. In contrast to the issues of secession and self-determination, the subject matter of this thesis has attracted relatively little scholarly attention. Only one book by Susan Lalonde<sup>4</sup> and articles and papers by distinguished scholars such as Malcolm Shaw, Steven Ratner, Alan Pellet, Ian Brownlie, James Crawford and others<sup>5</sup> have encompassed issues on the correlation between the two principles of international law, but they have not addressed these issues with respect to the Post-Soviet area in great details with the role of the principle of *uti possidetis*.<sup>6</sup> A substantial amount of literature has been reviewed during these six years and much time has been spent in various libraries, archives, centres and institutions around the world. Due to the lack of fundamental researches in the Post-Soviet area, it is a primary purpose of this thesis to fill in this gap and produce a clear picture on the legal evaluation of the current problem.

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<sup>4</sup> SN Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis* (Montreal, McGill Queens University Press 2003) 169-170.

<sup>5</sup> Shaw, *Peoples, Territorialism and Boundaries* (n 1) 478-507; S Ratner, 'Drawing Better Line: Uti Possidetis and the Borders of New States' (1996) 90 AJIL 593-595; A Pellet, 'The Opinion of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 EJIL 178; I Brownlie, *African Boundaries – A Legal and Diplomatic Encyclopaedia* (London, C Hurst & Company 1979) 9; J Crawford, 'State Practice and International Law in Relation to State Succession' (1998) 69 BYBIL 17.

<sup>6</sup> FS Mirzayev, 'Principle of *Uti Possidetis*: History and Modern Reality' (2004) 3 Ukrainian YBIL (In Russian) 36-47.

The thesis claims to be among the first complex scientific researches of international legal problems of the principle of *uti possidetis* and its correlation with self-determination in the Post-Soviet area. The thorough analysis of the Soviet legislation as well as bilateral and multilateral boundary agreements between and among the former Soviet republics and third states provided in the thesis could represent much interest for international legal studies of the Post-Soviet conflicts in Georgia, Azerbaijan and Moldova. The thesis is based on researches of general and specialised literature dedicated to the problem. The main emphasis was made on the basis of documents and literature available in Soviet, Post-Soviet and Western sources. The researches refer to some documents that are not open to the public and perhaps have never been referenced in any available sources. For the purposes of confidentiality, in some cases no references to such documents are given and rather a general referencing as to 'on file with the author' is used in these cases.

The methodological basis of the thesis uses general and comparative methods of researches. The historical method was used to review the evolution of both principles in international law, while the comparative method was used to research the experience of other similar conflicts. The practical importance of the thesis is in fact that it be of some interest to researchers and international legal experts specialising in the Post-Soviet area.

The structure of the thesis was created with an emphasis on the researches made herein. It includes an Introduction, Chapters 1–5 and a Conclusion. The doctrinal views are also accompanied by references to the existing practice with respect to the correlation of the principle of *uti possidetis* and self-determination.

In Chapter 1 a brief introductory descriptive analysis is given on the legal historical background in respect of the four conflict cases of Abkhazia, South Ossetia,

Nagorno-Karabakh and Transnistria. Its main purpose is to provide general information on historical legal facts related to the conflict cases.

Chapter 2 considers the history of the evolution and development of the principle of *uti possidetis* from Roman law until its current employment by modern international law, together with importance of its application for the resolution of disputes and conflicts related to the determination of state territories and boundaries. This chapter also deals with the issues of the application of the principle beyond the colonial frameworks with respect to newly independent states of the Post-Soviet area. The basic doctrinal views and the vast practice of international tribunals, arbitrations, special commissions and organisations are considered therein. Chapter 2 also refers to the evolution of the principle of *uti possidetis* and its formation as the general principle of international law. The critics of the principle and the counter-arguments to such positions are also explored.

Chapter 3 examines the right to self-determination, and its evolution as the principle of international law as well as its controversial nature, referring to the doctrine of international law with the analysis of specific cases. The problematic issues regarding the misuse of this right and its legal consequences are the main target of the research in this chapter. The problems of lawful secession and separatism are considered and analysed on the basis of the theoretical and practical viewpoints. There is also an assessment of the purposes of the application of self-determination in compliance with the fundamental principles of international law together with the grounds for its possible application thereto.

Chapter 4 explores the theoretical and practical issues with respect to the correlation of the principle of *uti possidetis* and self-determination in the Post-Soviet area. Based on the reviews made in the previous Chapters 1–3, the correlation and the

collision between these two principles in the practice of the former USSR republics in respect of territorial and boundary disputes and conflicts are analysed therein. The chapter focuses on the Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistrian conflicts. The analysis submitted in this chapter refers to a review of Soviet legislation and regional legal instruments employed within the CIS format as well as general analysis of two principles' correlation in the four conflict cases under international law.

Chapter 5 deals with peace initiatives of the four conflicts and, based on conclusions given in Chapter 4, considers solution of the problem of collision between the principle of *uti possidetis* and the right to external self-determination in the Post-Soviet area under international law.

The Conclusion provides a synopsis of the thesis and a legal evaluation of the current problem. It addresses the question whether there is a real conflict between the two international law principles of *uti possidetis juris* and self-determination in the case of the Post-Soviet area. It is concluded that there are no grounds for breakaway regions of Georgia, Azerbaijan and Moldova to exercise their rights to external self-determination through impairing the territorial integrity of these sovereign states. It is further argued that the researched conflict cases are of a legal nature and are the subjects of major politics with the involvement of third major powers. It is also submitted that even if there is such conflict between *uti possidetis juris* and external self-determination, the former should have a prevailing force over the latter since it is called to define and protect the boundaries of sovereign Georgia, Azerbaijan and Moldova. It is also argued that application of the principle of *uti possidetis juris* in the Post-Soviet area is of a consensual nature due to the numerous bilateral and multilateral legal instruments initiated within the CIS format.

# CHAPTER 1: HISTORICAL BACKGROUND OF THE CONFLICTS IN THE POST-SOVIET AREA

## 1.1 Georgian Knots: Abkhazia and South Ossetia

### 1.1.1 Abkhazia: A Historical Pressure Tool on Georgia

In 1990 Georgia declared its independence and boycotted the referendum on preserving the USSR, while the Abkhazians voted for saving the Soviet State.<sup>7</sup> In the early 1990s Georgia was among the first constitutional units struggling for its independence from the USSR. Abkhazians were among a few minorities that did not support Georgia's independence referendum held on 31 March 1991.<sup>8</sup> At the end of 1990 the nationalistic forces led by Zviyad Gamsakhurdia came to power in Georgia and they declared the restoration of Georgia's state independence that it possessed from 1918 to 1921.<sup>9</sup> Finally on 9 April 1991, based on the results of the referendum held on 31 March 1991, the National Assembly of Georgia adopted the Constitutional Act on Restoration of State Independence of Georgia.<sup>10</sup> Under this Act, Georgia declared that a legal succession of the Democratic Republic of Georgia existed from 1918 to 1921 and ceased the Georgian SSR.<sup>11</sup>

When in 1992 the Georgian authorities declared the restoration of the Georgian Democratic Republic, the minority groups including Abkhazia argued that such declaration would infringe its autonomous status, even though the 1921 Georgian Constitution did guarantee regional autonomous rights.<sup>12</sup> Simultaneously the Abkhazian

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<sup>7</sup> Conciliation Resources. 'Georgia-Abkhazia Relations Chronology' <<http://www.c-r.org/our-work/accord/georgia-abkhazia/chronology.php>> accessed 12 August 2009.

<sup>8</sup> B Coppieters and others, *Statehood and Security: Georgia after the Rose Revolution*. American Academy of Arts and Sciences (Cambridge, MIT Press 2005) 384.

<sup>9</sup> D Djaparidze and others, *Democratic Republic of Georgia: 1919-1921. Three historic documents* (Tbilisi 1991) (In Russian) 109-133.

<sup>10</sup> *ibid* 98-107.

<sup>11</sup> TM Shamba and Neproshin YA, 'Soviet Abkhazia-Sovereign State' in TM Shamba and Neproshin YA, *Legal Grounds of Statehood and* <<http://abkhazia.narod.ru/SH/chap-44.html>> accessed 27 March 2013.

<sup>12</sup> Djaparidze and others (n 9) 105.

ASSR declared its independence from Georgia. On 25 August 1990 the Abkhazian ASSR adopted the Declaration on State Sovereignty of Abkhazia and the Resolution on Legal Guarantees of State Sovereignty Protection, where the merger with Georgia in 1931 was declared void.<sup>13</sup> Abkhazia used such argument for declaration of its independence from Georgia. Declaration of Abkhazia's independence was accompanied by violent actions against the high Georgian officials and civilians. Being supported by Russia and its military elite, Abkhazia entered into a military phase with Georgia.<sup>14</sup> Short period of war between the breakaway region and Georgia resulted in the exodus of the ethnic Georgians from Abkhazia. The Georgian President Gamsakhurdia, who conducted nationalistic policy towards minority groups, tried to break the Abkhazian resistance, but military defeats of Georgian troops led to the former's replacement by Eduard Shevardnadze, one of the former powerful Soviet bosses.

The Abkhaz conflict developed in similar circumstances as in South Ossetia, but with certain specifics. Despite many similarities with South Ossetia, the Abkhaz conflict has a different nature and history. In contrast to South Ossetia, in certain historical time periods Abkhazia enjoyed a certain quasi-statehood status. Being conquered by certain regional powers at various times of its history, Abkhazia was always one of the administrative units within these colonial powers. Abkhazia existed as an independent kingdom in the 8th century and then was conquered and emerged with the various Georgian states.<sup>15</sup> In the 16th century Abkhazia became an autonomous principality within the Georgian Kingdom. Abkhazia kept its autonomy even after the conquest of Georgia by the Ottoman Empire<sup>16</sup> and the subsequent conquest by the

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<sup>13</sup> Shamba and Neproshin (n 11).

<sup>14</sup> G Mirsky, *On Ruins of Empire: Ethnicity and Nationalism in the Former Soviet Union* (Wesport, Greenwood Publishing Group 1997) 72.

<sup>15</sup> S Graham and V Law, *Nation-Building in the Post-Soviet Borderlands* (Cambridge, CUP 1998) 56.

<sup>16</sup> D Gulia, *History of Abkhazia* (Sukhumi, Gosizdat of the Abkhazian ASSR 1951) (In Russian) 57-63.



Russian Empire.<sup>17</sup> Within the Russian Empire, Abkhazia was one of the administrative units, but after the Bolshevik's coup d'état Georgia incorporated the former into its territorial frameworks. Abkhaz sources state that after Abkhazia's downgrade to the autonomous republic in 1931 during the period of Stalinism, Abkhazians were subjected to mass oppression and discrimination ended after Stalin's death.<sup>18</sup> However, after Stalin, Abkhazians re-gained administrative power over the region which was intentionally supported by the central Moscow authorities as a part of *divide et impera* policy for the loyalty to the Soviet Empire by the local minorities.

The Bolshevik's coup d'état led to the establishment of the independent Georgian state, and Abkhazia was incorporated into the Democratic Republic of Georgia. Only after the invasion of the Red Army was Abkhazia re-established as the Socialist Soviet Republic.<sup>19</sup> However, it did not enjoy full membership status as the other Soviet republics did; in contrast, it had the ambiguous status of a treaty republic associated with the Georgian SSR.<sup>20</sup> On 4 March 1921 Abkhazia was declared as one of the constitutional units of the USSR, as one of the Soviet socialist republics.<sup>21</sup> In 1931 the Abkhazian SSR was abolished and merged with the Georgian SSR, becoming the Abkhazian Autonomous Soviet Socialist Republic.<sup>22</sup>

The Abkhazians often refer to the 1992 Georgian military campaign which resulted in the capture of Abkhazia's capital Sukhumi, qualifying it as an international crime against the civilian population of Abkhazia which gave the latter the right to

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<sup>17</sup> *ibid.*

<sup>18</sup> Shamba and Neproshin (n 11).

<sup>19</sup> A Neproshin, *Abkhazia, Problems of International Recognition*. Lecture at the Moscow State Institute of International Relations (MGIMO) (16-17 May 2006) (In Russian) <<http://www.abkhaziya.org/server-articles/article-c165f1f9be6ab370d75a0b3d2af71a59.html>> accessed 11 September 2009.

<sup>20</sup> A Menteshashvili, *From the History of Relationships of Georgian, Abkhaz and Ossetian Peoples. 1918-1921* (Tbilisi, Znanie 1990) (In Russian) 14-16.

<sup>21</sup> Constitution of USSR, adopted on 31 January 1924. Full text is in Y Kukushkin and O Chistyakov, *Outline of Soviet History* (Politizdat, Moscow 1987) (In Russian) 17-21.

<sup>22</sup> S Lakoba and O Bgajba, *History of Abkhazia* (Sukhum, Alashargaba 2007) (In Russian) 190-210.

exercise the right to external self-determination.<sup>23</sup> The separatist unit claims that under the ‘Remedial Theory’ being subject to gross violation of human rights pursuant to the principle *uti possidetis juris*, the Abkhazians have a right to claim independence based on the boundaries of the Abkhazian SSR which existed for a couple years within the USSR.<sup>24</sup>

However, at that time Abkhazians themselves were supported by the Russian regular forces, and their various illegal armed groups (referred to as the ‘Confederation of Mountain Peoples of the Caucasus’ which even had as a member Shamil Basayev, one of the leaders of the Chechen terrorist groups), were fighting against Georgia and committing serious crimes against the civilians.<sup>25</sup> Heavy fighting ended with a short-term ceasefire brokered by the UN and Russia which was breached by the Abkhazians after their recapture of Sukhumi in Autumn 1993.<sup>26</sup> The recapture of Sukhumi by the separatists and its allied Russian forces led to the massacre of the ethnic Georgians residing in Sukhumi.<sup>27</sup> The Sukhumi massacre remains one of the cruellest and

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<sup>23</sup> A Djergeniya, General Prosecutor of the Republic of Abkhazia, Preliminary Materials of the Investigation of Criminal Cases related to the Act of Genocide, Mass Murder and other Serious Crimes committed by Georgian Authorities and its Armed Forces during Occupation of Abkhazia in 1992-1993 (In Russian) <<http://www.abkhaziya.org/genocid.html>> accessed 18 January 2010.

<sup>24</sup> S Bagapsh, ‘Abkhazia is de-facto State’, Interview of Novoye Vremya in December 2006 (In Russian) <<http://www.gazetanv.ru/article/?id=368>> accessed 7 February 2010; S Shamba, ‘The Right to Independence’ *New Politics* (12 May 2005) (In Russian) <<http://www.abkhaziya.org/server-articles/article-1297b5ed939b13a5956eef606743750d.html>> accessed 12 November 2009; A Cyganok, ‘Legal Grounds for Recognition of Abkhazia and South Ossetia’ (10 October 2006) (In Russian) <<http://www.apn.ru/publications/article10592.htm>> accessed 17 October 2009; N Petro, ‘What the Tagliavini Report Fails to Consider’ *OpEdNews* (3 October 2009) <<http://www.opednews.com/articles/What-the-Tagliavini-Report-by-Nicolai-N-Petro-091002-478.html>> accessed 11 February 2010.

<sup>25</sup> A Kullberg, ‘The Contradiction between Nationalists and Islamists in Eurasian Conflict Areas’ *Eurasian Politician* (9 August 2003) 4; J Steele, ‘Shamil Basayev: Chechen Politician Seeking Independence through Terrorism’ *The Guardian* (11 July 2006)

<<http://www.guardian.co.uk/news/2006/jul/11/guardianobituaries.chechnya>> accessed 15 March 2010.

<sup>26</sup> Agreement on Ceasefire in Abkhazia and Mechanisms of Compliance Control (signed on 27 July 1993) Bulletin of the Parliament of the Republic of Georgia (No 9, 1993) (In Russian) 223-227; A Zverev, ‘Ethnic Conflicts in the Caucasus 1988-1994’ in B Coppieters (ed), *Contested Borders in the Caucasus* (Brussels, Vubpress 1996) 54.

<sup>27</sup> S Chervonnaia, *Conflict in the Caucasus: Georgia, Abkhazia, and Russian Shadow* (Somerset, Gothic Image Publications 1994) 23.

bloodiest crimes in the history of this conflict.<sup>28</sup> After the recapture of Sukhumi, the separatist forces supported by the Russians took control of the entire territory of Abkhazia, except for the Upper Kodori Gorge which had recently been lost by Georgia during the 2008 war. The victory of the separatists resulted in the mass exodus of the ethnic Georgians from the territory of Abkhazia.<sup>29</sup>

After the ceasefire between Georgia and Abkhazia the active phase of negotiations started between the parties. All negotiations took place under the direct supervision of the UN, the OSCE and Russia.

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<sup>28</sup> US State Department, 'Country Reports on Human Rights Practices for 1993' (February 1994) 619.

<sup>29</sup> HRW, 'Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict' (Helsinki, March 1995) <<http://www.hrw.org/reports/pdfs/g/georgia/georgia953.pdf>> accessed 14 February 2009.

### 1.1.2 South Ossetia: A Permanent Choice Dilemma between Georgia and Russia

The history of the conflict between Georgia and South Ossetia dates back to the nineteenth century in Tsarist Russia times.<sup>30</sup> In the 19th century Ossetia, being one of Russian provinces, was divided into two parts; Northern Ossetia was incorporated into Russia, while South Ossetia became part of Georgia which was also incorporated into Russian Empire.<sup>31</sup> The first military clashes between Georgians and South Ossetians took place in the beginning of the 20th century when, after the Bolshevik's coup d'état, Georgia declared its independence in 1918.<sup>32</sup> South Ossetia became part of the Democratic Republic of Georgia, while North Ossetia became part of the Terek Soviet Republic existing within the RSFSR.<sup>33</sup> During this period South Ossetians periodically fought against the central Georgian authorities claiming independence.<sup>34</sup> In 1921 when independent Georgia fell down and was conquered by the Red Army, South Ossetia was declared as part of Soviet Georgia. However, for the purposes of normalisation of the situation which had arisen due to the dissatisfaction of the divided Ossetians, South Ossetia was declared an autonomous oblast in April 1922. Like all other Soviet autonomous units, South Ossetia enjoyed the full scope of rights and freedoms during the Soviet times, including participation in the political administration of the region.

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<sup>30</sup> M Bliev, *South Ossetia in Conflict Relations of Russia and Georgia* (Vladikavkaz, Evropa 2006) (In Russian) 15-303.

<sup>31</sup> K Dzugayev, 'Republic of South Ossetia: History and Today' (In Russian) <<http://www.spektr.info/articles/narodi/182>> accessed 12 February 2010.

<sup>32</sup> Bliev, (n 30) 250-320.

<sup>33</sup> B Kharebov, 'People of South Ossetia' in K Dzuhayev (ed), *South Ossetia: 10 Years* (Vladikavkaz 2000) (In Russian) 32-33.

<sup>34</sup> Y Gagloyti and others, *From the History of South Ossetia* (Tskhinval 1995) (In Russian) <<http://rusk.ru/st.php?idar=27878>> accessed 24 November 2009; ICG, 'Georgia: Avoiding War in South Ossetia', Europe Report No 159 (26 November 2004) 2-3 <<http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN019224.pdf>> accessed 13 August 2009.

The conflict began in 1989 when South Ossetia demanded the upgrade of its status from ‘autonomous oblast’ to ‘autonomous republic’.<sup>35</sup> Georgian authorities recognised this decision as void<sup>36</sup> and undertook certain measures on banning political parties in regions including South Ossetia and Abkhazia, which led to protests by the latter.<sup>37</sup> In response, South Ossetia (supported by Russia) declared its independence as the South Ossetian Democratic Republic within the USSR.<sup>38</sup>

On 21 December 1991 South Ossetia declared its independence and sovereignty from Georgia. Afterwards South Ossetia held a referendum on 19 March 1992 where the majority of population excluding the exiled Georgians voted for reunification with Russia.<sup>39</sup> However, as of the date Russia was reluctant to incorporate South Ossetia into its territorial frameworks.<sup>40</sup> The central Georgian authorities abolished the autonomy of South Ossetia in response to the latter’s declaration of independence.<sup>41</sup> Georgian attempts to reintegrate the breakaway region through the use of force were unsuccessful and ended in ceasefire.<sup>42</sup> Until 2008 South Ossetia was not recognised by any member of the UN, including the Russian Federation.

The military phase of the Georgian–South Ossetian conflicts ended with Russian mediation on 24 June 1992 by signing the Agreement on the Principles for Settlement

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<sup>35</sup> Decision of XII Session of 20<sup>th</sup> Convocation of Soviet of People’s Deputies of South Ossetia Autonomous Oblast ‘On Upgrading of Status up to the Autonomous Republic within Georgian SSR’ (adopted on 10 November 1989, Tskhival) (In Russian) <<http://www.osetinfo.ru/ist3>> accessed 12 February 2009.

<sup>36</sup> Decree of the Presidium of the Supreme Soviet of Georgian SSR, ‘On Decision of XII Session of 20<sup>th</sup> Convocation of Soviet of People’s Deputies of South Ossetia Autonomous Oblast’ (adopted 20 June 1990, Tbilisi) (In Russian) <<http://www.sojcc.ru/bazeofindep/234.html>> accessed 3 February 2009.

<sup>37</sup> B Chochiyev and M Djioyev, *South Ossetia: Chronicle of Georgian Aggression Events 1988-1992*, (Tskhinval 1996) (In Russian) 36.

<sup>38</sup> Declaration ‘On State Sovereignty of South Ossetian ASSR’ (adopted at III Session of the Supreme Soviet of South Ossetian Autonomous Oblast on 20 July 1990, Tshikhval) *Socialist Ossetia* (21 July 1990) (In Russian) <<http://soveticus5.narod.ru/85/sborn91.htm>> accessed 13 December 2009.

<sup>39</sup> K Kelekhsayev, *Ossetia and Ossetians* (St-Petersburg, Pechatniy Dvor 2009) (In Russian) 420-550.

<sup>40</sup> J Perovic, ‘From Disengagement to Active Economic Competition: Russia’s Return to the South Caucasus and Central Asia’ (2005) 13 *Demokratizatsiya* 61-85.

<sup>41</sup> ICG (n 34) 3-4.

<sup>42</sup> R Donaldson and J Nogee, *The Foreign Policy of Russia: Changing Systems, Enduring Interests* (New York, Armonk 2005) 199.

of Georgian–Ossetian conflict.<sup>43</sup> For the settlement of the South Ossetia conflict, the first attempt was the signing of the agreement on establishment of trilateral Joint Peacekeeping Forces (JPKF), including Georgian, Russian and Ossetian units in 1992.<sup>44</sup> However, Russian forces were the main force dividing the conflicting sides. Since deploying Russian peacekeeping forces they were basically unilaterally supporting the separatist forces. Under Russia’s permanent pressure Georgia agreed the ceasefire with South Ossetia to avoid escalation with Russia. Under the ceasefire agreement, with the support of Russia, both South Ossetia and Georgia undertook not to apply sanctions against South Ossetia and to avoid the use of force.<sup>45</sup> Since that time Russia pretended to play a key role in settlement of the conflict which became ‘frozen’ and all attempts to negotiate the peaceful settlement with Russian mediation were unsuccessful. Moreover, the peaceful negotiations were twice broken by military clashes in particular periods; however, they never transformed into large-scale war, except for the ‘Five-Day War’ in 2008.<sup>46</sup>

Like Abkhazia, South Ossetia was unable to determine its position as to whether to exercise the right to external self-determination and be independent or to become part of a third state. If, at the early stages before the Five-Day War’, the separatist unit had declared on the soonest integration into the Russian Federation,<sup>47</sup> at the later stage South Ossetian authorities stated that they prefer to retain independence and that under

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<sup>43</sup> (1993) 8 Bulletin of International Treaties (In Russian) 25.

<sup>44</sup> ICG, Georgia: Avoiding War in South (n 34) 4.

<sup>45</sup> Agreement ‘On Principles of Georgian–South Ossetian Conflict Settlement’ (signed on 24 June 1992 in Sochi). Bulletin of International Agreements No 7 (БМД No 8 Moscow 1993) (In Russian) 25

<sup>46</sup> C King, ‘The Five-Day War: Managing Moscow after the Georgia Crisis’ *Foreign Affairs* (November/December 2008) <[http://www9.georgetown.edu/faculty/kingch/King\\_Five\\_Day\\_War.pdf](http://www9.georgetown.edu/faculty/kingch/King_Five_Day_War.pdf)> accessed 26 October 2009.

<sup>47</sup> ‘We will join Russian Federation’, Statement of the Speaker of South Ossetian Parliament Znaur Gassiyev (In Russian) <<http://www.rosbalt.ru/2008/08/29/518624.html>> accessed 17 December 2009; T Halpin, ‘Kremlin announces that South Ossetia will join “one united Russian state”’, *The Times* (30 August 2008) <<http://www.timesonline.co.uk/tol/news/world/europe/article4635843.ece>> accessed 11 January 2010.

no circumstances the separatist unit would join Russia.<sup>48</sup> In 2009 South Ossetia adopted new amendments to the Constitution proclaiming the breakaway region as an 'independent and sovereign state' which has exercised its right to external self-determination.<sup>49</sup>

In 2008 President Michael Saakashvili initiated a military campaign against the intractable separatist unit which resulted in direct Russian involvement and military conflict between the two states. The Five-Day War between Russia and Georgia resulted in a military defeat of Georgia followed by Russia's official recognition of South Ossetia and Abkhazia. Georgia's arguments claiming that the Five-Day War commenced with provocative actions by South Ossetians supported by Russians, and the former's self-defence actions and counter-attack did not receive strong support from the other countries. In contrast to the Russian and South Ossetian statements, the Georgian authorities argued the unplanned nature of the Georgian military attack that was initiated as a response to the provocative actions undertaken by the South Ossetian military men and the Russian peacekeeping forces.<sup>50</sup> The defeat of Georgia after the Five-Day War and the establishment of full control over the territory of the separatist unit by the latter's authorities, as well as Russia's recognition of South Ossetia and Abkhazia, have made this complicated conflict 'frozen'.

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<sup>48</sup> 'South Ossetia will not Refuse from its Independence', Statement of South Ossetian President Eduard Kokoiti to Interfax News Agency (In Russian) <<http://www.lentacom.ru/reviews/455.html>> accessed 17 April 2010.

<sup>49</sup> Constitution of the Republic of South Ossetia (adopted at referendum held on 8 April 2001, Tskhinval) (In Russian) <<http://cominf.org/node/1127818105>> accessed 29 September 2009.

<sup>50</sup> 'Russia and Georgia in verbal war', *BBC News* (6 August 2009) <<http://news.bbc.co.uk/2/hi/europe/8188532.stm>> accessed 24 March 2010; 'Ex-Diplomat Says Georgia Started War with Russia', *New York Times* (25 November 2008) <<http://www.nytimes.com/2008/11/26/world/europe/26georgia.html>> accessed 12 April 2010.

## **1.2 Insoluble Dilemma: Armenian-Azerbaijani Conflict over Nagorno-Karabakh**

A review of some historical facts is vital for the purposes of the correct legal appraisal of the conflict and its nature. The name ‘Karabakh’ means in Azerbaijani ‘Black Garden’ and the first references to this name as to the Azerbaijani Turkic region may be found in 14–15th-century sources.<sup>51</sup> After the conquest of Azerbaijani lands in the 19th century, the Russian Tsarist Government was paying a huge attention to the establishment of a Christian state neighbouring with the Ottoman Empire, its strategic geopolitical rival. It was the main reason for the massive settlement of the Armenian population from Turkey and Iran in Azerbaijani territories. Tsarist Russia had a goal to seriously change the demographic map of the Western Azerbaijani lands.<sup>52</sup> After the fall of the courageous Karabakh Khanate, which was unable to resist the powerful Russian military machine, along with other lands Karabakh became a part of the administrative territorial system of the Russian Empire.

Up until the 1917 Russian coup d’état, the historical lands of Azerbaijan, Karabakh and Zangezur (the modern geographical strip between the Nakhchivan Autonomous Republic of Azerbaijan and Armenia) were parts of Azerbaijan. After the 1917 Russian Bolshevik coup d’état and follow-up declaration of independence by Azerbaijan in 1918, Karabakh became part of the independent ADR.<sup>53</sup>

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<sup>51</sup> F Mamedova, *Political History and Historic Geography of Caucasian Albania* (Baku, Elm 1986) (In Russian) 104; T Swietochowski, *Russia and Azerbaijan: A Borderland in Transition* (New York, Columbia University Press 1995) 1.

<sup>52</sup> For the full texts of the historical documents in English on the settlement of Armenians in the territory of Azerbaijan by the Russian Empire, see Y Mahmudov and K Shukurov, *Garabagh: Real History, Facts, Documents* (Baku, Tahsil 2005) 307-330; J McCarthy, *Armenian Terrorism: History as Poison and Antidote* (Ankara, Ankara University Press 1984) 85-94; I Aliyev, *Nagorno-Karabakh: History, Facts, Events* (Elm, Baku 1989) (In Russian) 73-74; N Shavrov, *New Threat to Russian Case in Caucasus: Forthcoming Sale of Mugan to Foreigners. St-Petersburg 1911* (Re-published Elm, Baku 1990) (In Russian) 63-68.

<sup>53</sup> T Kocharly, *Karabakh* (Elm, Baku 2002) (In Azerbaijani) 325-328; A Balayev, *National Democratic Movement in 1917-1929* (Elm, Baku 1990) (In Russian) 50-51.



At the end of WWI in 1918, before consideration of its recognition as independent state by the League of Nations, Azerbaijan was mandated to the British troops. Governor-General Thomson of Baku, who was representing the allied forces of the Entente, recognised Karabakh (including Zangezur) as part of Azerbaijan. It is notable that during the British control by General Thomson's troops over Azerbaijan, they recognised Azerbaijan's jurisdiction over Karabakh, and even went so far as to strengthen its position by appointing an Azerbaijani Governor in Shusha, a central town of Karabakh at that time. Thomson's authorities recognised ADR's Government and approved the appointment of H Sultanov as a Governor of Karabakh.<sup>54</sup> Thompson called upon Armenian military forces to immediately leave Nagorno-Karabakh and the Zangezur regions and assisted in the restoration of Baku's administration in the regions.<sup>55</sup> He reaffirmed the jurisdiction of Azerbaijan over the Nagorno-Karabakh region through appointing an Azerbaijani governor. Following that, the Armenian community of Shusha in 1919 officially recognised Azerbaijan's jurisdiction over Nagorno-Karabakh upon the condition that it grant a territorial autonomy to the region and national-cultural autonomy to the Armenian population of Karabakh.<sup>56</sup> The Paris Peace Conference also later accepted and recognised Azerbaijan's claims to the region.<sup>57</sup>

Immediately after granting the British mandate and restoration of Azerbaijani control over Karabakh, the Armenian Elders of Karabakh voluntarily and officially

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<sup>54</sup> Swietochowski (n 51) 75-76.

<sup>55</sup> AL Altstadt, *Azerbaijani Turks: Power and Identity under Russian Rule* (Stanford, California, Hoover Institution Press 1992) 100; AH Arslanian 'Britain and the Transcaucasian Nationalities during Russian Civil War' in RG Suny (ed), *Transcaucasia, Nationalism and Social Change* (rev edn, Ann Arbor, University of Michigan Press 1996) 303.

<sup>56</sup> AL Altstadt (n 55) 102.

<sup>57</sup> T Potier, *Conflict in Nagorno-Karabakh, Abkhazia, and South Ossetia: A Legal Appraisal* (The Hague, Boston, Kluwer Law International 2001) 2; EC Svante, *The Nagorno-Karabakh Conflict* (Uppsala, Department of East European Studies April 1999) 7  
<[http://www.silkroadstudies.org/new/inside/publications/1999\\_NK\\_Book.pdf](http://www.silkroadstudies.org/new/inside/publications/1999_NK_Book.pdf)> accessed 2 December 2008.

recognised the jurisdiction of Azerbaijan over Nagorno-Karabakh.<sup>58</sup> The same was done by the small Armenian community of Shusha on 28 February 1920; they recognised the Azerbaijani Government as a sole legitimate authority in the region.<sup>59</sup> As a main condition, Karabakhi Armenians put forward a demand to be granted a territorial and national-cultural autonomy to the whole Armenian population of the Nagorno-Karabakh.<sup>60</sup>

The 1919 the Paris Peace Conference recognised Azerbaijan's jurisdiction over Karabakh.<sup>61</sup> Azerbaijan's jurisdiction over Nagorno-Karabakh was re-confirmed after inclusion of both states into the USSR, whereas Armenia was compensated through receiving Zangezur, a territory connecting Azerbaijani mainland with its western Nakhchivan region.<sup>62</sup> On 12 January 1920 the Supreme Council of the Allied States de facto recognised the independence of Azerbaijan,<sup>63</sup> and on 1 November 1920 the head of Azerbaijani delegation to the League of Nations submitted a written request to the Secretary of the organisation on membership of Azerbaijan in the League.<sup>64</sup> After the fall of ADR in April 1920 as a result of the Soviet Russia's invasion, Armenians again put forward new claims with respect to Karabakh, Zangezur and Nakhchivan and demanded the unification of these territories with Armenia.

In contrast to the Nakhchivan region of Azerbaijan which was proclaimed the Soviet autonomous republic after its capture by the Soviet Russia's troops in 1921, it took two years to determine the status of Karabakh. In December 1922 the Presidium of

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<sup>58</sup> Swietochowski (n 51) 75-76.

<sup>59</sup> *History of Establishment of the Nagorno-Karabakh Autonomous Oblast of Azerbaijan SSR 1918-1925. Documents and Materials* (Baku, Azerneshr 1989) 23-25; J Walker, *Armenia: The Survival of a Nation* (2nd edn) (London, Rev. Minority Rights 1990) 270.

<sup>60</sup> Altstadt (n 56) 102.

<sup>61</sup> *ibid.*

<sup>62</sup> UNCHR 'Displacement Practice Analysis: Azerbaijan, Report of Francis Deng, the Representative of the Secretary-General' (1999) UN Doc E/CN 4/1999/79/Add 1/10.

<sup>63</sup> Balayev (n 53) 43-44.

<sup>64</sup> *ibid.*

the Central Committee of the Azerbaijan SSR Communist Party made a decision on the establishment of autonomy covering only the mountainous part of Karabakh. This decision was reaffirmed in the Resolution of the Committee of 2 July 1923.<sup>65</sup> As a result, autonomy with the total area of 4,400 square kilometres without any territorial connection with Armenia was established within the Azerbaijan SSR.

Autonomies were established in the USSR on an ethnicity basis and took their names from these ethnic groups. However, due to the existence of the national Armenian state it was decided to give the geographic name to the autonomous region. Hence the name of 'Nagorno-Karabakh' arose that never existed before.<sup>66</sup> The territory and boundaries of the NKAO were defined with an intention of encompassing the majority of the Armenian population through including Armenian villages and settlements and excluding Azerbaijani ones.<sup>67</sup> As a result, by 1989 the Armenian population of the NKAO constituted over 76% versus 21% of the Azerbaijani population.<sup>68</sup>

Another additional argument confirming Azerbaijan's jurisdiction over Nagorno-Karabakh was the Decision of the Caucasian Bureau of Central Committee of Russian Communist Party of Bolsheviks dated 5 July 1921 on keeping the Nagorno-Karabakh region within Azerbaijan's boundaries.<sup>69</sup> After Soviet occupation, Armenia itself withdrew from any claims to Karabakh and confirmed this in a Treaty signed with

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<sup>65</sup> Full text in *History of Establishment* (n. 60) 152-153.

<sup>66</sup> I Mammadov and T Musayev, *Armenian-Azerbaijani Conflict. History, Law, Mediation* (2nd edn, Baku 2008) (In Russian) 54-58.

<sup>67</sup> L Chorbajian and others, *The Caucasian knot: The History and Geopolitics of Nagorno-Karabakh* (Zed Books, London 1994) 13.

<sup>68</sup> Central Statistics Committee, *The National Composition of USSR. Statistics of the Union's Population Census of 1989* (Baku, Azerneshr 1987) (In Russian) 22.

<sup>69</sup> Protocol of the Meeting of the Plenum of the Transcaucasian Bureau of Central Committee of the Communist Party of RSFSR (5 July 1921) (State Historical Archives of Azerbaijan Republic, f1, op 2, d 25, Baku) (In Russian) 16.

the Soviet Russia in January 1921.<sup>70</sup> However, after sovietisation of Armenia and the transfer of Zangezur region to Armenia by the Soviet Russia's leadership, the Karabakh issue was still open. Various disagreements and numerous opinions on the Nagorno-Karabakh issue among the members of the Soviet Communist Party were the main reason for discussions at the special Plenum of the Transcaucasian Bureau of Central Committee of the Communist Party of RSFSR.<sup>71</sup> However, after the long discussions and pursuant to the opinion of Armenian leaders supporting the existence of strong economic ties of Karabakh with Azerbaijan, it was decided to keep the Nagorno-Karabakh region within Azerbaijan's territory.<sup>72</sup> The decision also instructed the Azerbaijan authorities to determine the boundaries of the future autonomous region.<sup>73</sup>

Only on 7 June 1923 did the Central Executive Committee of the Azerbaijan SSR adopt a new Decree 'On establishment of the Nagorno-Karabakh autonomous region'.<sup>74</sup> Moreover, the autonomous status of Nagorno-Karabakh within Azerbaijan's territory was reconfirmed in the USSR constitutions adopted in 1936 and 1977. In the meantime, the huge Azerbaijani population of Armenia was refused the grant of such autonomy within the Armenian SSR.<sup>75</sup> While during the various historical times of USSR's existence, several regions and settlements of Azerbaijan were unilaterally granted to Armenia under the direct command of Moscow.<sup>76</sup> During the entire Soviet

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<sup>70</sup> *Collection of Treaties, Agreements and Convention of RSFSR with Foreign States* (Issue 3 No 79, Moscow 1922) (In Russian) 14-15; YV Kluchnikov and AV Sabanin, *International Politics of New Era in Treaties, Notes and Declarations* (Vol III, Issue 1) (Moscow 1928) (In Russian) 75-76,

<sup>71</sup> *ibid.*

<sup>72</sup> *Correspondence between Mikoyan, Ordjonekidze and Narimanov* (Central State Archives of Soviet Azerbaijan Republic (ИГАОР) АР, ф.28, оп.1, д.99, Baku, 1920) (In Russian) 115.

<sup>73</sup> AL Altstadt, 'Nagorno-Karabakh – 'Apple of Discord' in Azerbaijan SSR' (1988) 7 *Central Asia Survey* 66.

<sup>74</sup> *History of Establishment* (n 60) 152-153.

<sup>75</sup> Mammadov and Musayev (n 66) 34-37.

<sup>76</sup> Mahmudov and Shukurov (n 52) 68-91.

history Armenia always demonstrated a huge ambition to achieve the incorporation of Nagorno-Karabakh and Nakhchivan within its territorial frameworks.<sup>77</sup>

During the late 1980s, the last years of the Soviet Empire, the nationalistic forces came to power in Armenia and commenced an aggressive campaign on the occupation of Karabakh. De Waal characterised Armenia as more violent and chaotic at the beginning of the conflict in 1988 where the innocent Azerbaijanis were killed during pogroms in November and December.<sup>78</sup> It is a commonly accepted and recognised fact that the hostility between Azerbaijan and Armenia commenced in 1987 as a result of the forceful expatriation of ethnic Azerbaijanis from their historic lands in Armenia. As a result, over 300,000 Azerbaijanis left the Armenian SSR and over 200 people were killed.<sup>79</sup>

On 20 February 1988 the 20th Congress of NKAO's Delegates of the Armenian ethnicity made a decision to secede from the Azerbaijan SSR and unify with the Armenian SSR.<sup>80</sup> The decision was made without the delegates of Azerbaijani ethnicity. The Congress of Delegates of Armenian ethnicity appealed to the Supreme Soviet of the USSR with the request to approve the secession decision. However, on 13 June 1988, acting in full compliance with the norms of Soviet legislation, the Supreme Soviet of the Azerbaijan SSR declared the decision of the Congress of Delegates of the Armenian ethnicity of Nagorno-Karabakh null and void.<sup>81</sup> In response to Azerbaijani lawful actions, the radical nationalistic authorities of the Armenian SSR undertook reciprocal measures. On 15 June 1988 the Supreme Soviet of the Armenian SSR adopted the

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<sup>77</sup> For the history, see Potier (n 57) 6-8.

<sup>78</sup> A Yunusov, 'Pogroms in Armenia in 1988-1989' (26 February 1991) 9(186) *Journal Ekspress-Khronika* (In Russian) 19; T De Waal, *Black Garden. Armenia and Azerbaijan through Peace and War* (New York and London, New York University Press 2003) 60.

<sup>79</sup> *The Statistical Information about Refugees and IDPs in Azerbaijan* (Baku, State Statistics Committee 2000) (In Azerbaijani) 2.

<sup>80</sup> *Sovetsky Karabakh* (Stepanakert 21 February 1988).

<sup>81</sup> *Izvestiya* (Moscow 19 June 1988).

Resolution approving the decision of the Congress of Delegates of the Armenian ethnicity of Nagorno-Karabakh regarding the unification of the NKAO of the Azerbaijan SSR with the Armenian SSR. Furthermore, the Armenian authorities submitted a request to Moscow leadership to support this decision.<sup>82</sup>

The central Moscow authorities reacted with mass criticism and called it an extremist attempt to violate Soviet laws.<sup>83</sup> Pursuant to article 78 of the USSR Constitution that imposed a restriction on territorial changes of Soviet republics without their express consent, the Supreme Soviet of the USSR on 18 July 1988 made a decision to keep Nagorno-Karabakh within the Azerbaijan SSR.<sup>84</sup> However, the Soviet leadership established a direct central administration of Moscow in the NKAO. On 24 March 1988 the Central Committee of the Communist Party of the Soviet Union made a decision to appoint Arcady Volsky as a representative of the central Soviet Government in the NKAO.<sup>85</sup> Having established a direct administration of Moscow central authorities and through support of the Armenian forces, Volsky created the foundations for further development of the Armenian separatism in this region.<sup>86</sup>

It was the first time in history that Karabakh was taken out of Azerbaijan's administrative control. On 28 November 1989 the Supreme Soviet of the USSR abolished Volsky's commission and replaced it with the Republican Organisation Committee (Orgcom) of the Azerbaijan SSR. The main goal of the Orgcom was the restoration of the Azerbaijan SSR's jurisdiction over the autonomous region and the re-establishment of the local self-governing bodies. However, facing the military

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<sup>82</sup> *Izvestiya* (Moscow 17 June 1988).

<sup>83</sup> TASS Information Agency (23 February 1988) quoted in J Libaridian, *Documents and facts on the region of Mountainous Karabagh, 1918-1988* (1st edn, Cambridge MA, Zoryan Institute for Contemporary Armenian Research & Documentation 1988) 98-99.

<sup>84</sup> Resolution of the Presidium of the Supreme Soviet of USSR, 'On decisions of the Supreme Soviets of Armenian SSR and Azerbaijan SSR regarding Nagorno-Karabakh issue' (18 July 1988) 29 Bulletin of the Supreme Soviet of USSR (Moscow 1988) (In Russian) 20-21.

<sup>85</sup> *ibid.*

<sup>86</sup> Moscow Home Service, in Russian at 1600 GMT (18 January 1989) // SU/0364 B/4 (21 January 1989).

resistance of the Armenian armed groups Orgcom was not able to achieve its main goal. On 10 December 1991 immediately after the proclamation of independence by Azerbaijan, the Armenian separatists of Nagorno-Karabakh held a referendum without the participation of the Azerbaijani population of Nagorno-Karabakh, which at that time constituted 20% of the total population of Nagorno-Karabakh and proclaimed independence from Azerbaijan.<sup>87</sup> Moreover, there are solid evidences that a so-called ‘referendum’ on unification with Armenia was just a collection of signatures from the NKAO’s farms and factories.<sup>88</sup>

Immediately after the collapse of the USSR, Armenia commenced the active military phase against Azerbaijan through portraying it as a liberation movement of Karabakhi Armenians. It resulted not only in the loss of 20% of Azerbaijan’s territory constituting 890 towns, villages and settlements, 1 million refugees and IDPs, but also in multibillion Soviet roubles economic losses (approximately USD 60 billion) and the deaths of 20,000 and the injury of 50,000 Azerbaijanis.<sup>89</sup> It is confirmed that the exodus of IDPs in Azerbaijan as a result of the Armenian occupation was one of the biggest in Europe since the end of WWII.<sup>90</sup>

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<sup>87</sup> Russian Radio, in Russian at 2200 GMT (13 December 1991) / SU/1256 B/9 (16 December 1991).

<sup>88</sup> De Waal (n 79) 19-20.

<sup>89</sup> *IDP and Refugee Population in Azerbaijan* (Baku, State Committee on Refugees and IDP 2005) 8-9; UNGA, ‘Letter dated 25 October 1996 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General’, UNGA 51<sup>st</sup> Session, Third Committee Agenda item 110 (30 October 1996) UN Doc Supp (A/C.3/51/9); *Discussion Paper: Assistance to Internally Displaced Persons (IDP)*, EU TACIS / Reform of the Social Protection System in Azerbaijan (Helsinki Consulting Group, BBJ Consult and Emergences, November 2006) 2-3.

<sup>90</sup> UNHCR, ‘Statistical Yearbook’ (2002) UNYB 20-22

<<http://www.unhcr.org/home/STATISTICS/41206f762.pdf>> accessed 12 July 2008; International Red Cross and Red Crescent Societies, ‘Azerbaijan Appeal’ No. 01.78/2003 Appeal 2003-2004 (Geneva 2003) <<http://www.ifrc.org/docs/appeals/annual03/017803.pdf>> accessed 12 July 2008.

### **1.3 Transnistrian Puzzle for Moldova**

A brief overview of the historical background of the Transnistrian conflict can enable a better understanding of this conflict relevant for the purposes of this research.

Transnistria is an unrecognised entity created by the Russian-speaking minority of this Moldovan region proclaimed in Tiraspol on 2 September 1990 and initially named as the Moldovan Transnistrian Soviet Socialist Republic. Currently this separatist entity is known as the Moldavian Transnistrian Republic (MTR'). It consists of a narrow strip of land located between the East bank of the Dniester river and the Moldovan–Ukrainian boundary on a piece of land which was the Moldovan Autonomous Soviet Socialist Republic from 1924 to 1940 within the Ukrainian SSR. MTR currently covers a territory of 4,163 km<sup>2</sup> with approximately 555,000 inhabitants.<sup>91</sup>

If referring to the historical sources, Transnistria had been a part of Romania, Turkey, Russia, Poland and other major regional powers at various times of the history.<sup>92</sup> Up until the 15th century Transnistria was part of Rzeczpospolita, the Polish–Lithuanian Commonwealth and was basically populated by Slavonic tribes. After the dissolution of Rzeczpospolita and the Russian conquest, Transnistria became part of the Russian Empire, being the latter's new southwest border. The territory of modern Moldova (at that time called Bessarabia) was an integral part of Romania, a vassal of the Ottoman Empire located on the opposite side of the river. Bessarabia was not a part of Romania and in the 9th–14th centuries it was a part of Kievskaya Rus' and Galizia-

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<sup>91</sup> US Department of State, 'Country Report on Human Rights Practices for the Republic of Moldova' (Washington, 2004) <<http://www.state.gov/g/drl/rls/hrrpt/2004/41697.htm>> accessed 18 February 2007.

<sup>92</sup> JVA Fine, *The Early Medieval Balkans: A critical Survey from the Sixth to the Late Twelfth Century*. (Michigan, University of Michigan Press 1991); P Kolsto and A Yedemskii, 'The Dniestr Conflict: Between Irredentism and Separatism' (1993) 45(6) Europe–Asia Studies 973-1000.



Volinia.<sup>93</sup> In the 16th century Bessarabia became part of the Ottoman Empire, but later after numerous Russo–Turkish wars in 1812 was incorporated into the Russian Empire. After the 1917 Bolshevik’s coup d’état in Russia, people of Bessarabia voted for unification with Romania, while Transnistria formally became part of the Ukrainian SSR and was assigned the name of the MASSR. It was the first time in history that Transnistria was renamed Moldavia. Most commentators state that the Soviets (ruled by Stalin) did it intentionally with the future intention of annexing the Romanian territories.<sup>94</sup>

Most of the available sources providing a copy of the original Molotov–Ribbentrop Pact signed between the Communist Soviet Union and Nazi Germany provide a ground to argue that under ‘the secret protocol’ of this Pact certain territories of Romania and number of other countries were divided between the signatory states.<sup>95</sup> As the outcome of the Molotov–Ribbentrop Pact, a part of Romania called Moldavia (Transnistria) was united with the MASSR of the Ukrainian SSR in 1940.<sup>96</sup> Emerged as a result of the unification of Transnistria and Bessarabia, the Moldavian SSR became one of the components of the USSR. Fifty-one years later it was the Moldovan Parliament which proclaimed such unification void *ab initio*.<sup>97</sup>

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<sup>93</sup> C King, *The Moldovans: Romania, Russia, and the Politics of Culture* (Stanford, Hoover Institution Press 2000) 181.

<sup>94</sup> Motyl A and Krawchenko B (1997) ‘Ukraine: from empire to statehood’ in I Bremmer and R Taras (ed), *New States, New Politics: Building the Post-Soviet Nations* (Cambridge, CUP, 1997) 235-275.

<sup>95</sup> Treaty on Non-Aggression between Germany and Soviet Union (Molotov–Ribbentrop Pact) (23 August 1939). Full text of the original in Russian and German (23 August 1939) <[http://www.1000dokumente.de/index.html?c=dokument\\_de&dokument=0025\\_pak&object=facsimile&pimage=1&v=100&nav=&l=de](http://www.1000dokumente.de/index.html?c=dokument_de&dokument=0025_pak&object=facsimile&pimage=1&v=100&nav=&l=de)> accessed 26 July 2012.

<sup>96</sup> King (n 93) 93.

<sup>97</sup> Declaratia de independenta a Republica Moldova, Romania Libera (August 28, 1991) 8 <<http://old.parlament.md/img/pdf/declaratia.pdf>> accessed 11 January 2013.

During the Soviet era, Transnistria was the industrial and political centre of the Moldavian SSR,<sup>98</sup> and it produced a large amount of goods and almost all the electric energy in Moldova.<sup>99</sup> As part of the USSR's cultural policy, the Moldavian SSR was forced to change its alphabet from Latin to Cyrillic and to accept the Romanian language as the official language of Moldova.<sup>100</sup> During Soviet times the region was a concentration area for military plants and the large number of heavy industry facility employees from Russia and Ukraine who settled there. The number of ethnic Russians and Ukrainians exceeded the number of Romanians in the separatist region. In the course of the stage of active war, the number of ethnic Russians increased due to the regime's discrimination policy towards the Romanian-speaking Moldovans who were forced to leave the region. All old state Soviet symbols of the MASSR have been kept by the separatist regime. The separatist region is still a very important strategic place for the Russian troops. The place currently accommodates 30 percent of Moldova's industry and over 90 percent of its overall electric energy production.

There is a general view that the separatist regime started its breakaway from Moldova in 1989 as a protest against the law on switching to Latin script and proclaiming the Romanian language as the official state language and the change of the Soviet flag to a new one similar to the Romanian tricolour.<sup>101</sup> In fact, upon grounding its position concerning its secession right, the separatist regime referred to the three main issues constituting serious human rights violations that gave the region an exclusive right to exercise external self-determination. The regime refers to the reforms on change of the alphabet, the outcome of the war and the current economic blockade

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<sup>98</sup> GP Herd, 'Moldova and the Dniestr Region: Contested Past, Frozen Present, Speculative Future?' Conflict Studies Research Centre, Central and Eastern Europe Series 05/07 (February 2005) 2-8.

<sup>99</sup> Kolsto and Yedemskii (n 92) 980.

<sup>100</sup> *Ilascu and others v Moldova* (APP no 48787/99) (8 July 2004) 28.

<sup>101</sup> *ibid* 29.

made by Moldova.<sup>102</sup> In the opinion of the Special Committee on European Affairs of the Association of the Bar of the City of New York, all such arguments are not persuasive and lack any legal grounds under international law.<sup>103</sup>

At the beginning of the USSR collapse process, the new leader of Moldova, Mircea Snegur, proposed to Gorbachev to accept the 'Union Treaty' plan instead of Moscow's assistance with the suppression of the breakaway region. However, the weak communist centre did not accept this plan and instead Moldova declared its independence from the USSR. A number of small-scale clashes were transformed into a huge military phase with the participation of the Russian 14th Army which resulted in hundreds of deaths on both sides.<sup>104</sup>

After the ceasefire a number of attempts to negotiate the status of the region were undertaken by the parties. The main subject of the negotiations was the granting of the expanded autonomy to the Transnistria region with the right to exert jurisdiction over taxation, police forces, budget and other issues. However, leaders of the separatist regime were not eager to achieve any peace agreement and each time insisted on various statuses suggestive of an independent state. The separatist regime pursued a policy to achieve recognition and tried to apply for membership in the CIS and conducted a referendum on joining the Russia–Belarus Union.

A short but very violent conflict was stopped by the signing of the Limanskoe Ceasefire Agreement on 7 July 1992 under the mediating authority of the Russian 14th Army's General Alexander Lebed one of the active initiators of the conflict's military

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<sup>102</sup> Official Website of the Transnistrian Moldovan Republic <<http://pridnestrovie.net>> accessed 17 February 2007 (In Russian).

<sup>103</sup> The Association of the Bar of the City of New York, the Special Committee on European Affairs, Mission to Moldova, 'Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova' (New York, 2006) <<http://www.nycbar.org/pdf/report/NYCity%20BarTransnistriaReport.pdf>> accessed 9 January 2007.

<sup>104</sup> SJ Kaufman, 'Spiralling to Ethnic War' (1996) 21 *International Security* 108, 130-131.

phase.<sup>105</sup> The Agreement also established peacekeeping forces comprising the Russian, Moldovan and Transnistrian forces, the gradual withdrawal of the 14th Army, and the establishment of the free economic zone in the city of Bender; however, even after the signing of this Agreement, the Transnistrian conflict still remains frozen.<sup>106</sup>

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<sup>105</sup> Herd (n 98) 3.

<sup>106</sup> D Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and De Facto States* (Washington DC, United States Institute of Peace Press 2004) 42.

## CHAPTER 2: *UTI POSSIDETIS JURIS* AS A PRINCIPLE OF INTERNATIONAL LAW

### 2.1 Definition and Origin

The principle of *uti possidetis* is one of the principles of international law which serves for the purposes of delimitation of state territories.<sup>107</sup> This principle is regarded within the context of territorial issues related to the process of obtaining independence. The principle also provides for the process of statehood formation.<sup>108</sup> The principle of *uti possidetis* is not ordinary for the legal doctrine.<sup>109</sup> However it should be observed that *uti possidetis* has been recognised as a general principle of international law.<sup>110</sup>

According to most legal dictionaries, *uti possidetis* is the international law principle which refers to the transformation of former administrative borders of a colonial empire or dissolved states into international boundaries of newly independent states.<sup>111</sup> Professor Shaw clearly stresses that the principle of *uti possidetis* is a principle designated to strengthening the principle of territorial integrity.<sup>112</sup> Oppenheim pointed out the role of *uti possidetis juris* as being a doctrine of great importance which strengthens the principle of the stability of state boundaries.<sup>113</sup> Cukwurah characterises the principle as a doctrine which is relative to, if not ‘a prolongation’ of, the concept of

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<sup>107</sup> CC Hyde, *International Law, Chiefly As Interpreted and Applied by the United States* (Vol. 1) (Boston, Little, Brown and Company 1945) 501-503.

<sup>108</sup> J Crawford, *The Creation of States in International Law* (New York, OUP 2006) 107; NQ Dinh, P Daillier and A Pellet, *Droit International Public* (8th edn) (Paris, LGDJ 2009) 573-637.

<sup>109</sup> D Bardonnet, ‘Les Frontières Terrestres et la Relativité de leur Trace’ (1976) 153 *Recueil des Cours* 9-36; JB Moore, ‘Memorandum on Uti Possidetis: Costa Rica-Panama Arbitration 1911’ in JB Moore, *The collected Papers of John Bassett Moore* (Vol III) (New Haven, Yale University Press 1944) 349-367; P Campinos, ‘L’Actualité de l’Uti Possidetis’ (1980) *Société Française pour le Droit International, La Frontière* 95-123; AO Cukwurah, *The Settlement of Boundary Disputes in International Law* (Manchester, Manchester University Press 1967) 114; JM Sorel and R Mehdi, ‘L’Uti Possidetis Entre la Consécration Juridique et la Pratique: Essai de Reactualisation’ (1994) 11 *AFDI* 11.

<sup>110</sup> *Burkina Faso v Mali* [1986] ICJ Reports 554-566 (the Frontier Dispute case).

<sup>111</sup> BA Boczek, *International Law: A Dictionary* (Lanham, MD, Scarecrow Press 2005) 253-254.

<sup>112</sup> M Shaw, *International Law* (6th edn) (Cambridge, CUP 2008) 527-528.

<sup>113</sup> R Jennings and A Watts, *Oppenheim’s International Law* (Vol I) (9th edn, London/New York, Longman 1996) 669-670.

state succession.<sup>114</sup> Corten asserts that the principle of *uti possidetis* is a right of a newly established state to determine its boundaries.<sup>115</sup> Some commentators also support the idea that the principle of *uti possidetis* provides for the protection of the boundaries of newly independent states<sup>116</sup> as a shield against their further defragmentation.<sup>117</sup> Others characterise the principle as a respect of the boundaries established by colonial powers and recognised as international boundaries of newly independent states.<sup>118</sup> It is even argued that in the case of Latin America the principle of *uti possidetis* was a rule of regional customary law.<sup>119</sup>

It is agreed with some commentators who argue that the principle *uti possidetis* has been adopted in international law for the purposes of protecting the territorial integrity of the constitutional units of former states which have exercised their right to external self-determination.<sup>120</sup> In other words, this principle has been applied as a legal tool not only for the delimitation of the boundaries of new units possessing all attributes of the statehood, but also for the forming of the international legal personality of such new states. The main idea of the principle is that it determines state boundaries of newly independent states on the grounds of their previous administrative borders which they inherited from the former parent state. Therefore, the principle of *uti possidetis* pertains to the process of the creation of newly independent states, ie is one of the elements of the creation of statehood.

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<sup>114</sup> Cukwurah (n 111) 112.

<sup>115</sup> O Corten, 'Droit des peuples à disposer d'eux-mêmes et *uti possidetis*: deux faces d'une même médaille?' (1998) 31 RBDI 408.

<sup>116</sup> E Hasani, 'Uti Possidetis Juris: From Rome To Kosovo' (2003) Fletcher Forum of World Affairs 85.

<sup>117</sup> Dinh, Daillier and Pellet (n 108).

<sup>118</sup> LD Timchenko, *Succession of States: End of XX Century Experience* (Kharkiv, University of Internal Affairs 1999) (In Russian) 39-40.

<sup>119</sup> The Frontier Dispute case (n 110) 566-583; A Orakhelashvili, 'Statehood, Recognition and the United Nations System: Unilateral Declaration of Independence in Kosovo' (2008) 12 Max Planck Yearbook of United Nations 7-8.

<sup>120</sup> H Hannum, 'Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?' (1993) 3 Tran L & Contemp Problems 57-73.

### 2.1.1 Roman Roots

The principle of *uti possidetis* originates from Roman law. It referred to a right of a temporary ownership over things and referred to preserving the status quo of situations.<sup>121</sup> Republican Rome law provided an express difference between a right to possession to and ownership of immovable properties. Such law provided that if possession to property was obtained in good faith with no use of force or fraud, Roman law applied the famous rule *uti possidetis, ita possideatis*, which meant ‘as you possess, so may you possess’.<sup>122</sup>

The referred Roman *uti possidetis* rule was basically applied in specific cases when the possession and/or ownership right of a person was disputed by third parties. Under this rule, possession had to remain inviolable save where it was obtained through illegal actions using force. However, if any such facts were available to non-possessing third parties disputing the possession rights, they were entitled to claim property from such person who owned the property.<sup>123</sup> In other words, the main meaning of such Roman interdict was to preserve the status quo in possession of immovable property in disputes between two conflicting parties.

*Uti possidetis* was permanently evolved in Roman law but kept its primary purpose, ie preserving the status quo in a right to possession to immovable property. A couple of centuries later this Roman rule was borrowed by the law of wars and was considered as *status quo post bellum*, regulating the issues of possession of conquered territories in the post-war period and it lost its initial designation taken from Roman law.<sup>124</sup>

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<sup>121</sup> Moore (n 111) 328.

<sup>122</sup> Lalonde (n 4) 11-16; M Reisman, ‘Protecting Indigenous Rights in International Adjudication’ (1995) 89(2) AJIL 352.

<sup>123</sup> F Schulz, *Classical Roman Law* (Oxford, Clarendon Press 1951) 448.

<sup>124</sup> Lalonde (n 4) 22.

However, this Roman law principle had been seriously affected by its *sui generis* interpretation and application in the Latin American continent.<sup>125</sup> Such rule of Roman law further transformed into the principle of international law whose primary objects were state territory and territorial sovereignty matters.<sup>126</sup> Later in the 18–20th centuries, *uti possidetis* became a subject of inter-state relations in Latin America, Africa, Asia and Europe.<sup>127</sup>

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<sup>125</sup> FJ Dias Van Dunem, 'Les Frontiers Africaines' (Unpublished PhD dissertation, Universite d'Aix-Marseille 1969) 252–267.

<sup>126</sup> T Baty, 'Can an Anarchy be a State?' (1934) 28 (3) AJIL 444-454; H Lauterpacht, *Oppenheim's International Law* (Vol II) (7th edn, London, Longman 1952) 598-599

<sup>127</sup> E Hasani (n 116) 85.



### 2.1.2 'New Birth' in Latin America

*Uti possidetis* originates from a principle referring to the boundary issues in Latin America as a result of the application by the former Spanish colonies upon the process of their gaining independence. Most commentators agree that as the principle of international law, *uti possidetis* came from the Latin American continent.<sup>128</sup> Within the Latin American context, the principle of *uti possidetis* meant a transformation of the former administrative borders of the Spanish colonies into the state boundaries of newly independent states of this continent.<sup>129</sup> *Uti possidetis* served as an effective tool for the prevention of conflicts related to the state boundaries of successor states of the Spanish Empire.<sup>130</sup> The principle was also actively used in the course of territorial and boundary disputes' settlement. Such role was attributed to *uti possidetis* in Latin America and had become its main meaning in modern international law. Based on the existing state practice, it can be argued that the principle of *uti possidetis* became a customary norm with respect to Latin America. In this regard it can be agreed with some commentators that such role of *uti possidetis* in forming the international boundaries of newly independent states in Latin America can be seen from various legal documents.<sup>131</sup>

In the 19th century a reference to the principle of *uti possidetis* could be found in more than two hundred legal documents in Latin America.<sup>132</sup> Most of the early Latin American constitutions, bilateral and multilateral treaties were proclaiming the inheritance of former administrative borders of the Spanish Empire. The principle was

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<sup>128</sup> Sorel and Mehdi (n 111) 13; Campinos (n 111) 95; A Alvarez, 'Latin America and International Law' (1909) 3(2) AJIL 269-353; Lalonde (n 4) 28.

<sup>129</sup> Campinos (n 111) 95.

<sup>130</sup> *Colombia v Venezuela Arbitration* [1922] 16 AJIL 428; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)* [1992] ICJ Reports 251, 387.

<sup>131</sup> Lalonde (n 4) 32.

<sup>132</sup> P Hensel, M Allison and A Khanani, 'Territorial Integrity Treaties and Armed Conflict over Territory', Paper presented at the 2006 Shambaugh Conference 'Building Synergies: Institutions and Cooperation in World Politics' (University of Iowa 13 October 2006) <<http://www.paulhensel.org/Research/cms09app.pdf>> accessed 17 June 2012.

reflected in most national constitutions of Latin American states.<sup>133</sup> The 1810 Constitution of Venezuela stated that its territory was formed within the boundaries of Venezuela which was a former colonial unit of the Spanish Empire.<sup>134</sup> Article 7 of the Constitution of Costa Rica proclaimed that only *uti possidetis* lines defined in 1826 were boundary limits of the Costa Rica's territory and formed its international boundaries.<sup>135</sup>

While in the early treaties concluded between the Latin American states there was no reference to the principle of *uti possidetis*, in the second half of 19th century there was an explicit reference to the principle in at least three bilateral treaties.<sup>136</sup> Provisions on *uti possidetis* were included in the numerous agreements concluded between Latin American states. The Treaty of Amity between Columbia and Peru of 1829 proclaimed that both parties recognised as boundaries those frontiers which belonged to them as Spanish colonies before their independence.<sup>137</sup> The 1851 Convention on Commerce and River Navigation between Peru and Brazil, the 1852 bilateral treaty between Brazil and Venezuela, and the 1867 Treaty of Amity between Brazil and Bolivia contained references to the principle of *uti possidetis* as an instrument providing for the delimitation of boundaries between these contracting

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<sup>133</sup> LDM Nelson, 'The Arbitration of Boundary Disputes in Latina America' (1973) 20 *Nether I L Rev* 268-271; *Honduras v Nicaragua* [1959] ICJ Reports 199 (The Arbitral Award of the King of Spain 1906 case).

<sup>134</sup> S Duran-Bachler, *The Latin American Doctrine of Uti Possidetis* (Geneva, Graduate Institute of International Studies 1972) 156-158.

<sup>135</sup> *Constitución Política de Costa Rica de 1848*

<[http://esociales.fcs.ucr.ac.cr/materiales/civica/constituciones/const\\_1848.pdf](http://esociales.fcs.ucr.ac.cr/materiales/civica/constituciones/const_1848.pdf)> accessed 25 March 2013.

<sup>136</sup> 'Bolivia-Peru: Treaty of General Arbitration' (1999) 3 *AJIL* 378; Hensel, Allison and Khanani, (n 131); EJ De Arechaga, 'Boundaries in Latin America: Uti Possidetis Doctrine' in R Bernhardt, *Encyclopaedia of Public International Law* (Vol 6, 5th edn, Oxford, North-Holland 1984) 450; Nelson (n 133) 268-271.

<sup>137</sup> *Colombia v Venezuela* (n 130) 428; Shaw, 'Peoples, Territorialism and Boundaries', (n 1) 478-507; SP Sharma, *International Boundary Disputes and International Law: A Policy Oriented Study* (2nd edn) (Bombay, Tripathi 1976) 303.

states.<sup>138</sup> The 1860 Treaty of Amity between Peru and Ecuador was basically concluded on the basis of *uti possidetis* and defined the boundaries between these two Latin American states. Moreover, the 1810 Agreement on Arbitration between Bolivia and Peru urged arbitrators to settle all disputes exclusively under the *uti possidetis* principle.<sup>139</sup> Even if there were no explicit references to *uti possidetis* in the national constitutions of Latin American states and in the treaties among them, the state practice and the contents of most such legal instruments implied the application of the principle for the determination of international boundaries of newly independent states in this continent. Moreover, the application of the principle of *uti possidetis* among Latin American states was also recognised in multi-states format by some members of the Pan-American Congress in Lima in 1848.<sup>140</sup> The final version of the treaty signed by Bolivia, Chile, Ecuador, Columbia and Peru expressly provided that the contracting states were eager and ready to keep their boundaries inherited from the Spanish colonial administration.<sup>141</sup> Thus, the administrative borders of the former Spanish colonies transformed into state boundaries of the newly independent states of Latin America and produced the internal borders of the administrative units of the former Spanish colonies.<sup>142</sup>

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<sup>138</sup> 'Convención Fluvial sobre Comercio y Navegación, firmada en Lima, el 23 de octubre de 1851, Brasil Y Peru'

<[http://es.wikisource.org/wiki/Convenci%C3%B3n\\_Fluvial\\_sobre\\_Comercio\\_y\\_Navegaci%C3%B3n](http://es.wikisource.org/wiki/Convenci%C3%B3n_Fluvial_sobre_Comercio_y_Navegaci%C3%B3n)> accessed 5 August 2012; 'O Tratado Sobre Extradicao Celebrado Entre Sua Magestade o Impredaor Do Brasil E A Republcia De Venezuela, 1852' <[http://dai-mre.serpro.gov.br/atos-internacionais/bilaterais/1852/b\\_36/at\\_download/arquivo](http://dai-mre.serpro.gov.br/atos-internacionais/bilaterais/1852/b_36/at_download/arquivo)> accessed 23 June 2011; GM Junior, 'O Tratado Brasil-Peru 1867' in GM Junior (ed), *Documentos Para A Histoair Do ACRE* (Brasilia 2009) <[http://www.senado.gov.br/senadores/senador/geraldomesquita/textos/tratado\\_Peru\\_final\\_II.pdf](http://www.senado.gov.br/senadores/senador/geraldomesquita/textos/tratado_Peru_final_II.pdf)> accessed 21 June 2012.

<sup>139</sup> Bolivia-Peru: Treaty of General Arbitration (n 138) 378-422; Nelson (n 133) 268-271.

<sup>140</sup> 'Protocols del Congreso de Lima, 1847-1848'

<<http://constitucionweb.blogspot.co.uk/2012/03/protocolos-del-congreso-de-lima-1847.html>> accessed 7 January 2011.

<sup>141</sup> Protocols del Congreso de Lima (n 140); Alvarez (n 128) 280; De la Pradelle, *La Frontière: Etude de Droit International* (Paris, Les Editions International 1928) 78.

<sup>142</sup> Lauterpacht (n 126) 598-599; M Shaw, 'The Heritage of States: the Principle of Uti Possidetis Juris Today' (1996) 67 BYBIL 75-123.

Nevertheless, these boundaries were not exact, since in most cases the actual boundaries did not comply with the ones reflected in the official legal documents adopted by the official authorities of the colonial power. Under such circumstances it was complicated to apply the principle of *uti possidetis* to the administrative borders established by the Spanish colonial authorities and the borders that actually existed at that moment.<sup>143</sup> For the avoidance of this problem, based on available legal instruments the principle of *uti possidetis* was supplemented with the word '*juris*', which meant the legal, but not factual, boundaries. There were two approaches to the principle of *uti possidetis*. The supporters of the first approach of *uti possidetis de facto* argued that all territories that were in possession of certain administrative units should be included within the territorial frameworks of the newly independent states regardless of the legal documents that determined the boundaries of the former administrative units and which were adopted by the colonial powers.<sup>144</sup> Supporters of the second approach contended that *uti possidetis* lines defined by the central colonial powers and reflected in specific documents should serve as the only legal ground for determining the international boundaries of newly independent Latin American states.<sup>145</sup> However, in Latin America in most cases *uti possidetis juris* boundaries were explicitly defined neither on the places nor on the maps. Some of these territories were never used and remained as black holes, but in the meantime legally they were included within the territorial frameworks of certain colonial powers.<sup>146</sup> The boundaries of these territories in some cases were unknown and the available maps were not explicit; the names of the rivers, villages, regions, mountains and lakes mentioned in the maps were distorted. The lack of clearly

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<sup>143</sup> HM Waldock, 'Disputed Sovereignty in the Falkland Island Dependencies' (1948) 25 BYBIL 224-225.

<sup>144</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>145</sup> S Ratner, 'Drawing Better Line' (n 5) 593-595; Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-507.

<sup>146</sup> M. Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

drawn maps with an express delimitation of the former administrative borders was one of the main obstacles against determining the international boundaries of the newly independent states of Latin America. Another considerable obstacle was the lack of local administrative authorities in most of the territories, which was a serious problem for determining the status of certain territories and was a cause of serious disputes among the newly emerged states.<sup>147</sup>

For these reasons and for the sake of their own interests, not all the former colonial units of Latin America were satisfied with the application of *uti possidetis*. The principle was basically applied between the successor states of the Spanish Empire, but not between the former Spanish colonies and Brazil which was a former Portuguese colony.<sup>148</sup> Brazil did not recognise this principle as a *de jure* legal doctrine and paid more attention to its *de facto* application, and it basically referred to *de facto* possession of certain territories rather than relying on *uti possidetis* boundary lines based on a solid legal basis.<sup>149</sup> If the former Spanish colonies supported *uti possidetis juris*, Brazil (being a former Portuguese colony) adhered to *uti possidetis de facto*. Brazil argued that the former colonial units could not legally refer to the 1750 Madrid Agreement and the 1777 Treaty of San-Ildenfonso establishing the boundaries between the colonial possessions of Spain and Portugal due to the war which took place between Spain and Portugal in 1801.<sup>150</sup> Brazil contended that the previous agreements were not confirmed by Spain and Portugal in the new treaty referred to as the Peace of Badajoz.<sup>151</sup> Based on that, Brazil stated that the only way to settle territorial and boundary disputes and

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<sup>147</sup> *Guatemala-Honduras Arbitral Award* [1933] II Rep of International Arbitral Awards 1307-1325.

<sup>148</sup> P Hensel and A Khanain, 'The Colonial Legacy and Border Stability: Uti Possidetis and Territorial Claims in the America' (2004) <<http://www.paulhensel.org/Research/io05.pdf>> accessed 6 May 2011; Ratner, 'Drawing Better Line' (n 5) 593-595.

<sup>149</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>150</sup> MG Kohen, *Possession Contestee et Souverainete Territoriale* (Paris, PUF 1997) 445.

<sup>151</sup> 'Tratado de Paz, e de Amizade entre as Coroas de Portugal, e de Espanha, assinado em Badajoz pelos Plenipotenciários do Príncipe Regente e de Sua Majestade Católica' em 6 de Junho de 1801' <[http://www.arqnet.pt/exercito/tratado\\_badajoz.html](http://www.arqnet.pt/exercito/tratado_badajoz.html)> accessed 14 June 2011.

conflicts was to apply the principle of *uti possidetis de facto* and the doctrine of effective occupation.<sup>152</sup> Hyde argued that Brazil incorrectly interpreted the principle of *uti possidetis* and limited its meaning by the doctrine of effective occupation only admitting *uti possidetis de facto*.<sup>153</sup> It can be argued that Brazil's position came from attempts to justify not only Portugal's colonial conquests, but also its own annexation policy towards its neighbours.<sup>154</sup>

In fact, most of the former colonies in Latin America inherited undefined boundaries and such circumstances led to numerous territorial and boundary disputes and conflicts. It was accepted as a serious threat to independence by most of the newly independent states of Latin America.

It is agreed with Moore that the vital necessity for the wide application of the principle in Latin America for the settlement of territorial and boundary disputes arose after certain wars took place between the newly independent Latin American states.<sup>155</sup> Therefore, it can be argued that for these purposes the newly independent states were trying to find a solution that could be acceptable for most of them and serve as an effective conflict prevention tool. *Uti possidetis juris*, allowing the newly independent states to define their territories based on the former administrative borders, was accepted by most of the Latin American states as such an effective tool. The governments of the newly independent states of Latin America considered the principle of *uti possidetis* as the most acceptable and fair solution for existing boundary and territorial disputes and conflicts. In fact, the application of *uti possidetis* served for preserving the status quo in Latin America and achieving peace and stability in the continent. Decades of territorial and boundary disputes and conflicts strongly convinced

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<sup>152</sup> Hyde (n 107) 502.

<sup>153</sup> *ibid.*

<sup>154</sup> Nelson (n 133) 270.

<sup>155</sup> Moore (n 111) 344-345.

Latin American states to concentrate on a legal doctrine that could prevent such disputes and conflicts. For these reasons, in most cases the application of the *uti possidetis* principle gave positive results.<sup>156</sup> Some commentators actively supported this idea and referred to the two disputes between Paraguay and Bolivia, and Honduras and Salvador.<sup>157</sup> Arguably, such choice in favour of *uti possidetis* was an intention of the newly independent states in Latin America to protect themselves against each other as far as possible against future European colonialism<sup>158</sup>. It can be agreed with the argument that the application of *uti possidetis* in Latin America allowed the newly independent states to postpone the discussion of territorial and boundary disputes to the later stage.<sup>159</sup> Even in the Falkland Islands conflict, Argentina actively relied on the principle of *uti possidetis*, stating that the Islands fell under its jurisdiction due to the fact that they were inherited from Spain under *uti possidetis de jure*.<sup>160</sup>

Moreover, a strong intention of Latin American states to peacefully settle the existing disputes and conflicts served as a ground for further inclusion of *uti possidetis* in most arbitration agreements between Latin American states. For instance, the arbitration dispute between Columbia and Venezuela was settled based on the principle of *uti possidetis*.<sup>161</sup> The 1930 arbitration agreement between Guatemala and Honduras also provided settlement of the conflict between the parties under the principle of *uti possidetis*.<sup>162</sup> Another example is the complicated territorial dispute between Guatemala

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<sup>156</sup> *Argentina v Chile* [1977] 52 ILR 93-125 (Beagle Channel case); *Colombia v Venezuela (Frontiers Colombo-Venezueliennes)* (Swiss Federal Council) [1922] I Reports of International Arbitral Award 223-228.

<sup>157</sup> Kohen, *Possession Contestee et Souverainete Territoriale* (n 150) 449-500.

<sup>158</sup> De Arechaga, 'Boundaries in Latin America' (n 136) 46.

<sup>159</sup> Dias Van Dunem (n 125) 252.

<sup>160</sup> LS Gustafson, *The Sovereignty Dispute over the Falkland (Malvinas) Islands* (New York, OUP 1988) 3.

<sup>161</sup> H Aufricht, *Guide to League of Nations Publications* (New York, Columbia University Press 1951) 292.

<sup>162</sup> 'Treaty between Guatemala and Honduras submitting to Arbitration their Boundary Dispute signed at Washington on 16 July 1930' (1930) 130 BFSP 823-826.

and Honduras, which had a long history of settlement; after numerous unsuccessful attempts to resolve the long-lasting boundary dispute, the parties to the dispute concluded an agreement under the principle of *uti possidetis* in which they consented that the only legal ground for the determination of boundary lines was the principle of *uti possidetis juris*.<sup>163</sup> The parties further stated that the arbitration court should define the *uti possidetis* line. However, the parties did not come to agreement regarding the interpretation of the *uti possidetis* principle's meaning.<sup>164</sup> In the absence of agreement between disputing parties regarding the meaning of *uti possidetis*, the principle's application created certain difficulties for Latin American states.<sup>165</sup>

It should be stressed that the principle of *uti possidetis* was not an absolute mandatory norm for Latin American states, and rather carried a consensual nature and was a voluntary choice for many of them. It is clear that *uti possidetis* as a principle of international law allowed Latin American states to consent to and withdraw their application of the principle when it was not possible to agree thereon.<sup>166</sup> It is agreed with some commentators who believed that the opponents of *uti possidetis* were wrong when they argue that the principle served only the determination of the boundary lines.<sup>167</sup> In fact, in Latin America *uti possidetis* meant that the newly independent Latin American states could inherit the former administrative borders if they really existed. However, specific conditions should be available for the application of *uti possidetis*. Among such vital conditions was the necessary availability of clear administrative borders, the lack of which was a serious obstacle for *uti possidetis*' application.

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<sup>163</sup> Hyde (n 107) 502.

<sup>164</sup> FC Fisher, 'The Arbitration of the Guatemalan-Honduras Boundary Dispute' (1933) 27(3) AJIL 403-427.

<sup>165</sup> Waldock (n 143) 224-245.

<sup>166</sup> S Torres Bernardez, 'The 'Uti Possidetis Juris Principle' in Historical Perspective' in K Zemanek (ed), *Volkerrecht Zwischen Normativem Anspruch und Politischer Realitat* (Berlin, Duncker & Humbolt 1994) 432.

<sup>167</sup> Kohen, *Possession Contestee et Souverainete Territoriale* (n 150) 453-487.



Arguably, under such circumstances the principle of *uti possidetis* was not applicable and any arbitrators who were considering the cases had to apply other norms and principles of international law for the settlement of boundary and territorial disputes.<sup>168</sup> Nevertheless, since the state practice in Latin America strengthened the principle and contributed to its development as a general principle of international law, the review of the history of *uti possidetis*' evolution on this continent is important for the purposes of these researches.

To conclude, Latin American states consented to apply a modified Roman law doctrine that was accepted as an effective tool for the settlement of disputes related to the determining of the uncertain and unclear boundary lines inherited from the former colonial powers. The above-discussed aspects of Latin American *uti possidetis* highlight its importance for the continent. It can be evaluated through reference to the bilateral and multilateral treaties between and among Latin American states as well as some early constitutions. Moreover, the state practice of Latin American states acknowledges *uti possidetis*' recognition as the general principle of international law. The principle was applied as such in arbitration settlement of numerous boundary and territorial disputes between Latin American states. Some commentators contend that the principle was applied in each such dispute.<sup>169</sup> It was also argued that the application of *uti possidetis* in bilateral treaties between Latin American states constitutes a landmark in its transformation from a delimitation tool into a norm of customary international law.<sup>170</sup> Based on the state practice of the Latin American continent of the application of *uti possidetis*, it can be concluded that the principle played an important role in the settlement of territorial and boundary disputes between the newly independent states of

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<sup>168</sup> *ibid.*

<sup>169</sup> *ibid.* 453.

<sup>170</sup> G Nesi, 'L'uti Possidetis hors de Contexte de la Décolonisation: le cas de l'Europe' (1998) 44 AFDI 1-34.

the continent and preserved their boundaries. In the meantime, such wide application of the principle in Latin America was a landmark for the birth of *uti possidetis* and its transformation into an international law principle.

### 2.1.3 African Approach to *Uti Possidetis*

The formation of the African boundaries of newly independent post-colonial states was one of the most complicated issues in the continent's life. It was fairly commented that the scars of the colonial past affected the process of boundary determination in Africa.<sup>171</sup> If in Latin America primarily one colonial power controlled most of the territories, in Africa numerous European states divided the continent's territory among themselves basically on geographic lines, and the colonial powers to a certain extent took into account the ethnic and economic factors.<sup>172</sup>

Most of administrative borders in Africa were determined by the colonial powers on a rough basis and in some cases no clear lines were determined. After the collapse of the African colonial system, like in Latin America the newly independent states of Africa faced a problem with determining their boundaries. In such circumstances the African states referred to the principle of *uti possidetis* which could serve as an effective instrument for the settlement of boundary and territorial disputes in Africa. However, there were major differences between the application of *uti possidetis* in Africa and in Latin America. If in Latin America the principle was applied towards the administrative borders of the former colonial units which were determined under the decrees and orders of the Spanish colonial authorities, in Africa the newly independent states agreed to apply the principle towards factual boundaries that they inherited from the former colonial powers. In the meantime, in some cases the newly independent African states agreed to apply the principle under the available legal instruments, ie the agreements between some colonial powers determining the limits of their colonial possessions. The intention of African states to preserve the existing boundaries created

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<sup>171</sup> S Chime, 'The Organization of African Unity and African Boundaries' in GG Widstrand (ed), *African Boundary Problems* (Uppsala, Scandinavian Inst. of African Studies 1969) 165-197.

<sup>172</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

a ground for the application of *uti possidetis* for the purposes of settlement of the boundary disputes, especially in the cases where the concerned parties disputed the exact delimitation lines.<sup>173</sup>

In fact, most of the African states supported the application of *uti possidetis* for the sake of preserving the existing boundaries and avoiding possible cruel conflicts on the continent. Such attitude of African states to the principle of *uti possidetis* can be found in numerous regional instruments. For instance, the Cairo Declaration adopted at the Conference of the Organization of African Unity in 1964<sup>174</sup> explicitly referred to the necessity of preserving the existing boundaries inherited from the colonial powers. At the time of adopting the Cairo Declaration, several serious boundary disputes presented a real concern for the continent. In such situation it was a primary task of the African leaders to come to a consensus that allowed them to avoid massive-scale boundary disputes and conflicts. Some commentators believed that such intention was one of the primary reasons for the establishment of the OAU which in its Charter acknowledged the adherence to preserving the status quo of newly independent African states' boundaries.<sup>175</sup> It is arguable that under such intention, African states applied the principle of *uti possidetis* and made it a customary norm for the continent. The former UN Secretary-General Boutros Boutros-Ghali argued that the principle of *uti possidetis* was approved for Africa upon adopting the OAU's Charter.<sup>176</sup>

The OAU's Charter acknowledged the principles reflected in the UN Charter and other universal international legal instruments, among which the top priority was the principle of territorial integrity. The comprehensive interpretation of this principle

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<sup>173</sup> M Shaw, *Title to Territory in Africa International Legal Issues* (Oxford, Clarendon Press 1986) 185-187.

<sup>174</sup> OAU Cairo Declaration 1965 AHG/Res 16(1).

<sup>175</sup> S Touval, *The Boundary Politics of Independent Africa* (Cambridge, MA, Harvard University Press 1972) 86.

<sup>176</sup> B Boutros-Ghali, 'The Addis Ababa Charter' (1964) 546 *International Conciliation* 1-29.

was given by Boutros Boutros-Ghali who aptly commented that, upon adopting the OAU's Charter, the heads of African states were basically considering the ways to avoid territorial and boundary disputes and conflicts, and for these reasons they referred only to the known classic principles of international law.<sup>177</sup> In the Cairo Declaration, African states confirmed their intention to preserve and respect the former colonial borders which at that moment transformed into international boundaries of the sovereign African states.<sup>178</sup> Adoption of the Cairo Declaration was a key political and legal step giving space for the principle of *uti possidetis*. Some commentators commented that notwithstanding the lack of the direct references to *uti possidetis*, the principle was assumed in the OAU's founding documents.<sup>179</sup> Although there were certain areas of dissatisfaction with the delimitation expressed by some African states, most of them supported the idea of preserving the existing boundaries, arguing that any changes in delimitation would be a potential threat to peace and security in Africa.<sup>180</sup> In other words, the principle of *uti possidetis* reaffirmed the territorial integrity of 'certain colonial territories' in Africa for the purposes of preventing separatist units from breaking the integrity of the state boundaries of the newly independent African states.<sup>181</sup>

In the case of Africa, the ICJ and some international arbitration tribunals considered and evaluated the key role of *uti possidetis* in determining African boundaries. In the boundary dispute between Burkina Faso and Mali (the Frontier Dispute case), the ICJ stated that the Cairo Declaration determined and emphasised the role of the principle of *uti possidetis* as a common concept of customary international

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<sup>177</sup> *ibid.*

<sup>178</sup> Shaw, *Title to Territory in Africa* (n 173) 185-187; Touval (n 175) 86.

<sup>179</sup> J Klabbers and R Lefeber, 'Africa: Lost Between Self-Determination and Uti Possidetis' in C Brolmann (ed), *Peoples and Minorities in International Law* (London, Martinus Nijhoff Publishers 1993) 37-76.

<sup>180</sup> *ibid* 57.

<sup>181</sup> Shaw, *International Law* (n 112) 528.

law.<sup>182</sup> The ICJ stressed that it was the independent will of the African states to preserve and respect the former administrative colonial borders and transform them into the international boundaries of the newly independent states of Africa.<sup>183</sup> The Court declared that the principle became a general concept of customary international law and was not affected by the right of peoples to self-determination—the principle is a doctrine which lies in the fundamental right to provide the inviolability of territorial boundaries upon the gaining of independence by the former African colonies.<sup>184</sup> Furthermore, the ICJ stated that in the case of delimitation between states which were the subjects of the same parent states, the former administrative borders between these units should be transformed into inter-state boundaries.<sup>185</sup> This stance was reconfirmed in *El Salvador v Honduras*,<sup>186</sup> and this has become one of the authoritative opinions in international law. In subsequent cases, the ICJ determined that *uti possidetis* was retrospective principle and that it had contributed to and directly served the process of transformation of former administrative borders into state boundaries of sovereign state.<sup>187</sup> In the Frontier Dispute case,<sup>188</sup> it was emphasised that the principle of *uti possidetis* freezes the possession right over the territory and does not constitute a ground to go back to the past.<sup>189</sup>

It can be concluded that upon affirming the principle of preserving the territorial status quo of the newly independent African states and transformation of the former colonial administrative border into the international boundaries, African states implied the principle of *uti possidetis*. Therefore, it can be argued that African states preferred to

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<sup>182</sup> The Frontier Dispute case (n 110) 565-566.

<sup>183</sup> *ibid.*

<sup>184</sup> *ibid.*

<sup>185</sup> *ibid.*

<sup>186</sup> *El Salvador v Honduras* (n 130) 386.

<sup>187</sup> *ibid* 388.

<sup>188</sup> The Frontier Dispute Case (n 110) 568.

<sup>189</sup> G Naldi, 'Case concerning the Frontier Dispute (Burkina Faso and Mali): Uti Possidetis in an African Perspective' (1987) 36 ICLQ 893.

preserve the status quo of the inherited boundaries and in fact assumed the application of the principle of *uti possidetis*. By virtue of such approach, no massive-scale revision of the state boundaries took place in Africa. Some commentators argued that even if African states had wished to change the existing boundaries, it could only have been achieved only if all the states had been dissolved and re-established with new boundaries that were different from the existing ones that duplicated the geographic meridians and parallels.<sup>190</sup> Undoubtedly, it was unacceptable solution for African states at that difficult time.

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<sup>190</sup> I Potekhin, 'Inheritance of Colonialism in Africa' (1964) 3 *Mejdunarodnaya Jizn* (In Russian) 30-51.

#### 2.1.4 Application in the Middle East and Asia

Based on the specifics of certain disputes in the Middle East and Asia, it can be argued that the principle of *uti possidetis juris* was also effectively applied by mediators and international tribunals.

One of such disputes was the Palestine–Egypt boundary delimitation dispute. In this case it should be noted that the international boundaries were established based on the existing administrative borders.<sup>191</sup> Until the end of the 19th century the territories of modern Egypt and Israel were part of the Ottoman Empire. Starting from the 19th century, Britain gradually gained the control over Egypt, which had at that time control over the coastline province Hejaz with the Aghaba port in the Red Sea granted by the Ottoman Empire.<sup>192</sup> Britain retained control over Egypt until the mid-20th century. The Ottoman Empire agreed to recognise Britain's 'special role' in Egypt, and in 1906 the trilateral treaty was signed between the Ottoman Empire, Britain and Egypt in Rafakh under which, as a result of delimitation between Egypt and Palestine, the Taba region became a territory of Egypt.<sup>193</sup> After WWI Egypt became the British protectorate and its independence was recognised by Britain in 1928 with the unlimited right to protect it together with the Suez channel.<sup>194</sup> At the same time Britain obtained a mandate over Palestine, whose boundaries had to be determined by the allied forces. However, Egypt referred to the Rafakh Treaty which delimited the borders between Egypt and

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<sup>191</sup> 'Case Concerning the Location of Boundary Markers in Taba between Egypt and Israel' (29 Sep 1988) *XX Reports of International Arbitral Awards* 1-118; K Nurit, 'The Evolution of the Egypt-Israel Boundary: From Colonial Foundations to Peaceful Borders' (1994) 1(8) *Boundary and Territory Briefing* 1-21.

<sup>192</sup> JC Hurewitz, 'Introduction: Bounding Mandated Palestine' in P Toye (ed), *Palestine Boundaries 1833-1947* (Vol I) (London, Archive Editions 1989) 169-193.

<sup>193</sup> 'Convention between Great Britain and Turkey relative to Egyptian Affairs, signed at Istanbul' (1885) 77 *BFSP* 442-453.

<sup>194</sup> 'Circular Despatch to His Majesty's Representatives stating the decision of His Majesty's Government to terminate the Protectorate and to recognize Egypt as an independent sovereign State' (24 July 1922) 116 *BFSP* 842-932.



Palestine.<sup>195</sup> Britain confirmed that it had no intention to change the boundaries between Egypt and Palestine even though the circumstances had changed dramatically.<sup>196</sup> However, the situation with the Egypt–Palestine boundaries changed considerably after creation of the State of Israel in 1948. As a result of Israel’s creation, the neighbouring Arab states sent their troops to Palestine, justifying their aggressive actions by an intention to establish order. As a result of Israel’s dominance in military operations and the UNSC’s interference, Israel and Egypt signed the ceasefire agreement in Rhodes in 1949 establishing a delimitation line between Israel and Egypt.<sup>197</sup> Following the Camp Davies peace process initiated in 1978 following the Arab-Israel wars, Israel and Egypt came to an agreement that the boundaries between the two countries should be based on the administrative borders established between Egypt and Palestine under the Treaty of Rafakh. All these agreements were expressed in the Peace Agreement of 26 March 1979.<sup>198</sup> Although Israel and Egypt agreed on many matters, there was a section of the south boundary upon which the parties could not agree for a long time. As a result, based on the provisions of the 26 March 1979 Peace Agreement between Israel and Egypt, the parties submitted the Compromis to the special arbitration comprised of three arbitrators in 1986.<sup>199</sup> In the Compromis the parties referred to the recognised international boundaries previously established between Egypt and Palestine.<sup>200</sup> As an international boundary line the parties agreed upon the delimited line defined in the Treaty of Rafakh signed by Britain, Egypt and the Ottoman Empire, and the parties

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<sup>195</sup> Lalonde (n 4) 83.

<sup>196</sup> ‘Letter of Mr DM Riches to Mr MW Low’ (16 April 1947) FO 371/63080.

<sup>197</sup> *Taba Case (Egypt v Israel)* [1979] 80 ILM 297-321.

<sup>198</sup> ‘A Framework for Peace in the Middle East, 17 September 1978’ (1978) 17 ILM 1463-1479; ‘Egypt-Israel: Treaty of Peace’ (1979) 18 ILM 362-363.

<sup>199</sup> ‘Egypt-Israel: Agreement to Arbitrate the Boundary Dispute Concerning the Taba Beachfront’ (1987) 26 ILM 1-3.

<sup>200</sup> *ibid.*

agreed on a consensual basis that the boundary line could be changed subject to any agreements reached in other similar disputes.<sup>201</sup>

The Israeli–Egypt arbitration adopted the same position taken by the ICJ in the *Temple of Preah Vihear* case in a dispute between Thailand and Cambodia, where the Court confirmed the adherence of the international community to the principle of the stability of boundaries.<sup>202</sup> However, in its separate opinion on the Israeli–Egypt arbitration, the arbitrator Lapidoth argued that there was an explicit difference between the boundaries established de jure and de facto.<sup>203</sup> In her opinion she referred to the Frontier Dispute case.<sup>204</sup> One of the key points of Lapidoth’s separate opinion was an argument supporting the application of *uti possidetis juris* under the 1906 Treaty signed by Britain, the Ottoman Empire and Egypt. In her opinion the boundaries determined by the 1906 Treaty should be considered as the international boundaries of the existing independent states regardless of subsequent change of the circumstances.<sup>205</sup>

Therefore it can be stated that in the Egypt–Israel dispute the arbitration as a key argument used the 1906 Treaty which established the boundaries between Egypt and the mandated Palestine, and recognised the same boundary line as the boundaries between Egypt and Israel. Although this case is known for stating that a boundary line can be changed based on the mutual consent of the concerned parties, the case is still interesting for the current researches as one in which the disputed parties applied *uti possidetis juris* for delimitation of inter-state boundaries. Decision on the Egypt–Israel dispute regarding the Aghaba territory was nothing but a confirmation of the

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<sup>201</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria)* [2002] ICJ Reports 441; Report of the UN Commission for Eritrea [1950] UN DOC A/1285, 17ff, 106-31; R McCorquodale, ‘International Boundary Decisions: Pillars of Salt?’ (1988) 48 Cambridge L J 352.

<sup>202</sup> *Cambodia v Thailand* [1962] ICJ Reports 34 (Temple of Preah Vihear case).

<sup>203</sup> The Frontier Dispute case (n 110) 566.

<sup>204</sup> *ibid.*

<sup>205</sup> *Taba Case* (n 197) 297-321.

recognition of transformation of administrative borders into international boundaries of sovereign states which can be considered in fact as an application of the principle of *uti possidetis*.

The above-considered dispute between Egypt and Israel in 1988 clearly indicates the role of *uti possidetis* and its status as a principle of international law under which the Parties and the arbitration recognised the former administrative borders between the two territorial units of the same colonial parent state as international boundaries between the two independent states. Even the writers who criticise the principle of *uti possidetis* admit that the principle was applied in the Egypt–Israel dispute, and that the arbitration referred to the boundary lines that were established between Egypt and Palestine due to the former’s special quasi-state status within the Ottoman Empire.<sup>206</sup>

In Asia the principle was applied by the ICJ in the *Temple of Preah Vihear* case between Cambodia and Thailand, where the Court considered this principle within the context of the stability of boundary treaties. In this case Cambodia applied to the ICJ arguing that Thailand had violated its territorial integrity in the region where the Temple of Preah Vihear was located. Thailand denied all allegations of violation of Cambodia’s sovereignty and stated that the disputed territory was integrally part of Thailand since the signing of the Franco–Siamese treaty, when both Cambodia and Thailand were parts of a single state with common borders.<sup>207</sup> Each party argued, based on the existing treaties, the concept of effective control, history, geography and culture. Thailand claimed that the disputed territory was under its effective control. However, the Court did not accept Thailand’s arguments referring to the treaty between Siam (later Thailand) and France, in which it was expressly provided that the disputed

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<sup>206</sup> Lalonde (n 4) 88.

<sup>207</sup> Temple of Preah Vihear case (n 202) 6- 34.

territory should be part of Cambodia.<sup>208</sup> The ICJ also rejected Thailand's argument on the inaccuracy of the maps determining the boundaries between the two states, stating that Thailand should have raised this issue within fifteen years of the signing of the treaty, and stated that the boundaries between the two states should be determined according to the administrative borders established by the treaty and explicitly shown on the maps.<sup>209</sup> Although there are no direct references to the principle of *uti possidetis* in this case, the specifics of the case and the method of its solution raise no doubts that this territorial dispute was considered by the ICJ within the context of *uti possidetis*.<sup>210</sup>

As can be seen from the above-referred two cases, like in Latin America and Africa, the existing disputes in the Middle East and Asia were effectively resolved on the basis of *uti possidetis* reaffirming the preservation of the de jure territorial status quo which put the end to the long-lasting disputes. The application of the principle by way of special arbitration and the ICJ in both cases expressly indicated the effectiveness of its application for the settlement of such boundary and territorial disputes.

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<sup>208</sup> *ibid.*

<sup>209</sup> Temple of Preah Vihear case (n 202) 16.

<sup>210</sup> ICG, 'Waging Peace: Asean and the Thai-Cambodian Border Conflict' (Asia Report No 215, 6 December 2011) <<http://www.crisisgroup.org/~media/Files/asia/south-east-asia/thailand/215%20Waging%20Peace%20--%20ASEAN%20and%20the%20Thai-Cambodian%20Border%20Conflict.pdf>> accessed 5 August 2012.

### 2.1.5 European Experience: Aaland Islands Dispute

The Aaland Islands dispute arose after Finland declared its independence from Russia immediately after the Bolshevik's coup d'état. In the 4 December 1917 Finnish Declaration of Independence, the Aaland Islands were declared an integral part of the independent Finland.<sup>211</sup> However, the Islands were basically inhabited by the Swedish minorities claiming the Islands' incorporation into the territorial frameworks of Sweden. The lack of key states' interest to settle this dispute at the Paris Peace Conference in 1919–1920 and the failure of the parties to come to a resolution of the dispute led to a decision made by the concerned parties to submit the dispute for the consideration of the League of Nations.<sup>212</sup>

For the almost seven centuries Finland was a part of the Swedish Kingdom and all this time the Aaland Islands were part of the Swedish administrative region Abo (Turku). However, after the defeat of Sweden by Russia and under the permanent pressure of the latter, Finland and the Aaland Islands were incorporated within the Russian Empire. Under the Fredrickshamn Treaty of 17 September 1809 the Swedish King recognised Russian jurisdiction over Finland and the Aaland Islands.<sup>213</sup> Together with the Aaland Islands, Finland became the autonomous unit within the Russian Empire called the Great Principality of Finland. Upon consideration of Finland's legal status within the Russian Empire, there were huge debates and various controversial interpretations on this issue. However, based on the historical facts, it can be argued that under the Fredrickshamn Treaty Finland enjoyed a status of full autonomy within the Russian Empire.

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<sup>211</sup> T Modeen, 'Aaland Islands' in R Bernhardt (ed), *Encyclopedia of Public International Law* (Vol. 6, 5th edn, Oxford, North-Holland 1984) 438-492.

<sup>212</sup> *ibid.*

<sup>213</sup> 'Treaty of Fredrikshamn (Harmina) of 17 September 1809'. Original text in Russian <<http://www.hrono.ru/dokum/rusv1809.html>> accessed 7 May 2008.

In the course of Finland's preparation for the declaration of its independence from Russia, the Swedish ethnic population of the Aaland Islands was preparing to rejoin to Sweden. The Aalanders Committee was created for the purposes of exercising the population's will.<sup>214</sup> A plebiscite took place on 31 December 1917 where one third of the population voted for unification with Sweden. A petition was submitted by the Aalanders to the Swedish King who announced that he would work with the Finnish Government for the effective and rapid solution of this problem.<sup>215</sup> Nevertheless, the Swedish–Finnish negotiations did not result in any positive development. Finland was trying to offer more compromises to the Aaland Islands through granting them an extensive scope of autonomous rights.<sup>216</sup> The 6 May 1920 Finnish Parliamentary Act approved the grant of wide autonomy to the Aaland Islands.<sup>217</sup> Under this Act the Aalanders were exempted from military service in the Finnish army.<sup>218</sup> However, the local authorities of the Islands rejected all proposals of the Finnish Government.<sup>219</sup>

Certain punitive measures undertaken by the Finnish Government resulted in escalation between Sweden and Finland. In such circumstances, Great Britain submitted the case for resolution by the League of Nations pursuant to article 11 of the League's statute.<sup>220</sup> Finland officially protested against the British initiative and stated that the League of Nations was not authorised to consider the Aaland dispute, since it was the internal issue of Finland.<sup>221</sup> Moreover, Finland also referred to article 15 of the

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<sup>214</sup> *Katangese Peoples' Congress v Zaire* [1994] 75/92 Communication of the African Commission on Human and Peoples' Rights 66.

<sup>215</sup> 'Report of the International Committee of Jurists on the Aaland Islands Question' (1920) (Vol 3) (Paris, League of Nations OJ Spec Supp) 11.

<sup>216</sup> GW Prothero, *Great Britain Foreign Office Historical Section* (Issues 158-162) (London, HM Stationery Office 1920) 68.

<sup>217</sup> *History of Aaland: Aaland Crisis, Alanningsang, Bomarsund, Aaland, History of the Aaland Islands, Heraldry of Aaland, Pommern, Flag of Al* (Memphis, Books LLC 2010) 7-20.

<sup>218</sup> *ibid.*

<sup>219</sup> *ibid.*

<sup>220</sup> Prothero (n 216) 32-45.

<sup>221</sup> *ibid.*

League's statute providing for non-admissibility of interference into internal affairs of the member states.<sup>222</sup>

Due to the fact that the PCIJ was not yet established at that time, the Council of the League of Nations appointed a special Commission of Jurists which was requested to provide an advisory opinion on the Aaland dispute within a short time period. The Commission of Jurists was instructed to clarify two questions: (i) whether the Aaland dispute fell under the internal jurisdiction of Finland and could not be considered by the League, and (ii) how to settle the problem of the Island's demilitarisation.<sup>223</sup> In respect of the first question, the Commission determined that the Aaland dispute between Finland and Sweden under international law did not fall under the internal jurisdiction of Finland.<sup>224</sup> The Commission defined that para 8 of article 15 of the Statute provided for the protection of the internal sovereignty of the states, but argued that the only ground of submission of the dispute to the League of Nations was not sufficient for treating the dispute as an international one.<sup>225</sup> The Commission argued that one of the key legal issues was the problem of determining Finland's status as a sovereign state at the time of the Aaland dispute.<sup>226</sup> The Commission concluded that since Finland was in the process of transformation, it was difficult to determine its legal status in the process of transformation of Finland's territory from de facto into de jure, and for these reasons the Aaland dispute could not fall under the internal jurisdiction of Finland due to the fact that this case affected its neighbours, other members of the international community.<sup>227</sup>

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<sup>222</sup> *League of Nations: Winter War, Nansen Passport, Henry Cabot Lodge, International Law Commission, Mukden Incident* (Memphis, Books LLC 2010) 37-58.

<sup>223</sup> Lalonde (n 4) 68.

<sup>224</sup> Report of the International Committee of Jurists (n 215) 5.

<sup>225</sup> *ibid.*

<sup>226</sup> *ibid.*

<sup>227</sup> J Barros, *The Aaland Islands Question: Its Settlement by the League of Nations* (New Haven, Yale University Press 1968) 87.

However, it was admitted that the Commission's main goal was to determine the legal status of the Aaland Islands within the independent Finland regardless of the fact that its territory was under transformation. The Commission was required to study the internal political situation in both Finland and the Aaland Islands and the history of the dispute, including the autonomous status of Finland within the Russian Empire and the influence of the diplomatic recognition of Finland by various states.<sup>228</sup> Following the study of the internal situation, the Commission determined that the establishment of the Finnish state in the period of 1917–1918 had to be considered as a new political event rather than the continuation of an already-formed state.<sup>229</sup> The Commission emphasised that the Aaland Islands were part of Finland when the latter was an administrative part of the Russian Empire. However the Commission challenged the fact that the Aaland Islands should be considered *de jure* part of Finland based only on this ground.<sup>230</sup>

The inconsistency in positions of the Commission of Jurists as well as the conservative positions of Finland and the Aaland Islands which led to some military clashes between the parties in 1918 convinced the Commission to conclude that the Aaland Islands problem was an international dispute and should be subject to consideration by the Council of the League of Nations.<sup>231</sup> In 1921 the Council of the League of Nations appointed a Commission of Rapporteurs comprised of members from the US, Switzerland and Belgium.<sup>232</sup> Immediately after commencement of its activities, the Commission of Rapporteurs recommended that the Aaland Islands should be kept within the boundaries of independent Finland with absolute guarantees from the

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<sup>228</sup> Lalonde (n 4) 69.

<sup>229</sup> Modeen (n 211) 438-492.

<sup>230</sup> Report of the International Committee of Jurists (n 215) 5.

<sup>231</sup> *ibid.*

<sup>232</sup> Report of the International Committee of Jurists (n 215) 5; 'The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs' (League Doc B721/68/106 (1921) 27–8.



Finnish Government on protection of the Swedish minorities and entitling them with the rights to enjoy their culture and language.<sup>233</sup>

Like the Commission of Jurists, the Commission of Rapporteurs supported the argument that, due to its nature, the Aaland dispute was not an internal issue of Finland.<sup>234</sup> Thus, the Commission of Rapporteurs emphasised that the primary task for the Commission was the clarification of the legal grounds for Finland to have jurisdiction over the Aaland Islands.<sup>235</sup>

As a result of thorough analysis, it was concluded by the Commission of Rapporteurs that the Great Principality of Finland was an autonomous state within the Russian Empire which possessed all attributes of such unit including a separate constitution.<sup>236</sup> The Commission of Rapporteurs unanimously agreed that for a long time the Aaland Islands were part of autonomous Finland starting from the 17th century.<sup>237</sup> However, despite the Commission of Rapporteur's general support on preserving the Aaland Islands within Finland's territorial frameworks, it argued that secession of the Islands from Finland could take place only in certain specific circumstances, which should be expressed only by way of plebiscite in the whole territory of Finland.<sup>238</sup> The Commission of Rapporteurs stated that the exercise of the right to self-determination should be used as a last resort and with certain limitations.<sup>239</sup> Both the Commission of Rapporteurs and the Commission of Jurists argued that at that time the principle of self-determination was not recognised as a universal principle of international law and therefore could not be used without limitations.<sup>240</sup>

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<sup>233</sup> *ibid* 27.

<sup>234</sup> *ibid*.

<sup>235</sup> *ibid* 34.

<sup>236</sup> Barros (n 227) 78.

<sup>237</sup> 'The Aaland Islands Question' Report (n 232) 27–8.

<sup>238</sup> *ibid*.

<sup>239</sup> *ibid*.

<sup>240</sup> Barros (n 227) 85-90.

The Commission of Rapporteurs argued that the unlimited use of self-determination by certain groups and units with the right to secede from sovereign states would lead to anarchy in international relation and threaten the global order and stability.<sup>241</sup> The Commission of Rapporteurs stated that separation of the Aaland Islands from Finland and further unification with Sweden should be qualified as violation of the territorial integrity of Finland.<sup>242</sup> The Commission of Rapporteurs came to the conclusion that in the current case the principle of territorial integrity should prevail over self-determination.<sup>243</sup>

The Report of the Commission of Rapporteurs on the Aaland dispute was considered by the Council of the League of Nations during its 30th Session in 1921.<sup>244</sup> After lengthy discussions and debates with the representatives of Finland, Sweden and the Aaland Islands, the Council recognised Finland's right to sovereignty over the Islands and demanded demilitarisation of the Islands and guarantees for the Aalanders to enjoy their culture.<sup>245</sup> Pursuant to the Council's recommendation, Sweden and Finland concluded a treaty confirming the status of the Aaland Islands which was approved by the Council of the League of Nations.<sup>246</sup>

Based on the review of the Aaland dispute it can be stated that the international community gave preference to preserving the Islands within Finland's territorial frameworks, whereas the references were made to the old administrative borders of the Finnish autonomy within the Russian Empire. Therefore, it can be argued that, based on the principle of *uti possidetis*, the League of Nations determined that the Aaland Islands should be kept within the territorial boundaries of Finland.

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<sup>241</sup> 'The Aaland Islands Question' Report (n 232) 232.

<sup>242</sup> *ibid.*

<sup>243</sup> *ibid.*

<sup>244</sup> *League of Nations* (n 222) 28-60.

<sup>245</sup> *ibid.*

<sup>246</sup> *ibid.*

It can be argued that application of the principle of *uti possidetis* allowed Finland to preserve its territorial integrity and state boundaries which it possessed being a territorial administrative unit within the Russian Empire. Although there were no direct references to the principle in the official documents, the position which was held by the League and its specialised commissions, as well as the results of the dispute's settlement, give solid ground to conclude that even in this case the application of *uti possidetis* did in fact take place. It should be also noted that in Europe the principle of *uti possidetis* was further applied in the case of the USSR, the SFRY and Czechoslovakia's disintegration considered herein below.

## **2.2. Uti Possidetis as the Principle of International Law**

### **2.2.1 Evolution as the Principle of International Law**

If the principle of *uti possidetis juris* was applied before only within the colonial frameworks in Latin America and Africa, currently it is recognised as a principle of international law. This was confirmed by the ICJ in a boundary dispute between Burkina Faso and Mali, where it was proclaimed that ‘*uti possidetis* is a general principle of international law which is logically connected to the process of obtaining independence regardless of the fact of where this process takes place’.<sup>247</sup>

Clearly in the context of this case, the Court’s statement was addressed to the decolonisation process and circumstances. However, it can be argued that the way in which this statement was made gives grounds to argue that it is also applicable beyond the decolonisation process. Professor Shaw stresses that the main goal of the Court in this case was to make ‘a special statement’ on cases related to the process of obtaining independence.<sup>248</sup> He also supports the argument that *uti possidetis* as the principle of international law is applicable to all cases of decolonisation and beyond it, since the Court’s statement can serve as a ground for lawful interpretation that the principle of *uti possidetis* is applicable to all situations where there is a transfer from one sovereign power to another one.<sup>249</sup> The Court specifically emphasised that *uti possidetis* is not ‘a special rule which is applicable to a specific system of international law’ or in certain continents like Latin America where it emerged or in post-colonial Africa, but that it is applicable to all situations related to the gaining of independence.<sup>250</sup> Therefore, it was

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<sup>247</sup> The Frontier Dispute case (n 110) 557.

<sup>248</sup> Shaw, ‘Peoples, Territorialism and Boundaries’ (n 1) 478-492.

<sup>249</sup> *ibid.*

<sup>250</sup> The Frontier Dispute case (n 110) 557.

witnessed that the ICJ declared the principle as an effective tool for the settlement and prevention of territorial and boundary disputes and conflicts.

Undoubtedly, such statement of the Court is a *ratio decidendi* representing an authoritative statement by such a leading legal forum as the ICJ. It is generally accepted that such authoritative statements can reflect the existing customary international law or be part of a process of creating a new norm of customary international law.<sup>251</sup> In this case, it is an absolute must that the new norm should comply with the pre-existing one, since it is a compulsory requirement for the creation of a new norm or the modification of an existing norm of customary international law.<sup>252</sup>

It can be agreed that there were no other norms of customary international law related to the application of the principle of *uti possidetis* to the newly established states beyond the decolonisation.<sup>253</sup> Therefore, it means that at that moment the application of *uti possidetis* beyond decolonisation to newly independent states, which were created upon the collapse of some states or through the separation from existing ones, constituted a ground for the creation of a new norm of customary international law. The subsequent state practice, decisions and awards of the international tribunals and arbitrations, as well as the developed legal doctrine, affirmed these arguments.

Such statement of the Court has been also enriched by the relevant state practice in the collapse of the SFRY and the USSR. Another obvious example is the disintegration of a unitary state of Czechoslovakia. On 1 January 1993 the CFR ceased to exist, resulting in the emergence of two independent states, the Czech Republic and

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<sup>251</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492; A D'Amato, *The Concept of Custom in International Law* (Ithaca, NY, Cornell University Press 1971) 60-63.

<sup>252</sup> *Fisheries Jurisdiction Case (United Kingdom v Iceland) (Merits)* [1951] ICJ Reports 152; A D'Amato (n 251) 60-61; Shaw, *International Law* (n 112) 72-98.

<sup>253</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

the Slovak Republic.<sup>254</sup> Through the signing of the 29 October 1992 Treaty on Delimitation of the Main Boundaries, the two former units of the CFR agreed upon the preservation of the former administrative borders between the two former units and their recognition as international boundaries of the new independent Czech and Slovak Republics.<sup>255</sup> Therefore, it can be clearly seen in this case that the two former units of a unitary state which was consensually dissolved had agreed on the application of *uti possidetis juris* and had effectively delimited the international boundaries of the two new independent states based on the former administrative borders between them.

The example of Eritrea can also serve as additional support for the above arguments in favour of *uti possidetis*. Eritrea broke away from Ethiopia and declared its independence within the administrative borders that it had within Ethiopia.<sup>256</sup> However, it should be stressed that the administrative borders of Eritrea were in fact international boundaries between independent Eritrea and Ethiopia delimited under the bilateral treaties in 1900 and 1908.<sup>257</sup>

The Badinter Commission on former Yugoslavia also adhered to the ICJ's position and argued in favour of *uti possidetis* being recognised as a general principle of international law.<sup>258</sup> In grounding its opinion, the Commission clearly referred to the ICJ's position expressed in the Frontier Dispute case,<sup>259</sup> which was made for the

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<sup>254</sup> J Malenovsky, 'Problèmes Juridiques Lies a la Partition de la Tchecoslovaque' (1993) 39 AFDI 305.

<sup>255</sup> *ibid.*

<sup>256</sup> J Temin, 'Secession and Precedent in Sudan' (US Institute of Peace, 17 Nov 2010) <[http://www.usip.org/files/resources/PB%2068%20-%20Secession%20and%20Precedent%20in%20Sudan%20and%20Africa\\_0.pdf](http://www.usip.org/files/resources/PB%2068%20-%20Secession%20and%20Precedent%20in%20Sudan%20and%20Africa_0.pdf)> accessed 11 February 2012.

<sup>257</sup> I Brownlie, *African Boundaries* (n 5) 9; R Goy, 'L'Indépendance de l'Erythée' (1993) 39 AFDI 350.

<sup>258</sup> S Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-Making Efforts in the Post-Cold War World* (Ashgate, Dartmouth 2000) 175-320.

<sup>259</sup> 'EC Yugoslav Arbitration Commission Opinion No 2' (1992) 3 EJIL 183-185.

purposes of clarifying what is accepted under the principle of *uti possidetis* leading to a transformation of former administrative borders into international boundaries.<sup>260</sup>

It is generally admitted that the principle of *uti possidetis* has two forms: *uti possidetis juris* and *uti possidetis de facto*.<sup>261</sup> If the first form is one of the principles of modern international law which refers to territorial and boundary issues and provides for the stability of boundaries, the second form was applied in the past and referred to the issues of partition of territories similar to the partition of private property. In modern international law, *uti possidetis* means a specific mechanism and process of international law which serves the transfer of sovereignty from a previous state to a new one within the previous administrative borders, and its wide interpretation refers to the principle of the stability of state boundaries.<sup>262</sup>

The importance of the principle of the stability of boundaries was stressed for the first time in 1909 by the Permanent Court of Arbitration in the *Grisbadarna* case between Norway and Sweden.<sup>263</sup> The Permanent Court of Arbitration confirmed that the principle exists within the people's right to self-determination and cannot be subject to any further modifications.<sup>264</sup> In the *Eastern Greenland* case due to Denmark's possession of territorial sovereignty over the disputed territory for a considerable time period, for the purposes of maintaining stability of boundaries the PCIJ made a decision to preserve Denmark's sovereignty over Greenland.<sup>265</sup> An almost identical position was taken by the chairing Judge Lagergren in the *Rann of Kutch* case between India and Pakistan over the determination of the eastern boundary between the two states.<sup>266</sup> In

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<sup>260</sup> 'EC Yugoslav Arbitration Commission Opinion No 3' (1992) 31 ILM 171.

<sup>261</sup> Moore (n 111) 349-367; Hasani (n 116) 85-97;

<sup>262</sup> Bardonnet (n 111) 9; Shaw, 'The Heritage of States' (n 142) 88.

<sup>263</sup> (*Norway v Sweden*) [1909] PCIJ Series 26 (*Grisbadarna* case).

<sup>264</sup> A Scott, *Hague Court Reports* (London, Stevens & Sons 1916) 22-130.

<sup>265</sup> *Denmark v Norway* [1933] PCIJ Series 46-54 (*Eastern Greenland* case).

<sup>266</sup> *India v Pakistan* [1965] 50 ILM 520 (including Judge Bebler's and Chairman Lagergren's Dissenting Opinion) (*Rann of Kutch* case).

this case Judge Lagergren stated that the principle of stability of boundaries is one of the fundamental instruments for the maintenance of peace and stability in the region.<sup>267</sup>

Therefore, the state practice on application of *uti possidetis juris* indicates that a transformation of former administrative borders into international boundaries is generally accepted subject to the availability of the concerned parties' consent. Although this process to some extent assumes the consent of the parties, it has become a norm of customary international law.

Taking into account the fact that the collapse of a unitary state and the change of its existing boundaries leads to cruel and sanguinary conflicts and disorder, the international community is in permanent search of finding an effective tool for the settlement of some territorial and boundary disputes. Referring to the nature and historical background most of territorial and boundary conflicts and their sanguinary consequences, it may be argued that preservation of the existing boundaries drawn up on the basis of internal administrative lines (*uti possidetis lines*) could be a better choice rather than revision of such boundaries leading to unpredictable endless clashes between the conflicting parties. In fact, *uti possidetis juris* can serve for the purposes of effective peace settlement of such conflicts through freezing such boundaries based on this principle. The same position was expressed by the ICJ in the Frontier Dispute case where the Court stated that the principle freezes the territorial titles and prevents 'fratricidal struggles'.<sup>268</sup> In such case, the principle of *uti possidetis* can be such tool in the absence of a better option. The effective application of *uti possidetis* in various continents as described in previous subsections is another solid argument in favour of its effectiveness. It can be argued that such all-parties consensual freeze of the boundaries under the principle of *uti possidetis juris* in case of the Post-Soviet territorial

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<sup>267</sup> *ibid.*

<sup>268</sup> The Frontier Dispute case (n 110) 20-30.



and boundary conflicts could serve for the effective settlement of such long lasting conflicts considered herein.

Moreover, the principle's application in the case of the USSR, the SFRY and Czechoslovakia gives grounds to argue that *uti possidetis* has become a rule of customary international law. Some commentators contend that the principle of *uti possidetis* should be applied automatically upon the collapse of a state or legitimate secession, since by its nature it serves to prevent the unlimited use of force and escalation of conflict.<sup>269</sup> It can be agreed that the ignorance of this principle's importance could be dramatic for the international community, since the principle determines sovereignty of the state over its territory, whose integrity cannot be violated.<sup>270</sup> The principle therefore plays an important role in the protection of a state from other states' unreasonable territorial claims.

Notwithstanding the principle's stabilising role in preserving the territories of sovereign states, it should be stressed that *uti possidetis* cannot be counter-opposed to the principle of territorial integrity. The latter provides for the protection of a state's territorial integrity, while *uti possidetis* provides for the transformation of former internal administrative borders among former constitutional units of one metropolitan state into international boundaries of newly independent states. Professor Shaw aptly states that *uti possidetis* applies within the context of the principle of territorial stability and traditional territorial acquisition principles.<sup>271</sup> In his opinion, the principle also exercises important functions in the international arena but cannot be considered as an absolute and stable principle enabling the international community to settle all territorial

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<sup>269</sup> Nesi (n 170) 1-34.

<sup>270</sup> JF Lachaume, 'La Frontiere: Separatio' in A Pedone (ed), *Societe Francaise pour le Droit International, Colloque de Poitiers, La frontier* (Paris, A Pedone 1980) 79-92.

<sup>271</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

and boundary disputes and conflicts.<sup>272</sup> Therefore, it can be argued that during the last decades of the 20th century *uti possidetis* developed into a principle of international law. Dissolution of the former communist federations including the SFRY and the USSR was a rebirth for *uti possidetis* in non-colonial format. The role of the re-born principle has been explicitly recognised by the legal community.<sup>273</sup>

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<sup>272</sup> Shaw, 'The Heritage of States' (n 142) 75-83.

<sup>273</sup> A Pellet, 'Note sur la Commission d'Arbitrage de la Conférence Européenne pour la Paix en Yougoslavie' (1991) 37 AFDI 329; R Yakemtchouk, 'Les Conflits de Territoires et de Frontières dans les Etats de l'ex-URSS' (1993) 39 AFDI 393- 401.

### 2.2.2 Recent State Practice in Application of the Principle of *Uti Possidetis*

State practice in application of *uti possidetis* in the context of decolonisation in Latin America, Africa, Asia and Europe was considerably enriched by the cases of the collapse of communist states. As referred to above, the application of the principle took place in the case of the disintegration of the USSR, the SFRY and Czechoslovakia.<sup>274</sup> Even the opponents of *uti possidetis* agree that the principle was applied in the cases of the SFRY and the USSR.<sup>275</sup>

In the case of the SFRY, the Arbitration Commission on Yugoslavia (set up by the European Community and referred to as the Badinter Commission) in its Opinions came to the conclusion of acceptance of the application of *uti possidetis* to the former units of the Yugoslav Federation. The Arbitration Commission was called to opine with respect to the settlement of existing sanguinary conflicts in the territory of the former SFRY. The application of *uti possidetis* was explicitly confirmed by the Badinter Commission which in its Opinion No. 3 referred to in the Frontier Dispute case arguing that the principle was a general principle of international law and could not be limited only to decolonisation cases.<sup>276</sup>

In fact, the modern international boundaries of the former Yugoslav units were determined on the basis of the territories which they possessed within the internal administrative borders within the SFRY. Analysis of Opinion No. 3 and the state practice shows that there were legal grounds for the Badinter Commission to argue that *uti possidetis* is a principle of international law. The Commission's reference to *uti possidetis* was nothing but an attempt to prevent further armed conflicts. The international community also confirmed recognition of the former administrative

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<sup>274</sup> Ratner, 'Drawing Better Line' (n 5) 592-593.

<sup>275</sup> Lalonde (n 4) 220-226.

<sup>276</sup> 'EC Yugoslav Arbitration Commission' (n 260) 172.

borders as the international boundaries of newly independent states of the former SFRY.<sup>277</sup> It was also confirmed by the UNSC Resolution No 713.<sup>278</sup>

The USSR's dissolution and agreement among the former Soviet republics on transformation of the former administrative borders into international boundaries was solid evidence of the application of *uti possidetis juris* as the principle of international law not only within the decolonisation process but also beyond it. Article 5 of the 8 December 1991 Agreement on establishment of the Commonwealth of Independent States signed in Minsk proclaimed that the Parties recognise and respect the territorial integrity and the inviolability of existing boundaries within the CIS.<sup>279</sup> It was affirmed again in the 21 December 1991 Alma-Ata Declaration signed by the eleven former USSR republics. This Declaration affirmed the obligations of CIS member states to recognise and respect the territorial integrity and inviolability of existing boundaries of member states.<sup>280</sup> The CIS Charter adopted on 22 January 1993 in Minsk in article 3 affirmed the respect of the territorial integrity of member states and recognition of existing boundaries.<sup>281</sup> In other words, the aforementioned instruments affirmed a transformation of the former administrative borders of the former USSR republics into their international boundaries. Moreover, in 1994 the member states of the CIS signed the new Declaration on Respect of Sovereignty, Territorial Integrity and Inviolability of Boundaries of Member States<sup>282</sup> which reinforced application of the principle of *uti possidetis* to the territory and boundaries of the former USSR republics. In this case, as Professor Shaw observes, such agreements within the CIS and the position of the

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<sup>277</sup> EC/US/USSR Declaration on Yugoslavia of 18 Oct 1991 (1991) 67 ILM 234-242; 'USA White House Press Release' (Washington DC, 7 Apr 1992).

<sup>278</sup> UNSC Res 713 (25 Sep 1991) UN Doc S/RES/713.

<sup>279</sup> Agreement on the Establishment of the Commonwealth of Independent States (signed on 8 December 1991 in Minsk) (1992) 31 ILM 138.

<sup>280</sup> Alma-Ata Declaration (1992) 31 ILM 148.

<sup>281</sup> The Charter of the Commonwealth of Independent States, adopted on 22 January 1993 (1995) 34 ILM 128.

<sup>282</sup> Bulletin of International Agreements No 7 (БМД No 7 Moscow 1994) (In Russian) 9-10.

European Community expressed in the EC Recognition Guidelines give grounds for the application of *uti possidetis juris* and deprive the separatist movements of Abkhazia and South Ossetia to seceding from the Republic of Georgia, Nagorno-Karabakh from Azerbaijan, and Transnistria from Moldova.<sup>283</sup> From the foregoing it may therefore be argued that under the CIS Charter and other agreements jointly signed and adopted by the former USSR republics, the principle of *uti possidetis* is applicable and had been applied by the former republics of the Soviet Union.<sup>284</sup>

The application of the principle in the case of Czechoslovakia was less problematic and painful in contrast to cases of the SFRY and the USSR. The disintegration of the common state was acknowledged by a constitutional Act adopted by the Czech Parliament on 25 November 1992.<sup>285</sup> The common state of Czechs and Slovaks ceased its existence from 1 January 1993. The boundaries between the two units were determined by the 1919 Paris Peace Treaty.<sup>286</sup> Under the 29 October 1992 Treaty on General Delimitation of Primary State Boundaries between the new states, both agreed upon approving the former internal administrative borders between the Czech and Slovak parts as their international boundaries.<sup>287</sup> Undoubtedly, the principle *uti possidetis* was applied as a legal ground for using the boundary line established between the two units by the 1919 Paris Peace Treaty. In the case of Czechoslovakia, the disintegration of the common state took place on the basis of mutual consensus

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<sup>283</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>284</sup> R Mullerson, 'New Developments in the Former USSR and Yugoslavia' (1993) 33 Va J Int'l L 299.

<sup>285</sup> LD Timchenko (n 120) 55-56; Malenovsky (n 254) 328.

<sup>286</sup> Treaty of Versailles 28 June 1919 <<http://net.lib.byu.edu/~rdh7/wwi/versailles.html>> accessed 5 August 2012.

<sup>287</sup> Treaty Between Czech Republic and Slovak Republic on Mutual Relations and Principles of Cooperation in Agriculture, Food Industry, Forestry, and Water Economy under the Conditions of the Customs Union (10 Dec 1992) <[http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search\\_type=query&table=result&query=ID:LEX-FAOC023131&format\\_name=ERALL&lang=eng](http://faolex.fao.org/cgi-bin/faolex.exe?database=faolex&search_type=query&table=result&query=ID:LEX-FAOC023131&format_name=ERALL&lang=eng)> accessed 11 August 2012.

achieved in the course of negotiations.<sup>288</sup> It can be further concluded that, due to *uti possidetis*' application, it was possible to achieve a consensus between the Czech and Slovak sides without any further escalation.

It should be emphasised that the precedents available as a result of the dissolution of the SFRY, the USSR and Czechoslovakia simply reconfirm the importance of the principle beyond the colonial context. Contrary to the arguments of Hannum, the principle of *uti possidetis* can in fact be considered as the 'neo-colonial territorial approach'.<sup>289</sup> Therefore, the state practice in the cases of the SFRY, the USSR and Czechoslovakia considered hereinabove is clear evidence confirming the transformation of *uti possidetis* into a general principle of international law.

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<sup>288</sup> Crawford, 'State Practice and International Law' (n 5) 17.

<sup>289</sup> H Hannum, 'Re-Thinking Self-Determination' (1993) 34 Va J Int'l L 37.

### 2.2.3 Practice of International Tribunals, Arbitrations and International Organisations

The position of the international tribunals and organisations in various territorial and boundary disputes and conflicts played a huge role in the formation of *uti possidetis* as a principle of international law. *Uti possidetis* was acknowledged as a principle of international law in a number of decisions made by international tribunals and universal and regional organisations.<sup>290</sup> If in the 19th century the Latin American principle (which was a customary rule of regional nature) applied basically between and among the former Spanish colonies, at the later stage it became a general principle of international law applied to newly established states beyond the decolonisation process. Application of *uti possidetis* in Latin America in the process of decolonisation was the key issue for the new interpretation of the principle within the context of settlement of territorial disputes in international law which served as a ground for transformation of the Roman law doctrine into the principle of international law.

If starting from the beginning of the principle's application in contemporary history, it may be argued that the position of the international community towards *uti possidetis* was initially expressed in the Aalands dispute.<sup>291</sup> Obviously, the use of the concepts and legal arguments constituting the core nature of *uti possidetis juris* by the League of Nations and its specialised commissions in the course of the settlement of the Aaland dispute confirmed that in some cases it can serve as the tool for effective and peaceful resolution of territorial conflicts.

In the boundary dispute between Sharjah and Dubai, the arbitration in its decision stated that *uti possidetis* is a general principle of international law with a

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<sup>290</sup> *Dubai v Sharjah Border Case* [1981] 91 ILR 578; *The Frontier Dispute case* (n 110) 565; *El Salvador v Honduras* (n 130) 386; *Rann of Kutch Case* (n 266) 407.

<sup>291</sup> Reports of International Commission of Jurists and the Committee of Rapporteurs League of Nations Council Documents (1921) Doc No B7:21/68/106 9-21.

‘consensual nature’, which is actively applied in relation to territorial and boundary disputes.<sup>292</sup>

Another important legal practice is the ICJ case law, which clearly indicates that the principle was applied also beyond the decolonisation process.<sup>293</sup> For instance, in a dispute on delimitation of land and maritime boundaries between El Salvador and Honduras, the ICJ affirmed its position and stressed the important role of *uti possidetis* in establishing the state boundaries.<sup>294</sup> However, the most indicative case referring to the principle of *uti possidetis juris* is the Frontier Dispute case, where the ICJ declared *uti possidetis* as ‘the general principle and the rule of common order’.<sup>295</sup> Obviously, such position of the ICJ expressed in territorial and boundary disputes and conflicts is solid evidence for considering *uti possidetis* as a norm of international law. Ratner also comments that references to the principle by the ICJ are nothing but its recognition as a general principle of international law.<sup>296</sup> This position taken by the ICJ is commonly supported by the doctrine of international law.<sup>297</sup>

The collapse of the communist regimes and application of *uti possidetis juris* upon settlement of various territorial and boundary disputes provided for its transformation into a principle of international law. The Badinter Commission on Yugoslavia in its Opinions also referred to the ICJ’s statement made in the Frontier Dispute case and argued that the principle of *uti possidetis juris* is the general principle

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<sup>292</sup> *Dubai v Sharjah Border Case* (n 290) 543-578.

<sup>293</sup> *Beagle Channel Case* (n 156) 93-125; *Bolivia-Peru: Treaty of General Arbitration* (1999) 3 American J Suppl 378-422; *Colombia v Venezuela* (n 156) 223-228; *Guatemala-Honduras Arbitral Award* (n 149) 1307-1325; *Guinea-Bissau v Senegal Case (concerning the Arbitral Award of 31 July 1989)* [1989] 83 ILR 35-58; *Guinea-Guinea-Bissau Maritime Delimitation Case* [1985] 77 ILM 635-728; *Territorial Dispute Case (Libya v Chad)* [1994] ICJ Reports 83-107; *The Arbitral Award of the King of Spain Case* (n 135), 191-199

<sup>294</sup> *El Salvador v Honduras* (n 130) 386-387; M Shaw, ‘Case Concerning the Land, Island and Maritime Frontiers Dispute’ (1993) 42 ICLQ 929.

<sup>295</sup> The Frontier Dispute case (n 110) 565.

<sup>296</sup> Ratner, ‘Drawing Better Line’ (n 5) 598.

<sup>297</sup> Cukwurah (n 111) 181; Brownlie, *African Boundaries* (n 5) 360; B Boutros-Ghali, The Addis Ababa Charter (n 179) 29; D Bourjorl-Flecher, ‘Heurs et Malheurs de l’uti Possidetis: l’Intangibilité des Frontières Africaines’ (1981) 35 RJPIC 812.



of international law which is applicable to all situations related to the obtaining of independence. The Badinter Commission's emphasis, in its opinions in 1992, of the role of *uti possidetis* as a general principle of international law, was an important event in the official recognition of the principle in a non-decolonisation context. The Badinter Commission in its Opinion No. 3 stated that the administrative borders among the former units of the Yugoslav Federation should be transformed into international boundaries of newly independent states and those boundaries should be guaranteed by international law.<sup>298</sup> Although the activity of the Badinter Commission is criticised,<sup>299</sup> it can be argued that it clearly determined the main criteria for the application of *uti possidetis juris* within the context of external self-determination.

Therefore, it can be argued that *uti possidetis* has formed as a principle of international law and as an additional tool for strengthening of the principle of territorial integrity in the case of newly independent states which were administrative territorial units of collapsed states. Arguments of those supporters who claim that *uti possidetis* is a norm of customary international law seems quite reasonable and well-grounded in the light of the existing state practice. Such factors provide the justification to argue that the principle is applicable to the situations related to independence obtaining beyond the decolonisation. The most recent example of the recognition of the former administrative borders as international boundaries of newly independent states of Eastern and Central Europe and the former USSR is an important argument for *uti possidetis*' transformation into a principle of international law. Moreover, the recognition of the territorial integrity of newly independent states, which were parties to territorial and boundary disputes and conflicts, within their former administrative borders by the vast

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<sup>298</sup> 'EC Yugoslav Arbitration Commission' (n 260) 172; Pellet, 'Note sur la Commission d'Arbitrage' (n 273) 329.

<sup>299</sup> Hannum, *Self-Determination* (n 120) 57.

majority of states and international organisations is a solid argument that from the principle of regional importance *uti possidetis* has transformed into a principle of international law.

## 2.3 Critics of Uti Possidetis

There are certain views and opinions in the doctrine against the recognition of *uti possidetis* as a general principle of international law applicable beyond the colonial context.<sup>300</sup> Hyde argued that the application of *uti possidetis* was simply a practice among the Latin American states, the former Spanish colonies, but that it was not a universally applied principle regulating the issues of establishment of state boundaries with binding force.<sup>301</sup> In other words, he claimed that the newly established independent states of Latin America did not have any obligations to recognise the borders established by the Spanish colonial powers, if the interests of those states could be violated by so doing.

Bluntschli criticised the use of the Roman law term for the description of *status quo post bellum* situations.<sup>302</sup> He asserted that it was incorrect to use the private law term for the purposes of public law.<sup>303</sup> However, it can be agreed with Moore who did not share Bluntschli's opinion and argued that this was purely a literal and linguistic issue.<sup>304</sup> Some other commentators claim that the principle should be applied basically in the colonial context, but not in non-colonial one.<sup>305</sup> One of such opponents of the principle of *uti possidetis* is Vidmar who claims that the principle is not applicable in its classic form to cases beyond the decolonisation.<sup>306</sup>

The Soviet doctrine absolutely denied *uti possidetis* and no researches are available in this regard. Soviet scholar Klimenko, specialising in territorial and

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<sup>300</sup> M Craven, 'The European Community Arbitration Commission on Yugoslavia' (1995) 66 BYBIL 385; Ratner, 'Drawing Better Line' (n 5) 613.

<sup>301</sup> Hyde (n 107) 508-509.

<sup>302</sup> M Bluntschli, *Le Droit International Codifié* (Paris, Librairie de Guillaumin et Cie 1870) 363

<sup>303</sup> *ibid.*

<sup>304</sup> Moore (n 111) 328-330.

<sup>305</sup> R McCorquodale and R Pangalangan, 'Pushing Back the Limitation of Territorial Boundaries' (2001) 12 EJIL 867-875; P Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission' (2000) 24 MELB Uni LR 50.

<sup>306</sup> J Vidmar, 'Confining New International Borders in the Practice of Post-1990 State Creations' (2010) 70 ZaöRV 322-330.

boundary problems, challenged the legal nature of the principle.<sup>307</sup> Other Soviet and Russian commentators also adhered to this position and took controversial positions and interpretations of the principle.<sup>308</sup>

The criticism of the principle is based on an argument that its application is unreasonable and legally unjustified. One of the key arguments of the principle's opponents is the vague *ratio decidendi* in the Frontier Dispute case, which in their opinion cannot be considered as a declaration of a new norm of customary international law. In their opinion, this principle is related basically to the principle of inviolability of colonial boundaries.<sup>309</sup> However, the supporters of this idea fail to defeat the argument that in this case the ICJ specifically emphasised the principle and its importance for the African continent and settlement of territorial and boundary disputes and elimination of sanguinary conflicts. The Court specifically emphasised that *uti possidetis* is not 'a special rule which is applicable to a specific system of international law' or certain continents like Latin America where it emerged or post-colonial Africa; rather, the Court stated that the principle is applicable to all situations related to the obtaining of independence.<sup>310</sup>

It is also argued that the international community did not recognise *uti possidetis* as a principle of international law since, due to its controversial nature, it contradicts international law.<sup>311</sup> In the Frontier Dispute case in a separate opinion Judge Abi-Saab doubted the status of the principle and stated that the principle did not have binding

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<sup>307</sup> Klimenko (n 3) 18-20.

<sup>308</sup> YG Barsegov, *Territory in International Law* (Moscow, Gosyurizdat 1958) (*In Russian*) 231.

<sup>309</sup> Lalonde (n 4) 231.

<sup>310</sup> The Frontier Dispute case (n 110) 566-583 (ICJ dictum); Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>311</sup> LP Bloomfield, *Egypt, Israel and the Gulf of Aquaba* (London, Kluwer Law International 1957) 107-108.

force and should be interpreted within the meanings assigned to it under international law.<sup>312</sup>

It is even argued that the Badinter Commission's analysis on *uti possidetis*' role as the general principle of international law was inaccurate and incorrect, and that it is simply a 'wrong interpretation'<sup>313</sup> and 'distortion'<sup>314</sup> of the ICJ's actions and decisions upon considering the Frontier Dispute case. All such positions of the principle's opponents are grounded by arguments that all references by the Court were made to the decolonisation processes.<sup>315</sup> To support this position criticising the ICJ's statement, reference is made to paragraph 23 of the ICJ decision in the above-mentioned case which emphasises only the role of *uti possidetis* for Latin America and its importance for preventing new colonisations in this continent.<sup>316</sup> However, even the literal interpretation fails to support this argument, since the statement of the Court was wide and generally applicable to all situations. In contrast, the ICJ specifically stressed that *uti possidetis* is the principle which provides for a transformation of former administrative borders into international boundaries of independent states as the delimitation between two (or more) former units of the same sovereign.<sup>317</sup> The Court did not specifically state that it is applicable exclusively to decolonisation cases, but rather declared it as the general rule applicable to all situations. Therefore, it can be argued that the application of *uti possidetis* beyond the decolonisation process for the purposes of justifying the transformation of the administrative borders among the former units of the same sovereign into the international boundaries of newly independent states should be considered as being in line with the Court's position.

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<sup>312</sup> The Frontier Dispute case (n 110) para 65, 159 (Individual Opinion of Judge Abi Saab).

<sup>313</sup> Ratner, 'Drawing Better Line' (n 5) 614.

<sup>314</sup> Torres Bernardez (n 166) 420-435.

<sup>315</sup> Lalonde (n 4) 170-235.

<sup>316</sup> The Frontier Dispute case (n 110) 554-566.

<sup>317</sup> *ibid.*

There are opinions which argue against the use of the Latin term of *uti possidetis* in international law for the settlement of territorial and boundary disputes and conflicts.<sup>318</sup> Other avid opponents of the principle contend that *uti possidetis* is not a principle of international law and that there are no solid grounds for its application in international law.<sup>319</sup> There are even arguments supporting that the principle is a concept contradicting the fundamental norms and principles of international law.<sup>320</sup> Other opponents of *uti possidetis* claiming that it cannot be accepted as a principle of international law basically refer to the conflicting correlation between this principle and self-determination.<sup>321</sup> Some other commentators argue that the principle did not serve as an effective tool for the positive settlement of boundary and territorial disputes and conflicts and was subject to various interpretations.<sup>322</sup>

Nevertheless, such critical views lack well-grounded legal argumentation and do not confute the core argument on the formation of *uti possidetis* as the general principle of international law which was effectively applied for the settlement of some of the territorial disputes considered herein.

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<sup>318</sup> Dias Van Dunem (n 125) 260-261.

<sup>319</sup> Lalonde (n 4) 228-229.

<sup>320</sup> De la Pradelle (n 141) 86; M Reisman (n 124) 350; Waldock (n 143) 225.

<sup>321</sup> Lalonde (n 4) 231-245; Hasani (n 116) 85.

<sup>322</sup> CG Fenwick, 'The Honduras-Nicaragua Boundary Dispute' (1957) 51 AJIL 761-765; A Munkman, 'Adjudication and Adjustment International Judicial Decision and the Settlement of Territorial and Boundary Disputes' (1972) 46 BYBIL 93; Sharma, *International Boundary* (n 137) 120.

## **2.4 Concluding Remarks**

From the foregoing review it is clearly seen that *uti possidetis*' origin dates back to *jus civile* of Roman law. The principle's main designation in Roman law was a preservation of the status quo and the stability of property possession. However, its gradual transformation into the principle of international law supporting the stability of state boundaries is a notable element of such evolution. From the rule of private Roman law the principle became a principle of international law which has a primary concern with state or territorial sovereignty.<sup>323</sup> Only in the 18–19th centuries did it become a principle of inter-state relations in Latin America and then in African and Asian continents.<sup>324</sup>

It may be argued that the principle of *uti possidetis juris* is a specific mechanism and the process of international law which serves the purpose of transferring sovereignty over the territory from a preceding sovereign to a new one. Therefore the principle itself is part of a wider principle which refers to the stability of state territories.<sup>325</sup> However, it should be emphasised that the principle of *uti possidetis* cannot be opposed to the principle of the territorial integrity of states. If the latter provides for the protection of territorial integrity, the former principle provides the transformation of former internal administrative borders between units which were colonies or parts of the same parent state into international boundaries. It should be agreed with the argument of the ICJ that even if *uti possidetis juris* was clearly recognised as a principle of international law which was applied to the process of

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<sup>323</sup> Baty (n 126) 444-454; Lauterpacht (n 126) 598-599.

<sup>324</sup> Hasani (n 116) 85.

<sup>325</sup> The Frontier Dispute case (n 110); Shaw, 'The Heritage of States' (n 142) 88; Bardonnnet (n 111) 9.

decolonisation, it is still the principle which is applied to all cases related to the achievement of independence, regardless of the circumstances.<sup>326</sup>

In this context, the role of *uti possidetis* has increased during the last decades of the 20th century. The state practice on application of *uti possidetis* in the framework of decolonisation in Latin America, Africa, Asia and Europe has been significantly enriched by the state practice beyond the decolonisation with respect to the dissolution of former communist countries in Eastern Europe and the USSR. The collapse of the USSR and the SFRY was a rebirth for the principle of *uti possidetis*. It is widely supported that the principle of *uti possidetis* was applied beyond the colonial context to the dissolution of the former USSR and SFRY.<sup>327</sup> The same was applied with respect to the dissolution of Czechoslovakia, where the parties agreed to apply the principle of *uti possidetis* for the establishment of their inter-state boundaries.

It may be concluded that application of *uti possidetis* in Latin America during decolonisation was a crucial basis for the completely new interpretation of the principle in the context of territorial issues in international law, and that it served as a ground for transformation of Roman law interdict into the principle of international law. *Uti possidetis* has been formed as a general principle of international law, which serves as a support to the principle of territorial integrity of newly independent states which were constitutionally defined administrative units within a single metropolitan state which is dissolved. The formation of *uti possidetis* as a general principle of international law has been affirmed by numerous decisions of international tribunals and arbitrations in territorial and boundary disputes as well as by the recent state practice in the course of the dissolution of the former USSR, the former SFRY and Czechoslovakia. To conclude, it may be argued that the principle of *uti possidetis* plays a significant role for

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<sup>326</sup> The Frontier Dispute case (n 110).

<sup>327</sup> Yakemtchouk (n 273) 401; Pellet, 'Note sur la Commission d'Arbitrage' (n 273) 329.



the protection of the territorial integrity of newly independent states as well as for the resolution of territorial and boundary disputes and the avoiding of conflicts' escalation.

## CHAPTER 3: SELF-DETERMINATION: A FUNDAMENTAL PRINCIPLE OF INTERNATIONAL LAW OR UNLIMITED RIGHT TO IMPAIR STATE INTEGRITY?

### 3.1 From Legal Doctrine to Principle of International Law

Although a great number of papers have been written about peoples' right to self-determination,<sup>328</sup> the consideration of the basic aspects of self-determination is necessary for the purposes of the current research in the light of its correlation with the principle of *uti possidetis*.

#### 3.1.1 Evolution and the Extent of Application in the Process of Decolonisation and Beyond

The principle of self-determination came onto the scene after the end of WWI and the establishment of the system of the League of Nations.<sup>329</sup> Despite its inclusion in the Covenant of the League of Nations, it was not initially considered as a legal principle; instead, it was considered as a political concept rather than a legal principle of international law.<sup>330</sup> In fact, there were a few international instruments that referred to this principle at that time. The argument as to such nature of self-determination was raised in the Aaland Islands dispute between Sweden and Finland.<sup>331</sup> Hannum aptly argues that peoples' self-determination is a principle which was established as a 'natural corollary' to demands arising from ethnic and political matters in the 18–19th

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<sup>328</sup> H Hannum, *Autonomy, Sovereignty and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, University of Pennsylvania Press 1992); A Cassese, *Self-determination of Peoples: Legal Reappraisal* (Cambridge, CUP 1995); M Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (The Hague, Martinus Nijhoff 1982); T Franck, *The Power of Legitimacy Among Nations* (New York, OUP 1990); R McCorquodale, *Self-Determination in International Law* (Dartmouth, Aldershot 2000).

<sup>329</sup> Jennings and Watts (n 113) 712.

<sup>330</sup> EJ de Arechaga, 'International Law in the Past Third of a Century' (1978) 159 RCADI 100; V Epps, 'The New Dynamics of Self-Determination' (1997) 3 ILSA J Int'l & Comp L 433.

<sup>331</sup> Reports of International Commission of Jurists and the Committee of Rapporteurs League of Nations Council Documents (1921) Doc No B7:21/68/106 P 22-23 (n 295).

centuries.<sup>332</sup> However, the principle basically developed after WWII and during the middle of the last century with the start of the decolonisation process, which led to its transformation as a political concept into a principle of modern international law.<sup>333</sup> Its inclusion in the UN Charter marked a new era for its development. Since then and its subsequent practice, the right to self-determination has become a norm of customary international law. Along with the UN Charter,<sup>334</sup> the Resolution 1514 (XV) – The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (‘Decolonisation Declaration’) was a fundamental legal document approving the right to self-determination, which is considered by some scholars as ‘a binding interpretation’ of the UN Charter.<sup>335</sup> Moreover, the right to self-determination has been confirmed in other numerous international instruments, for example, in the Universal Declaration of Human Rights, Helsinki Final Act 1975 (Part VIII), African Charter on Human and Peoples’ Rights 1981 (article 20) and the 1966 Human Rights Covenants.<sup>336</sup> Moreover, it is argued that the principle is a norm of customary international law<sup>337</sup> and constitutes a part of *jus cogens*.<sup>338</sup>

Since the 1966 International Human Rights Covenants are considered as having binding force for the parties and are ‘an authoritative interpretation of the UN Charter’s

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<sup>332</sup> Hannum, ‘Re-Thinking’ (n 289) 2-3.

<sup>333</sup> Hannum, Re-Thinking (n 289) 1; M Freeman, ‘National Self-Determination, Peace and Human Right’ (1998) 10 (2) *Peace Review* 28.

<sup>334</sup> Charter of the United Nations (4 October 1945) 1 UN Treaty Series XVI.

<sup>335</sup> GA Res 1513 (XV) (14 December 1960), UN Doc A/RES/1513 (XV) (‘Decolonisation Declaration’); I Brownlie, *Principles of Public International Law* (5th edn) (Oxford, OUP 1998) 600; Shaw, *Title to Territory in Africa* (n 173) ch 2.

<sup>336</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III); CSCE, Final Act of Helsinki, 1 August 1975: <<http://www.unhcr.org/refworld/docid/3dde4f9b4.html>> accessed 17 March 2013; OAU Doc CAB/LEG/67/3 Rev 5, (1982) 21 ILM 58; UNGA, International Covenants on Human Rights (26 February 1996) UN Doc A/RES/50/171.

<sup>337</sup> R Emerson, *Self-Determination* (1971) 65 AJIL 459.

<sup>338</sup> Brownlie, *Principles of Public International Law* (n 335) 513; A Cassese, *International Law in a Divided World* (Oxford, Clarendon Press 1986) 136; J Crawford, ‘The Rights of Peoples: Some Conclusions’ in J Crawford (ed), *The Rights of Peoples* (Oxford, Clarendon Press 1988) 159-177.

Human Rights provisions’,<sup>339</sup> the principle of self-determination has been affirmed as one of the fundamental human rights principle. The same is applicable to the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (the ‘Declaration on Principles of International Law’), which also approves certain provisions of the UN Charter on Human Rights, including those relating to self-determination.<sup>340</sup>

If in case of self-determination the main emphasis was made before on decolonisation, in the post Cold-War period the main concentration is made on self-determination of peoples exercised upon defragmentation of certain states and on the right of minority groups and indigenous peoples. Undoubtedly, the principle of self-determination is not similar to the one which took its birth after the WWI, and it can be argued that today it is comprehended and interpreted in various ways. If initially it was set up as the “democratic entitlement” guarantee<sup>341</sup> basically applied by the colonised nations and progressively served for the phenomenon of decolonisation, nowadays within non-colonial framework its role is basically seen in serving as a tool for protection of minority groups and rights of indigenous peoples. The attempts to apply the principle for defragmentation of sovereign states and use as the remedial tool due to impossibility to exercise the internal self-determination can be clearly observed in practice. In such case it is vital for the international community to re-confirm all those limitations applied to colonial self-determination which were expressed in safeguard clauses contained in numerous legal instruments mentioned hereinabove. It can be

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<sup>339</sup> Shaw, *International Law* (n 112) 308-311.

<sup>340</sup> GA Res 2625 (XXV) (24 October 1970) UN Doc A/8018; R Rosentock, ‘The Declaration of Principles of International Law Concerning the Friendly Relations’ (1971) 65 AJIL 111-115.

<sup>341</sup> A Whelan, ‘Wilsonian Self-determination and the Versailles Settlement’ (1994) 43 *International and Comparative Law Quarterly* 173

argued that by doing so the international community would assure the existing sovereign states that certain minority groups cannot use self-determination for impairment of such states which is an underestimated threat to the international peace and security.<sup>342</sup> In fact, the international community should concentrate its attention on the right to internal self-determination which can be considered as a compromise<sup>343</sup> between the minority groups and sovereign states.

The exercise of external self-determination beyond colonisation was applied in the most recent cases of the SFRY and the USSR, Montenegro, South Sudan, etc. In case of the USSR the newly independent states determined their destiny through declaration of independence and consented international boundaries among themselves based on *uti possidetis juris* under the CIS format and bilateral treaties. However, these newly independent states faced claims on external self-determination by some minority groups within their boundaries. The position of the European Communities with respect to self-determination in the case of the SFRY and the USSR was clearly expressed in the Declaration on Guidelines on Recognition of new states in Eastern Europe and Soviet Union of 16 December 1991, whereas reference was made to the importance of the right to self-determination,<sup>344</sup> which is important for the purposes of the principle's application beyond the decolonisation. A similar position was taken by the US upon the recognition of the newly independent states of the former Communist bloc.<sup>345</sup>

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<sup>342</sup> T Franck, 'Post Modern Tribalism and the Right to Secession' in C Brolmann (ed), *Peoples and Minorities in International Law* (London, Martinus Nijhoff Publishers 1993) 3-27.

<sup>343</sup> J Castellino and J Gilber, 'Self-Determination, Indigenous Peoples and Minorities' (2003) 3 Macquarie Law Journal 175.

<sup>344</sup> EC Guidelines on Recognition of New States in Eastern Europe and Soviet Union of 16 December 1991 (1993) 4 EJIL 72; 'EC Yugoslav Arbitration Commission' (n 259) 183-184.

<sup>345</sup> US Dept of State – Dispatch (1992) (Vol 13, No 3) 287.

The principle of self-determination was discussed by the ICJ in the *Namibia* and the *Western Sahara* cases.<sup>346</sup> In the *Western Sahara* case the Court clearly declared that the application of the principle of self-determination was legally grounded with respect to the non-self-governing territories, that is to say, the ICJ applied the principle to decolonisation.<sup>347</sup> Furthermore, in the *East Timor* case, the ICJ held that the principle of self-determination possesses *erga omnes* character and is ‘one of the essential principles’ of international law in respect of decolonisation.<sup>348</sup>

In the *Kosovo Advisory Opinion*<sup>349</sup> the ICJ rendered a vague opinion stating that unilateral declaration of independence by Kosovo was not contrary to modern international law. Moreover, the Court avoided any comprehensive legal discussions on validity of Kosovo’s secession, but rather produced an ambiguous statement which created some space for various speculative interpretations.<sup>350</sup> However, nothing in the *Kosovo Advisory Opinion* expressly supports the ‘Remedial Theory’, but in contrast it refers to restrictions applied towards secession within the non-colonial context.<sup>351</sup> It can be argued that the *Kosovo Advisory Opinion* was rendered within a limited context, since the Court simply limited its conclusion by stating that Kosovo’s unilateral declaration did not violate international law. Such position seems quite controversial, since the Court heavily relied on UNSC’s practice in such situations,<sup>352</sup> whereas it was

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<sup>346</sup> *Namibia Case (Advisory Opinion)* [1971] ICJ Reports 16; *Western Sahara Case (Advisory Opinion)* [1975] ICJ Reports 12.

<sup>347</sup> M Shaw, ‘The Western Sahara Case’ (1978) 49 BYBIL 119.

<sup>348</sup> *East Timor Case (Australia v Portugal)* [1995] ICJ Reports 102, 105-106.

<sup>349</sup> *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [2010] ICJ Reports para 141.

<sup>350</sup> D Fierstein, ‘Kosovo’s Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications’ (2008) 26 Boston Univ Int’l Law Journal 417-442; S Vaknin, ‘South Sudan v Kosovo: Secession, National Sovereignty, and Territorial Integrity’ (13 July 2011) *Global Politician* <<http://www.globalpolitician.com/26974-south-sudan-kosovo-secession-sovereignty>> accessed 7 June 2012.

<sup>351</sup> O Corten, ‘Territorial Integrity Narrowly Interpreted: Reasserting the Classical Inter-State Paradigm of International Law’ (2011) 24(1) *Leiden J. of Int’l Law* 88 -89

<sup>352</sup> *Kosovo Advisory Opinion* (n 356) 81

UNSC which in its resolutions condemned illegal independence declarations in cases of Northern Cyprus,<sup>353</sup> Republika Srpska<sup>354</sup> and Southern Rhodesia.<sup>355</sup>

The ICJ is criticised for such vague opinion on Kosovo which does not address the vital questions related to secession, and supporters of such views do not take into account that the Court cannot be involved in wide academic discussions and analysis or refer to questions that were not addressed to it. The Court simply relied on the ‘Lotus’ principle implying the formulae what is not prohibited in international law may be deemed as allowed, and took a narrow approach and commented on whether a unilateral declaration of independence is prohibited both under general international law and state and UNSC practice.<sup>356</sup> Moreover, in general it should be stressed that even advisory opinions of such authoritative judicial body such as the ICJ are not legally binding for the concerned parties.

It is important to pay attention to the ways how the Court discussed the Kosovo case. In fact, the ICJ did not concentrate at all on legal nature of the unilateral declaration or on the legal consequences of such declaration. The Court also did not state expressly that the unilateral declaration was valid under international law and it just limited its statement by proclaiming that it does not violate international law. Moreover, nothing in the *Kosovo Advisory Opinion* says that Kosovo’s secession from Serbia was valid under international law and it had successfully achieved statehood. Nor the legal appraisal of Kosovo’s recognition by other states and its impact on its status is touched upon. Another important matter is that the Court refused to discuss the ‘Remedial Theory’ in the *Kosovo Advisory Opinion* which is relied upon by Kosovo in

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<sup>353</sup> UNSC Res 541 (18 Nov 1983) UN Doc S/RES/541

<sup>354</sup> UNSC Res 787 (16 Nov 1992) UN Doc S/RES/787

<sup>355</sup> UNSC Res 216 (12 Nov 1965) UN Doc S/RES/216; UNSC Res 217 (20 Nov 1965) UN Doc S/RES/217

<sup>356</sup> Kosovo Advisory Opinion (n 356) 79-80.

justifying its secession from Serbia.<sup>357</sup> In other words the referred *Kosovo Advisory Opinion* does not imply a positive right for Kosovo's statehood.<sup>358</sup> It can be agreed with the Dissenting Opinion of Judge Koroma in the *Kosovo Advisory Opinion*, who disagreed with the Court position aptly commenting that the World Court misinterpreted the case and took wrong path even in proclaiming that Kosovo's unilateral declaration of independence was not in violation of international law.<sup>359</sup>

It is also interesting that although most of Kosovo's independence supporters, including the leading Western states, always argued that this case was a unique one and should not create a precedent, the ICJ did not make any statement proclaiming Kosovo being *sui generis* or a unique special case. However, the most important issue in the Kosovo Advisory Opinion to be focused for the purposes of the current studies is the Court's statement which expressly established that declarations of independence with unlawful use of force by other states or 'egregious violations of general international law, in particular violations of *jus cogens*' are illegal and violate international law.<sup>360</sup> Therefore, such statement was signalling that the Kosovo precedent is not similar to Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria cases, where the illegal use of force by third state(s) is undeniable and vivid.

It should be agreed with some commentators that despite recognition of Kosovo by substantial number of states and the ICJ's Advisory Opinion, Kosovo's current status is not legally stable both on local and international levels.<sup>361</sup> If at the local level it is not consented by Serbia being a parent state, on the international level Kosovo's

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<sup>357</sup> *ibid*, 82-83.

<sup>358</sup> T Christakis, 'The ICJ Advisory Opinion on Kosovo: Has International Law Something to Say about Secession?' (2011) 24(1) *Leiden J. of Int'l Law* 75; J Vidmar, 'The Kosovo Advisory Opinion Scrutinised' (2011) 24(2) *Leiden J. of Int'l Law* 358.

<sup>359</sup> Kosovo Advisory Opinion (n 356), Dissenting Opinion of Judge Koroma, 22.

<sup>360</sup> *ibid*, 81.

<sup>361</sup> A Orakhelashvili (n 121) 42-44.



independence is opposed by major international players such as Russia, China and India.<sup>362</sup> In fact, based on these factors it can be hardly believed that Kosovo could be generally recognised and become UN member in the nearest future.

One of the most recent examples of non-colonial external self-determination is South Sudan, which recently separated from Sudan. In fact, the secession of South Sudan is a specific case for the African continent. The exercise of external self-determination by South Sudan did not take place due to the active support or pressure by the international community, but rather was an attempt to finally bring an end to the military clashes between the conflicting sides and was exercised with consent of Sudan, the parent state.<sup>363</sup>

The Soviet scholar Tunkin emphasised that the evolution history of the self-determination of peoples was evidenced with cruel struggle, and even its inclusion in the UN Charter did not end contentious debates over its status.<sup>364</sup> It is clear from the UN Charter and the numerous UN resolutions, as well as various international tribunal decisions, that the principle has become one of the fundamental principles of international law applicable to decolonisation situations.

If to refer to most scholars they identify some primary theories of self-determination such as 'primary' or 'classic' and 'remedial' or 'secessionist' theories.<sup>365</sup> The primary or classic theory refers to a general right of nations based on certain values

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<sup>362</sup> *ibid.*

<sup>363</sup> C Know, 'The Secession of South Sudan: A Case Study in African Sovereignty and International Recognition' (College of Saint Benedict and Saint John's University 2012) <[http://digitalcommons.csbsju.edu/polsci\\_students/1/](http://digitalcommons.csbsju.edu/polsci_students/1/)> accessed 7 August 2012.

<sup>364</sup> GI Tunkin, *Theory of International Law* (AN Shestakov ed, Moscow, Zertsalo 2000) (In Russian) 51-58.

<sup>365</sup> A Buchanan, 'Theories of Secession' (1997) 26 (1) *Philosophy & Public Affairs* 31-61; M Koskeniemi, 'National Self-determination Today: Problems of Legal theory and Practice' (1994) 43 *International and Comparative Law Quarterly* 241; J Castellino and J Gilber (n 349) 157-158

to secede and establish their own state in absence of any injustices.<sup>366</sup> According to Buchanan under the classic theory nation's secession is not a response to any injustice, but in contrast the 'authentic expression of human nature' which results in self-determination through procedures established by the public authorities of that society of humans.<sup>367</sup> In contrast, the remedial or secessionist theory refers purely to a general right of a people (group of minorities) to secede from an existing sovereign state if they suffer injustice, their fundamental rights are violated and they are generally oppressed by such state, and the lack of peaceful means to resolve such conflict make it possible to rise up against such oppression and create its own state with its own institutions and government.<sup>368</sup>

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<sup>366</sup> M Koskeniemi (n 374) 249; J Castellino, 'Liberty, Equality and Fraternity: The Dubious Fruits of National Self-determination' (1999) 1 *Turku Law Journal* 1.

<sup>367</sup> *ibid.*

<sup>368</sup> A Buchanan, *Theories of Secession* (n 374); J Castellino and J Gilber (n 349) 157-158.

### 3.1.2 Forms of Self-Determination

It is generally accepted by the doctrine that there are two forms of the right to self-determination: internal and external.<sup>369</sup> Although such division of self-determination is rather formal, the authoritative views and opinion of various Human Rights bodies and some domestic courts have strengthened this approach. It was the CERD which first enacted the General Recommendation 21 in 1996, the first official document distinguishing internal and external self-determination,<sup>370</sup> whose distinction is generally supported in the doctrine. The CERD stipulated in the General Recommendation 21:

The right to self-determination of peoples has an internal aspect, that is to say, the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level... In consequence, Governments are to represent the whole population without distinction as to race, colour, descent or national or ethnic origin.<sup>371</sup>

The internal form is the self-determination within the frameworks of a state without the secession right and without the breach of political, economic and cultural integrity of sovereign states. The Supreme Court of Canada defined that self-determination is ‘normally fulfilled through internal self-determination – a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state’.<sup>372</sup> Subjects of federal states and autonomies in unitary states formed on grounds of ethnicity, language, religion and other grounds should be considered as territorial areas where the people constituting minority groups have exercised the right to internal self-determination.

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<sup>369</sup> Shaw, *International Law* (n 112) 289-293; Hannum, ‘Re-Thinking’ (n 289) 64-65.

<sup>370</sup> UN Committee on the Elimination of Racial Discrimination ‘General Recommendation 21’ (1996) UN Doc A/51/18.

<sup>371</sup> *ibid.*

<sup>372</sup> *Reference re Secession of Quebec* (n 471) para 385, 437-438.

The right to internal self-determination was reflected in the 1970 Declaration on Principles of International Law<sup>373</sup> and some other fundamental universal legal instruments.<sup>374</sup> Since internal self-determination is provided in most of the international legal instruments and notably in the UN Charter and ICCPR which is ratified by most of the countries, under the referred legal instruments states undertake to respect, protect and implement the right to internal self-determination. Therefore, it can be concluded that under international law states have obligations on internal self-determination at the international level.

The highest status of internal self-determination is often expressed in granting autonomous status to certain minority groups within sovereign states. Although it is not intended here to provide an analysis of autonomous models available in the political system of state administration, it is important to briefly touch upon such models for the purposes of the current researches. In fact, in the current system of state administration, the right to internal self-determination exercised through the granting of autonomy could be exercised in various ways. One type of autonomy is territorially delineated units which possess a wide legislative power and enjoy more economic, financial and taxation independence (such as Catalonia, Scotland, Gagauzia, the Aaland Islands, Greenland and South Tyrol). Another type does not possess any legislative power, but holds wide administrative regulatory powers (such as Crimea, Tatarstan, Corsica and Wales).<sup>375</sup> In the past before the initiation of the 1993 Constitution of Andorra, the ‘Andorra’ model referred to the joint condominium administration of two or more states

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<sup>373</sup> GA Res 2625 (XXV) (24 October 1970) UN Doc A/8018.

<sup>374</sup> International Covenant on Civil and Political Rights, UNGA Res 2200A (XXI) (16 December 1966) UN Doc RES/2200(XXI).

<sup>375</sup> A Legare and M Suksi, ‘Introduction: Rethinking the Forms of Autonomy at the Dawn of the 21<sup>st</sup> Century’ (2008) 15(2-3) Int’l J on Minority and Group Rights 143-155.

over the self-governing autonomous region.<sup>376</sup> However, currently it can be argued that Andorra is a state enjoying a full sovereignty and that it is less dependent on Spain and France than it was before.

The 1960 Decolonisation Declaration provides three ways for the exercise of external self-determination: (i) emergence of sovereign independent states; (ii) free association with an independent state; or (iii) integration with an independent state.<sup>377</sup> The right to external self-determination was applied basically to the colonial situations. It relates to the matters of state territory and boundaries as well as external relations between new states and other states. However, the Decolonisation Declaration does not provide for the right to secession from an independent state as the only remedy for exercising self-determination beyond the decolonisation process. According to some commentators, external self-determination is an action through which the people determine its international status and liberate themselves from foreign reign, whereas internal self-determination is simply a choice of the desired system of governance.<sup>378</sup> However, the extent to which self-determination implies secession leading to independence of certain groups or units still remains controversial.

Arechaga argued that external self-determination in the form of secession could be considered lawful if it has wide international support and has been successfully exercised, and as an example he referred to the case of Bangladesh's secession from Pakistan.<sup>379</sup> Some other commentators also support this argument, contending that the

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<sup>376</sup> J Dreze, 'Regions of Europe: A Feasible Status to Be Discussed' (1993) 8(17) *Economic Policy* 265-287.

<sup>377</sup> Decolonisation Declaration (n 341).

<sup>378</sup> M Pomerance, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998) 20 *Mich J Int'l L* 37.

<sup>379</sup> De Arechaga, 'International Law in the Past' (n 330) 111.

positive outcome of the secession depends on how successful the break-up was and under which circumstances it took place.<sup>380</sup>

Division of the principle into the referred forms creates many problems for various interpretations and speculations with the application of this principle. In this regard, external self-determination represents the main concern for the international community the misuse of which is often a serious threat to international peace and stability. Such negative aspects of external self-determination are considered herein below.

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<sup>380</sup> C Quaye, *Liberation Struggles in International Law* (Philadelphia, Temple University Press 1992) 240.

### 3.1.3 Key Controversial Aspects of the Right to External Self-Determination

Undoubtedly, self-determination of peoples has specific interpretations and is applied in various forms. The controversial nature of external self-determination lies in the meaning of the definition of ‘people’ in international law. This definition is used in international instruments that reflect the right to self-determination. However, there is neither explicit definition of ‘people’ in international law nor a definition of the socio-political meaning of this term.<sup>381</sup> Professor Shaw argues that the term ‘people’ was primarily used within the process of decolonisation and any attempts to widen its application beyond the decolonisation processes did not receive any support globally within the UN system.<sup>382</sup> As to the main argument he refers to the Decolonisation Declaration and the Declaration on Principles of International Law, where the international community expressed its negative attitude towards any actions which threatened the territorial integrity and national and political unity of sovereign states.<sup>383</sup>

Pellet aptly comments that the UN Charter applies self-determination to all peoples, but does not define its meaning.<sup>384</sup> Furthermore, he argues that there is no rule related to the exercise of this right except for a successful application of the principle to situations connected to decolonisation processes.<sup>385</sup> Higgins raises a question on what should be understood by the term ‘people’ pursuant to the provisions of the 1966 International Covenants on Human Rights and other international legal instruments.<sup>386</sup> She offers two options as to what should be understood by the term ‘people’ and argues that this term should either include (i) all population of the specific state or (ii) certain

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<sup>381</sup> P Allot, *Eunomia: New Order for a New World* (Oxford, OUP 1990) 56-60; A Cobban, *The Nation-State and National Self-Determination* (London, Collins 1969) 107.

<sup>382</sup> Shaw, *Peoples, Territorialism and Boundaries* (n 1) 478-507.

<sup>383</sup> *ibid.*

<sup>384</sup> Pellet, ‘The Opinion of the Badinter Arbitration Committee’ (n 5) 178.

<sup>385</sup> *ibid.*

<sup>386</sup> R Higgins, *Problems and Process International Law and How We Use It* (Oxford, Clarendon Press 1994) 74.

groups that are formed based on ethnic, racial and religious grounds.<sup>387</sup> However, she further argues that under the existing state practice the term ‘people’ means all groups and populations of the specific territory and even all members of relevant groups that form minorities, and in such case and under the above-referred international legal instruments such minorities possess a right to self-determination as individuals.<sup>388</sup>

However, the term ‘people’ was employed with respect to the right to self-determination in international law on the basis that it was more appropriate, because of its less controversial meaning. Some commentators assert that even in the 1966 Human Rights Covenants the word ‘peoples’ was used because it was a more ‘comprehensive term’ and was accepted as a term which includes peoples in all countries and territories, whether independent, trust or non-self-governing.<sup>389</sup> It is also argued that the term ‘people’ must be understood in its most common sense and should mean the entire population of a state which is a single community whose rights are exercised by governments.<sup>390</sup> Based on this, it can be concluded that the term ‘people’ was separated and employed due to its ethnic and cultural meanings. It is noted the term ‘people’ constitutes populations of states who are regarded as ‘a collectivity whose rights are exercised by governments’.<sup>391</sup>

Another problematic question arises whether all minority groups are ‘people’ for the purposes of self-determination. Under article 27 of the 1966 ICCPR, the answer should be negative, because minority rights are individual rights and not collective ones. The HRC under the ICCPR decided that certain groups are not ‘people’ for the purposes of self-determination and considered this principle as being a right of all peoples in a

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<sup>387</sup> *ibid.*

<sup>388</sup> Higgins (n 386) 75.

<sup>389</sup> R McCorquodale, ‘Self-Determination: A Human Rights Approach’ (1994) 43 ICLQ 857.

<sup>390</sup> M Bossuyt, *Guide to the ‘Travaux Préparatoires’ of the International Covenant on Civil and Political Rights* (Dordrecht, Martinus Nijhoff 1987) 32-35.

<sup>391</sup> R Jackson, *Sovereignty, International Relations and the Third World* (Cambridge, CUP 1990) 153.



certain territory.<sup>392</sup> In fact, nothing in international law expressly authorises any such minority groups to exercise the right to self-determination in the form of secession leading to a breakaway from or reunification with neighbouring states.

Some commentators argue that one problem of the term ‘people’ is in its literal interpretation, and most contend that it is not similar to the term ‘nation’ which in modern international law should be associated with sovereign states.<sup>393</sup> Hans Kelsen was among the first who provided an interpretation of the term ‘nation’ within an international law context, arguing that it should be treated as a right of sovereign states.<sup>394</sup> However, in contrast to the term ‘nation’ and having less controversial meaning, the term ‘people’ is used in international law. In fact, it may be argued in this case that term ‘people’ has been distinguished from the ethnic or cultural meanings.

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<sup>392</sup> *Lubicon Lake Band v Canada* [1984] UNDOC A/42/40 para 321.

<sup>393</sup> II Lukashuk, *International Law* (Vol I) (Moscow, BEK 1996) (In Russian) 279-280.

<sup>394</sup> H Kelsen, *Recent Trends in the Law of the United Nations: A Supplement to the ‘Law of the United Nations: A Critical Analysis of its Fundamental Problems’* (London, Stevens and Sons 1951) 51-53.

### **3.2 Limitations of the Principle**

The right to self-determination is not widely supported and is subject to criticism. It is contended that this principle should be applied with certain limitations.<sup>395</sup> Some commentators do not even recognise self-determination as a principle of international law and consider it to be an undefined and controversial doctrine.<sup>396</sup> It is even argued that self-determination is not a fundamental right and rather dependent on certain conditions.<sup>397</sup>

Soviet scholar Tunkin asserted that although the principle is one of the fundamental principles of modern international law and reflected in many international legal instruments, it should be applied with certain restrictions.<sup>398</sup> He further argued that external self-determination was basically applicable to the decolonisation process and was a right rather than an obligation.<sup>399</sup> It is also argued that the right to self-determination is not a fundamental right and depends on certain specific conditions the compliance of which does not necessarily mean that secession is lawful.<sup>400</sup> Moreover, it is argued that the right to self-determination does not include a right to secession, excluding the colonial situations.<sup>401</sup> Reference should be made to the Declaration on Principles of International Law which provides that the right to self-determination cannot be interpreted as authorising or convincing any groups to dismember or violate the territorial integrity or political unity of sovereign and independent states.<sup>402</sup> It further claims that each member state should refrain from any actions directed at partial

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<sup>395</sup> C Eagleton, 'Self-Determination in the United Nations' (1953) 47 AJIL 91-93; A Cobban (n 381) 47; M Sibert, *Traite de Droit International Public* (Vol I) (Paris, Dalloz 1951) 304-305.

<sup>396</sup> C Visscher, *Théories et Réalités en Droit International Public* (Paris, Pedone 1970) 186.

<sup>397</sup> A Buchanan, *Secession: The Legitimacy of Political Divorce from Fort Sumter to Lithuania and Quebec* (San Francisco, Westview Press 1991) 11.

<sup>398</sup> GI Tunkin, *Theory of International Law* (Cambridge MA, Harvard University Press 1974) 68-69.

<sup>399</sup> *ibid.*

<sup>400</sup> Buchanan, *Secession* (n 397).

<sup>401</sup> JP Humphrey, *Human Rights and the United Nations: A Great Adventure* (New York, Transnational Publishers 1984) 129.

<sup>402</sup> GA Res 2625 (XXV) (24 October 1970) UN Doc A/8018.

or full violation of the national unity and territorial integrity of another sovereign state.<sup>403</sup> These provisions, logically referred to as ‘safeguard clauses’, provide for the protection of existing sovereign states from secessions through proclaiming the priority of territorial integrity and national unity of states.<sup>404</sup> In fact, the term and concept of ‘territorial unity’ appeared after WWI, and article 10 of the Statute of the League of Nations provided that the member states bear responsibilities to respect and protect the territorial integrity and existing political independence of all members from any external aggression.<sup>405</sup> Territorial integrity should be considered as one of the key principles of the UN Charter in which it is referred in relation to the prohibition of the use of force (article 2(4)). Hannum aptly concludes that ‘a restrictive interpretation’ of the right to self-determination complies with the views of most of the states supporting this right.<sup>406</sup>

In fact, many states support ‘the limited interpretation’ of this right. Moreover, the Badinter Commission on Yugoslavia determined that self-determination is not a ground for changing existing boundaries with the purposes of creating newly independent states or the reunification with others.<sup>407</sup> In the case of Yugoslavia, the Badinter Commission stated that only boundaries of six former constitutional units of the SFRY possessed a right to external self-determination within their former administrative borders which should be transformed into the international boundaries of newly independent states.<sup>408</sup> In this case, it can certainly be argued that the Commission emphasised a limitation of the right to external self-determination. Some commentators

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<sup>403</sup> *ibid.*

<sup>404</sup> De Arechaga, ‘International Law in the Past’ (n 330) 109-110.

<sup>405</sup> Aufricht (n 161) 327.

<sup>406</sup> Hannum, ‘Re-Thinking’ (n 289) 23.

<sup>407</sup> ‘EC Yugoslav Arbitration Commission’ (n 260) 172.

<sup>408</sup> ‘EC Yugoslav Arbitration Commission’ (n 259) 183-184.

also adopt such position, arguing that the Commission affirmed such limitation with respect to external self-determination.<sup>409</sup>

Some scholars argue that the best way to exercise self-determination is by the grant of the right to internal self-determination in the form of internal autonomy, but under no circumstance should it mean grant of a full independence.<sup>410</sup> It is further argued that a nation or a state is some kind of pyramid which is formed from some major and minor groups and that the granting of unlimited right to external self-determination would lead to defragmentation of sovereign states into many thousands of small states.<sup>411</sup> However, it is argued that an effective exercise of self-determination should be based on a proper protection of minority rights. There is even some thought supporting the idea that self-determination should be restricted in states with a high level of democracy where all individuals can freely determine their political status and establish their ways of economic, social and cultural development for the benefit of the territorial integrity of those states.<sup>412</sup>

The state practice in cases of Kosovo, South Ossetia and Abkhazia and the lack of universal compromise among the international community members on secession of these entities has clearly shown that it does not provide absolute and unconditional support for external self-determination and is still not prepared to apply external self-determination without limitations. It can be argued that nowadays the right to self-determination is not an absolute right; certain lawful restrictions are imposed thereon which, along with the protection of human rights, are aimed at preserving the territorial

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<sup>409</sup> AA D'Amato, T Franck and M Reisman, 'Remarks at 'Communities in Transition: Autonomy, Self-Governance and Independence' Panel Discussions' (1993) *Proceedings, Am Soc Int L* 251-266.

<sup>410</sup> Higgins (n 386) 125.

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

<sup>412</sup> De Arechaga, 'International Law in the Past' (n 330) 110; F Kirgis, 'The Degrees of Self-Determination in the United Nations Era' (1994) 88 *AJIL* 306; V Nanda, 'Self-Determination Under International Law: Validity of Claims to Secede' (1981) 13 *Case W Res J Int'l L* 276.

integrity of sovereign states as well as at maintaining international peace and security. In fact, modern international law limits the right to external self-determination by the principle of territorial integrity, another fundamental principle of international law. The OSCE's Paris Charter proclaims the equality of all peoples and their right to self-determination under the UN Charter and other relevant norms and principles of international law including those which refer to territorial integrity of states.<sup>413</sup> Those provisions of the Paris Charter should be interpreted not only as obligations of third states to respect the territorial integrity of sovereign states, but also as limitation on the right to external self-determination. Such position was also taken by the European Community in its Declaration on Yugoslavia of 16 December 1991.<sup>414</sup>

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<sup>413</sup> Charter of Paris for a New Europe (Paris, 1990) <<http://www.osce.org/mc/39516>> accessed 5 February 2011.

<sup>414</sup> Declaration on Yugoslavia (16 December 1991) (Brussels, European Political Cooperation Press Release 1991) 129-191; S Trifunovska, *Yugoslavia through Documents* (Dordrecht, Martinus Nijhoff 1994) 221-234.

### **3.3 Misuse of the Principle: Secessionism and Separatism**

One of the problematic aspects of the right to external self-determination is its negative effect on territorial sovereignty of states.<sup>415</sup> It is argued that self-determination prescribed by the Decolonisation Declaration does not grant a right to fight for independence and breakaway from a sovereign state, and that the secession is not a mandatory method for exercise of the right to self-determination beyond the colonial situations.<sup>416</sup> In fact, there are many examples when the population of certain territories did not support (and voted against) the intention of their leaders to exercise secession from sovereign state.<sup>417</sup> Arechaga aptly commented that secession leading to full independence is not the only way to exercise the right to self-determination.<sup>418</sup>

Obviously, exercise of the right to external self-determination is one of the most controversial problems of the modern world and in many cases is associated with separation of certain territories from the existing sovereign states. Nowadays many politicians refer to self-determination for justification of separatism and territorial claims against existing sovereign states. It can be argued that secession is exercised in two forms: (i) lawful secession upon availability of certain grounds pursuant to the norms and principles of international law and (ii) separatism which targets the territorial integrity and political unity of existing sovereign states. There is a considerable difference between a lawful secession and separatism.

In the case of secession, examples are the cases of Bangladesh and the Baltic states, where constitutionally defined units of a single state exercised the right to external self-determination and received wide international support, and between 1971-

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<sup>415</sup> L Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale JIL 177.

<sup>416</sup> R McCorquodale, 'Self-Determination: A Human Rights Approach' (n 400) 857.

<sup>417</sup> G Marchildon and E Maxwell, 'Quebec's Right of Secession under Canadian and International Law' (1992) 32 Virg JIL 583.

<sup>418</sup> De Arechaga, 'International Law in the Past' (n 334) 103.

1973 Bangladesh was recognised by over hundred states.<sup>419</sup> Such recognition of Bangladesh by majority of states, including major states by 1974 played important role in its de facto statehood and prompt admission to the UN. In fact, Bangladesh is a unique case of successful secession with extraordinary circumstances accepted by the international community.

There are also some examples of successful exercise of external self-determination even without any constitutional or legislative mechanisms as a result of approval and support of central authorities.<sup>420</sup> Such examples include the separation of Singapore from Malaysia in 1965,<sup>421</sup> Eritrea from Ethiopia in 1993,<sup>422</sup> and South Sudan in 2011.<sup>423</sup> It should be noted that a lawful secession is a politically progressive phenomenon which can provide the best conditions for the development of all peoples residing in the specific territory.

In contrast, separatism has a negative meaning, since its main target is the breaking of the political, economic and constitutional unity of a sovereign state. Upon lawful secession, political leaders pursue a goal to protect the national, social and economic interests of their peoples and states, but in the meantime they do take into account the interests of other peoples and the whole population as well as a necessity for social progress. In contrast, in the case of separatism, the separatist leaders ignore the interests of other peoples and act in violation of national and state interests. Such leaders represent the specific interests of narrow groups of the population. Whereas lawful secession is exercised under valid domestic legislation and the norms and

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<sup>419</sup> C Tomuschat, 'Secession and Self-Determination' in G. Kohen (ed), *Secession: International Law Perspectives* (Cambridge, CUP 2006) 30.

<sup>420</sup> D Raic, *Statehood and the Law of Self-Determination* (Leiden, Boston, Martinus Nijhoff 2002) 314.

<sup>421</sup> NM Fletcher, 'The Separation of Singapore from Malaysia' (Ithaca, NY, Cornell University Press 1969) 17-82.

<sup>422</sup> GH Tesfagiorgis, 'Self-determination: Its evolution and Practice by the United Nations and its Application to the Case of Eritrea' (1987) 6 *Wis Int'l L J* 75-125.

<sup>423</sup> LD Reinheim, 'Sudan after Separation: New Approaches to a New Region' (2012) 29 *Heinrich Boll Stiftung Publication Series on Democracy* 11-107.

principles of international law accordingly, separatism does not comply with any such requirements of either domestic or international law.<sup>424</sup>

In addition to self-determination, history is familiar with three radical methods of solution of the national problem: (i) assimilation, (ii) segregation and (iii) genocide.<sup>425</sup> Many major nations have resolved national problems through the assimilation of minority groups.<sup>426</sup> These methods have always had negative consequences and currently are prohibited under modern international law. Cultural and civilisation losses are inevitable in the event of an assimilation. Segregation does not completely resolve the problem and has been recognised by international law as a serious violation.<sup>427</sup> The last of the methods referred to is genocide, a serious crime prohibited under international law. There are many examples of when certain states have tried to resolve national problems through genocide.<sup>428</sup> However, after the fall of the Nazi regime, genocide was included in the list of serious crimes against humanity in modern international law.

It should be noted that national issues are problematic in those countries where the minority groups are limited in the exercise of their right to internal self-determination. For instance, until 1982 the French central authorities refused to accept that France was a multinational country with a variety of other ethnic groups.<sup>429</sup> In the mid-20th century the French authorities were carrying on an active policy of the

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<sup>424</sup> SN Baburin, *State Territory: Legal and Geopolitical Problems* (Moscow, Moscow State University Press 1997) (In Russian) 210-212, 223-225.

<sup>425</sup> *ibid.*

<sup>426</sup> H Mylonas, 'A Theory of Nation-Building Assimilation and its Alternatives in Southeastern Europe' Conference Paper 3rd PhD Symposium on Contemporary Greece: Structures, Context and Challenges, LSE (June 14-15 2007)

<[http://www2.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/3rd\\_Symposium/PAPERS/MYLONAS\\_HARRIS.pdf](http://www2.lse.ac.uk/europeanInstitute/research/hellenicObservatory/pdf/3rd_Symposium/PAPERS/MYLONAS_HARRIS.pdf)> accessed 7 October 2010.

<sup>427</sup> R Chazan, *Reassessing Jewish Life in Medieval Europe* (New York, CUP 2010) 143-154.

<sup>428</sup> RJ Rummel, *Democide: Nazi Genocide and Mass Murder* (New Brunswick, NJ, Transaction Publishers 1992) 27-53; N Cigar, *Genocide in Bosnia: The Policy of 'Ethnic Cleansing'* (College Station, Texas A&M University 1995) 125-230.

<sup>429</sup> R Zauberman and R Levy, 'Police, Minorities, and the French Republican Ideal' (2003) 41(4) *Criminology* 1003-1456.



‘Frenchification’ of ethnic minorities. In the beginning of the 1980s such policy led to the total failure and appraisal of separatist movements and the creation of military organisations in Bretagne and Corsica.<sup>430</sup> In the same year France had to officially recognise the existence of ethnic minorities, languages and culture, and the teaching of certain minority languages in secondary schools, broadcasting of radio programmes and publications in these languages started from that time.<sup>431</sup> Corsica gained a limited autonomy in education, culture and radio broadcasting. In 2000 the French authorities had to step back after pressure from the National Liberation Front of Corsica (FLNC) and granted wide autonomy to Corsica.<sup>432</sup> The same situation existed a while ago in the UK, where as a result Scotland and Wales were granted more powers, and the central authorities in London agreed to have negotiations with even radical forces of the Irish movements in Ulster.<sup>433</sup> A similar problem in Spain was partially resolved after granting autonomies to five regions and the recognition of Spain as a multinational state.<sup>434</sup> However, the problem still exists in Basque Country where militarised organisation ETA is still resisting the central authorities and intends to create an independent Basque state, and Catalonia which is in reality enjoying many more powers and authorities than provided in the Spanish Constitution.<sup>435</sup>

In the Post-Soviet area the right to self-determination is comprehended by certain radical groups as an absolute right to secession. Perhaps such understanding was

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<sup>430</sup> A Cole, ‘Decentralization in France: Central Steering, Capacity Building and Identity Construction’ (2006) 4 French Politics 31-57.

<sup>431</sup> *ibid.*

<sup>432</sup> F Daftary, ‘Insular Autonomy: A Framework for Conflict Settlement? A Comparative Study of Corsica and the Aland Islands’ (European Centre for Minority Issues (ECMI) Working Paper, No 9, 2000) 78.

<sup>433</sup> J Makintosh, ‘Devolution, the Union and Britishness, Parliamentary Affairs’ (26 Feb 2012) <<http://pa.oxfordjournals.org/content/early/2012/02/26/pa.gss002.full.pdf+html>> accessed 12 May 2012.

<sup>434</sup> J Colomer, ‘The Spanish ‘State of Autonomies’: Non-Institutional Federalism’ (1998) 21(4) West European Politics 40-52.

<sup>435</sup> T Tadem, ‘Electoral Politics and Confronting the Challenge of Basque and Moro Nationalism’ (2010) 6/2 Social Science Diliman 50-78.

formed under the influence of decades of the communist regime which originates from Lenin's formula expressed in his two papers 'On peoples' right to self-determination'<sup>436</sup> and 'Critical Remarks on National Questions'.<sup>437</sup> These approaches were intentionally used for brainwashing effect by the Soviet political elite and negatively affected the Soviet school of international law. Lenin's understanding of self-determination as a right of every nation to secede from any sovereign state and establish its own state created a controversial and inadequate interpretation of the right to self-determination. It is notable that it was the countries of the Communist bloc which insisted on the inclusion of the right to secession in the principle of self-determination upon discussions at an international level. It can be argued that the 'Lenin theory of self-determination' was supported by the Communist regimes due to the lack of real democracy in those countries and their intention declaratively to draw ahead of the Western countries. In the Soviet and then the Russian doctrine of international law the definition of 'people' was introduced by Joseph Stalin who, in turn, plagiarised it from Manchini, and who determined 'people' as a historically constant unity of human beings formed based on territorial factors, common economic interests, language and psychological approach expressed in common culture.<sup>438</sup>

Some commentators argue that the right to secession can be exercised only when states deny minority groups the right to self-determination<sup>439</sup> and separatist movements can be treated as lawful in the case of the denial of human rights and freedoms.<sup>440</sup> In their opinion, there is a thin line between internal and external self-determination, and

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<sup>436</sup> VI Lenin, *Full Collection of Essays* (In Russian) (Vol 25) (Moscow, Politizdat 1971-1975).

<sup>437</sup> VI Lenin, *Full Collection of Essays* (In Russian) (Vol 20) (Moscow, Politizdat 1971-1975).

<sup>438</sup> SV Chernichenko, 'People's Right to Self-Determination Protection of Minorities in Modern International Law' Lecture (In Russian) <[http://www.terralegis.org/terra/lek/lek\\_27.html](http://www.terralegis.org/terra/lek/lek_27.html)> accessed 12 April 2008.

<sup>439</sup> Raic (n 420) 321.

<sup>440</sup> LC Buchheit, *Secession: The Legitimacy of Self-Determination* (New Haven, Yale University Press 1978) 94.

the right to secession can be exercised only in cases of serious violations.<sup>441</sup> Such link between internal and external self-determination was also stressed by Gross Espiel, special rapporteur of the UN Sub-Commission on Preventing Discrimination and Protection of Minority Groups.<sup>442</sup> However, in his report Espiel stressed that his statements apply to colonial and enslaved peoples.<sup>443</sup> Some commentators even argue that gross violations of human rights mechanically lead to gaining the right to external self-determination (the ‘Remedial Theory’).<sup>444</sup> In *Loizidou v Turkey*, Wildhaber and Risdal, two ECHR judges argued that peoples have a right to exercise external self-determination in the case of systematic and gross violations of human rights or where they are deprived from state governance through democratic and discriminative methods.<sup>445</sup> One of the supporters of this theory, Antonio Cassese, argues that external self-determination can be granted in exceptional cases only when the central authorities of a sovereign state deny or prevent certain groups from enjoying their rights and freedoms so as to constitute a violation of the right to internal self-determination and where such central authorities do not accept the idea of peaceful resolution within a single state.<sup>446</sup> In his argumentation, Cassese refers to Arechaga, who also supported the ‘Remedial Theory’, stating that it should be awarded as a compensation for gross human rights violations.<sup>447</sup> However, such references to the ‘Remedial Theory’ do not have any solid grounds under international law and provides for various political speculations. In fact, it can be argued that there is nothing in international law that

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<sup>441</sup> *ibid.*

<sup>442</sup> HG Espiel, ‘The Right to Self-Determination, Implementation of United Nations Resolutions’ (1980) (New York, UN Doc, 1980) No E/CN.4/Sub.2/405/Rev.1 para 90, p 10.

<sup>443</sup> *ibid.*

<sup>444</sup> Raic (n 420) 366-372.

<sup>445</sup> *Loizidou v Turkey* (App no 40/1993/435/514) ECHR (Merits) ECHR Judgement, 18 Dec 1996 (Vol VI) 2241 (Concurring Opinion of Judge Wildhaber Joined by Judge Risdal).

<sup>446</sup> Cassese, *Self-Determination of Peoples* (n 328) 118-122.

<sup>447</sup> De Arechaga, ‘International Law in the Past’ (n 336) 110.

entitles any groups to exercise external self-determination based on the 'Remedial Theory'.

Vidmar also strongly argues that any severe oppressions would lead to a widespread international recognition of the external self-determination which could mean the indirect acceptance of the 'Remedial Theory'.<sup>448</sup> Moreover, in case of external self-determination he puts the main emphasis on 'international acceptance' rather than statehood criteria or even severe human rights violations.<sup>449</sup> However, it is quite disputable argument since there is no a classic case on widespread international recognition and support based on the 'Remedial Theory' whereas severe oppressions served for such recognition and support. Although the references could be made to Kosovo case, but even a significant number of recognitions still does not lead to this entity being qualified as a successful case of external self-determination under the 'Remedial Theory'. It is even accepted by Vidmar who states that despite the recognition by substantial number of states 'Kosovo's legal status still remains ambiguous'.<sup>450</sup>

The issues of lawful external self-determination and secession were addressed by the Badinter Commission. In its request, Serbia raised a question whether the Serbs of Croatia and Bosnia-Herzegovina had the same rights to self-determination as the peoples of Croatia, Slovenia and Bosnia-Herzegovina.<sup>451</sup> The Commission argued that Serbs have a right to self-determination, but without the creation of their independent state or the change of the existing recognised boundaries.<sup>452</sup> The Badinter Commission

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<sup>448</sup> J Vidmar, 'International Legal Responses to Kosovo's Declaration of Independence' (2009) 42 Vanderbilt Journal of Transnational Law 814-816.

<sup>449</sup> *ibid.*

<sup>450</sup> *ibid.*, 816-819.

<sup>451</sup> S Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague, Martinus Nijhoff 1997) 228-229.

<sup>452</sup> 'EC Yugoslav Arbitration Commission' (n 259) 182-185.

considered the Serb minorities as having the right to internal self-determination. The Commission expressly differentiated the groups of national minorities from ‘territorial administrative units of the federal state’ and defined that only these ‘quasi-states’ – the six former republics of the SFRY possess the right to external self-determination with the further creation of their independent states.<sup>453</sup> Thus, the Commission specifically discussed the constitutional right to secession by those six constitutional units of the former Yugoslavia. From such position of the Badinter Commission, it can be concluded that external self-determination along with the principle of *uti possidetis* was applied for the protection of boundaries of the former six constitutional units of the SFRY. Such position was also taken by the International Commission of Lawyers in its opinions regarding East Pakistan in the beginning of the 1970s<sup>454</sup> and the Canadian Government in the light of decision made by the Supreme Court of Canada on Quebec’s secession right.<sup>455</sup> In the case of Quebec, the authoritative group of eminent jurists stated that secession from a single sovereign state is a negative factor.<sup>456</sup> Another recent case regarding the legal justification of the non-admissibility of secession is the Decision of the African Commission of Human and People Rights in *Katangese Peoples’ Congress v Zaire (Congo)*.<sup>457</sup> In 1992 the President of the National Congress of Katanga Province pursuant to article 65(5) of the African Charter of Human and People Rights submitted a petition on the recognition of the National Congress of Katanga Province as a liberation movement and the population of the Province itself as

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<sup>453</sup> *ibid.*

<sup>454</sup> International Commission of Jurists ‘East Pakistan Staff Study’ (1972) 8 International Commission of Jurists Review 44.

<sup>455</sup> *Reference re Secession of Quebec Factum of the Attorney General of Canada* [1997] para 152 <<http://www.canadianconstitutionfoundation.ca/files/17/DMS-OTTAWA-5651713-v1-Final%20Supreme%20Court%20Factum%20of%20CCF.PDF>> accessed 8 February 2008.

<sup>456</sup> T Franck and others, ‘L’integrité Territoriale du Quebec dans l’hypothèse de l’accession à la Souveraineté’ In *Commission d’étude des Questions Afférentes à l’accession du Quebec à la Souveraineté: Projet de Rapport* (Quebec, Anneté 1992) 51-52.

<sup>457</sup> *Katangese Peoples’ Congress v Zaire* (n 214) 66.

a nation struggling for its freedom and secession from Zaire.<sup>458</sup> The Commission held that in this case the right to self-determination could be exercised in various forms, but with necessary compliance with other fundamental principles of international law such as the principles of sovereignty and territorial integrity. The Commission also stated that it had to support the sovereignty and territorial integrity of Zaire, a member of the OAU and participant of the African Charter of Human and People Rights if there were no sufficient legal grounds in favour of external self-determination by the people of Katanga.<sup>459</sup> Moreover, the Commission further held that it necessary to define whether any fact existed of any violation of article 13(1) of the African Charter of Human and People Rights which refers to the denial of minority group rights to govern the state. Having assessed all the facts, the Commission concluded that the territorial integrity of Zaire could not be questioned under any circumstances. However, it also stated that the people of Katanga had a right to internal self-determination within the sovereign boundaries of Zaire.<sup>460</sup>

It can be argued that certain constitutionally defined administrative units can enjoy a right to secession if such right is reflected in the constitution of a parent state.<sup>461</sup> The latest 1977 USSR Constitution,<sup>462</sup> the 1968 Czechoslovak Constitution<sup>463</sup> and the 1974 SFRY Constitution<sup>464</sup> provided the secession right from these ‘socialist federations’. Nowadays, such constitutional right to secession is provided in the 1994

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<sup>458</sup> *Katangese People's Congress v Zaire* (2000) 75/92 African Commission of Human and People's Rights in R Murray and M Evans (ed), *Documents of the African Commission of Human Rights and People's Rights* (Oxford, Hart Publishing 2001) 389.

<sup>459</sup> *ibid.*

<sup>460</sup> *ibid.*

<sup>461</sup> ‘EC Yugoslav Arbitration Commission’ (n 259) 182-185.

<sup>462</sup> A Cassese, ‘Self-Determination of Peoples and the Recent Break-Up of USSR and Yugoslavia’ in R St-J MacDonald, *Essays in Honour of Wang Tieya* (Cambridge, CUP 1993) 137.

<sup>463</sup> Malenovsky (n 254) 314.

<sup>464</sup> B Bagwell, ‘Yugoslavian Constitutional Questions: Self-Determination and Secession of Member Republics’ (1991) 21 Ga J Int'l & Comp L 489.

Constitution of Ethiopia (art 39)<sup>465</sup> and the Constitution of Saint Kitts and Nevis.<sup>466</sup> The Constitution of Moldova provides for the right of secession to Gagauz autonomy from Moldova, and the special law providing the status of Gagauz autonomy and its secession right was adopted by the Moldovan Parliament on 23 December 1994, which specifically stipulates that Gagauzia can enjoy this right only upon Moldova changing its status as a subject of international law.<sup>467</sup> Obviously, it refers to the situation of Moldova joining Romania. Therefore, it means that the territorial integrity of Moldova is not threatened and Gagauz autonomy is not granted an absolute right of unilateral secession which can be exercised only under certain circumstances. The right to external self-determination of Gagauz people is limited to certain requirements, the realisation of which at the moment is not possible from a political point of view.

It can be argued that today, for the purposes of preserving sovereign states, the international community is faced with a dilemma, and even in the light of the recent secession precedents it is still reluctant to approve external self-determination as an absolute right. The views that international law is not friendly with the right to secession<sup>468</sup> can be actively supported in his regard. It was rightfully argued by some scholars that the lack of wide support of the right to secession by most sovereign states is one of a few instances when there is full solidarity.<sup>469</sup>

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<sup>465</sup> D Demissie, 'Self-Determination Including Secession v The Territorial Integrity of Nation-States: A Prima Facie Case for Secession' (1996) 20 Suffolk Transnat'l L Rev 166.

<sup>466</sup> Constitution of Saint Christopher and Nevis in AP Blaustein and GH Flanz, *Constitutions of the Countries of the World* (New York, Oceana Publications 1984) 1-42.

<sup>467</sup> P Kolso and A Malgin, 'The Transtinistrian Republic: A Case of Politicized Regionalism' (1998) 26 Nationalities Paper 103-132.

<sup>468</sup> T Christakis, *Le Droit a l'autodetermination en Dehors des Situations de Decolonisation* (Paris, La Documentation Francaise 1999) 82-83.

<sup>469</sup> Cassese, *Self-Determination of Peoples* (n 328) 23.

### **3.4 Concluding Remarks**

Based on the above discussions it can be argued that the modern system of international relations considers the national states as the only actors of such relations having recognised the problems of ethnic minorities falling under the internal jurisdiction of these states. One of the most important issues is the necessary differentiation of internal self-determination from illegal secession targeting the territorial integrity of sovereign states. Therefore, it can be argued that under modern international law ethnic, religious and racial groups inhabiting a specific territory of a sovereign state have a right to internal self-determination without the right to secession and to create their own independent states. In other words, the right to external self-determination is not an absolute right that can be exercised without any limitations, since the exercise of such absolute right could lead to serious negative effect on the existing rules and customs of a concept of sovereign states.

As mentioned hereinabove, self-determination of peoples is widely recognised in numerous international instruments as a principle which has developed into a principle of international law.<sup>470</sup> However, it can be argued that this principle is limited by the principle of territorial integrity of states. In the case of Quebec, the Supreme Court of Canada determined that numerous international acts supporting the right to self-determination at the same time also contain certain provisions prescribing that the exercise of this right should be limited to avoid any threats to the territorial integrity of existing sovereign states and stability of relationships between such states.<sup>471</sup>

Nowadays, the international community considers self-determination as a right which can be exercised within the existing sovereign states and most importantly while

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<sup>470</sup> *ibid* 171-172.

<sup>471</sup> *Reference re Secession of Quebec* [1998] 2 SCR 282.



preserving their territorial integrity. Such position was reflected in numerous international acts such as the Declaration on Principles of International Law,<sup>472</sup> the 1993 Vienna Declaration on Action Plan<sup>473</sup> or the 1995 UN 50th Anniversary Declaration.<sup>474</sup> Therefore, self-determination by certain groups can be exercised only within sovereign states, where they are guaranteed the right to choose their methods of political, economic and cultural development within such sovereign states.

It is obvious that such limitations on self-determination are designated to protect the rights of all peoples exercising self-determination, not only within that state or other states concerned but also for the interests of the whole international community, for the prevention of possible conflicts and for the stability of existing states as well as the maintenance of international peace and security.<sup>475</sup> The most important factor in understanding and exercising the right to self-determination is that internal self-determination should be differentiated from illegal secession, ie the separatism which has as a target the territorial integrity of states.

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<sup>472</sup> GA Res 2625 (XXV) (24 October 1970) UN Doc A/8018.

<sup>473</sup> GA, World Conference on Human Rights, Vienna, 14-25 June 1993, UN Doc A/CONF157/23.

<sup>474</sup> Declaration on the Occasion of the Fiftieth Anniversary of the United Nations <<http://www.un.org/UN50/dec.htm>> accessed 5 July 2008.

<sup>475</sup> B Boutros-Ghali, 'Agenda for Peace' in A Roberts and B Kingsbury (ed), *United Nations, Divided World* (2nd ed) (Oxford, Clarendon Press 1993).

## CHAPTER 4: CORRELATION OF *UTI POSSIDETIS* AND SELF-DETERMINATION IN THE POST-SOVIET AREA

### 4.1 General Comments on Correlation of the Two Principles in the Post-Soviet Area

The correlation of external self-determination and *uti possidetis* in the context of the preservation of the territorial integrity is one of the controversial problems in international law. As mentioned above, the principle of *uti possidetis* is not equal to the principle of territorial integrity, but it serves as a supporting tool preceding it and deals with a transfer of sovereignty from one sovereign to another. However, these two principles are closely connected and interact on certain levels. In this context, the conflict between the principles of *uti possidetis juris* and external self-determination may be considered in the framework of conflict between external self-determination and the principle of territorial integrity. If a designation of the principle of *uti possidetis* is clear, the controversial nature of external self-determination creates some problems in the correlation of this principle with other principles of international law. Kelsen argued that after the inclusion of the principle of self-determination into the UN Charter, the collision between this principle and the principle of territorial integrity disappeared.<sup>476</sup> He further stated that the principle of self-determination is a ‘reaffirmation of the principle of sovereign equality of states’ and therefore should be considered as ‘a principle of the sovereignty of states’.<sup>477</sup> Nevertheless, the review made in the previous chapters provides a ground to argue that both self-determination and *uti possidetis* are principles of international law and that their collision in the Post-Soviet area is a subject

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<sup>476</sup> Kelsen, *Recent Trends* (n 394) 52-53.

<sup>477</sup> *ibid.*

for legal appraisal.<sup>478</sup> The aggressive separatism and sanguinary consequences of the conflicts accompanying the secessionist movements in some former USSR republics raised again the problem of correlation of the principles of *uti possidetis* and external self-determination. Various national minorities within the territories of some former Soviet republics commenced secessionist movements and put forward claims of independence from those republics. Despite the parade of secession attempts in the Post-Soviet area, some conflicts were peacefully resolved. For example, one of the most developed and powerful subjects of the Russian Federation—Tatarstan<sup>479</sup>—in the early 1990s held polls where majority of the population voted in favour of independence, however which as a result was granted a wide autonomy. Another example is the Crimean Autonomous Republic,<sup>480</sup> which also after the collapse of USSR declared its independence from Ukraine. In contrast to these situations, however, other conflicts of the same nature in the Post-Soviet area were accompanied with sanguinary conflicts. The cruellest conflicts took place in Chechnya<sup>481</sup> of the Russian Federation, Abkhazia<sup>482</sup> and South Ossetia<sup>483</sup> of Georgia, Nagorno-Karabakh of Azerbaijan,<sup>484</sup> and Transnistria of Moldova.<sup>485</sup>

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<sup>478</sup> R Rich 'Recognition of States: The Collapse of Yugoslavia and Soviet Union' (1993) 4 EJIL 36-65.

<sup>479</sup> GM Danilenko and W Burhham, *Law and Legal System of Russian Federation* (New York, Juris Publishing 1999) 25-120.

<sup>480</sup> P Chase 'Conflict in the Crimea: An Examination of Ethnic Conflict under the Contemporary Model of Sovereignty' (1995) 34 Colum J Transn L 214-259.

<sup>481</sup> TN Tappe 'Chechnya and the State of Self-Determination in a Breakaway Region of the Former Soviet Union: Evaluating the Legitimacy of Secessionist Claims' (1995) 34 Colum J Transn L 225.

<sup>482</sup> G Nodia 'The Conflict in Abkhazia: National Projects and Political Circumstances' in B Coppieters and others (ed) *Georgians and Abkhazians, The Search for a Peace Settlement* (Cologne, Sonderveröffentlichung des Bundesinstituts für Ostwissenschaftliche und Internationale Studien 1998) 14.

<sup>483</sup> G Bezhuashvili, 'The Interaction of Principles: The Principles of Self-Determination, Territorial Integrity and State Sovereignty' (1998) 2&3 Georgian LR 3-19.

<sup>484</sup> Potier (n 57); T Vayrynen, *New Conflicts and their Peaceful Resolution: Post-Cold War Conflicts, Alternative Means for their Resolution and the Case of Nagorno-Karabakh* (Mariehamn, Abo Akademis Tryckeri 1998).

<sup>485</sup> Kolso and Malgin (n 467) 103.

It can be argued that not always are the two principles in conflict. In the aforementioned cases in the Post-Soviet area, two situations could be observed when the principles of *uti possidetis* and self-determination shared the elements of co-operation and conflict. Upon the existence of certain circumstances, the principles may effectively co-operate for the welfare of states and their peoples. The collapse of the USSR and the SFRY may be a clear example of the points of co-operation and conflict between the two principles. First, upon 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. Second is a situation when, after declaration of independence by the former USSR republics, some administrative units or ethnic groups of these republics claimed to exercise their right to external self-determination from the former ones. In this case, the conflict between the two principles was apparent.

From the review made in the previous chapters, it may be argued that the principle of *uti possidetis* can be considered as a limitation of the principle of external self-determination. Some commentators argue that application of the principles of *uti possidetis* cannot be considered as a limitation of the right to self-determination, save in the situations where the exercise of the right to self-determination impacts the inherited colonial boundaries.<sup>486</sup> Accordingly, external self-determination can be limited by the principle of *uti possidetis juris* when the former one is directed to the disruption of the territorial integrity and existing boundaries of independent states. It is basically aimed at the achievement of the stability of state boundaries through the preservation of the frontiers of a state inheriting these borders from the predecessor state. Such position is

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<sup>486</sup> McCorquodale, 'Self-Determination: A Human Rights Approach' (n 400).

justified by an intention to maintain the international peace and security. This idea was clearly stated by the ICJ in the Frontier Dispute case.<sup>487</sup> In this case the ICJ stated that there could be a conflict between *uti possidetis* and external self-determination.<sup>488</sup> Moreover, there is a view that the ICJ in this case subordinated the principle of self-determination to the principle of *uti possidetis* with respect to the frontiers of former colonial territories.<sup>489</sup> In fact, the way in which the Court stated its position in the case gives grounds to argue that conflict between the two principles is recognised and that the authoritative legal forum preferred the principles of *uti possidetis* and territorial integrity. Some commentators also note that these two principles are in conflict when the right to self-determination is exercised in the form of external self-determination. Here, the self-determination collides with *uti possidetis*, which ‘holds that state boundaries are fundamental to territorial integrity’.<sup>490</sup> Falk noted that there is a conflict between these two principles and stated: ‘the more state sovereignty is emphasised, the less room is left for the self-determination of peoples and vice versa’.<sup>491</sup>

One can also refer to the opinion of the Committee of Jurists in the Aaland Islands case and argue that the right to self-determination is limited and ‘may come to play’ only in extraordinary situations, when the state is not fully formed or is under the transformation or dissolution and the situation is obscure.<sup>492</sup> Some commentators have asserted that self-determination is a doctrine which cannot be widely applied and which exercisable upon the existence of ‘extraordinary circumstances’, and in this case international law cannot refer to the principle of respect and protection of state

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<sup>487</sup> The Frontier Dispute case (n 110) 554, 567.

<sup>488</sup> *ibid.*

<sup>489</sup> Jennings and Watts (n 113) 715.

<sup>490</sup> C Lloyd Brown-John ‘Self-Determination’ (1997) 9 *Options Politiques* 42.

<sup>491</sup> Crawford, ‘The Rights of Peoples’ (n 338) 17.

<sup>492</sup> Report of the International Committee of Jurists (n 215) 5-6; N Berman ‘Sovereignty in Abeyance: Self-Determination in International Law’ (1988) 7 *Wiscon ILJ* 390-443; W Werner ‘Self-Determination And Civil War’ (2001) 6 *C&S Law* 171; McCorquodale *Self-Determination in International Law* (n 332); A James, *Sovereign Statehood The Basis of International Society* (Allen and Unwin, London 1986).

sovereignty and territorial integrity.<sup>493</sup> Such position is also actively supported by other commentators.<sup>494</sup> However, as discussed hereinbefore, such views on ‘extraordinary cases’ seem quite vague and lack any legal justification under international law. Moreover, the Badinter Commission in Opinion No 2 expressly declared 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’.<sup>495</sup>

There is a strong view that the right to external self-determination can be applied only towards colonial territories, and beyond the colonial context international law would give a strong priority to internal self-determination.<sup>496</sup> The ‘safeguard clauses’ fixing the duty of states to respect internal self-determination, but without the threat to the territorial integrity and political unity of existing states, have been incorporated into the Decolonisation Declaration and the Declaration on Principles of International Law, which affirm such attitude of the international community.<sup>497</sup> The priority of the principle of territorial integrity as a basis for determining the boundaries under the principle of *uti possidetis* in some specific cases has been confirmed in numerous international documents as well as decisions and interpretation of the ICJ.<sup>498</sup> Principle 3 of the Final Act of Helsinki (1975), article 62 of the Vienna Convention on the Law of Treaties (1969), the Vienna Convention on Succession of States in Respect of Treaties (1978), article 3 of the Charter of the OAU, article 20 (implied) of the African Charter

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<sup>493</sup> Berman (n 492).

<sup>494</sup> M Koskenniemi ‘National Self-determination today: Problems of Legal Theory and Practice’ (1994) 43 ICLQ 241-269.

<sup>495</sup> ‘EC Yugoslav Arbitration Commission’ (n 259); Pellet, ‘Note sur la Commission d’Arbitrage’ (n 273) 351.

<sup>496</sup> AF Bayefski, *Self-Determination in International Law: Quebec and Lessons Learned* (The Hague, Kluwer Law International 2000) 12; T Franck, *Fairness in International Law and Institutions* (Oxford, OUP 1995) ch 5.

<sup>497</sup> Werner (n 492) 171.

<sup>498</sup> The Frontier Dispute case (n 110).

of Human and Peoples' Rights (1981) and paragraph 6 of the UNGA Resolution 1514(XV) clearly proclaim that self-determination cannot be interpreted and applied to impair the territorial integrity of sovereign states.<sup>499</sup> Nevertheless, the recent 1993 Declaration of the UN World Conference on Human Rights stated that although all peoples have a right to self-determination, this right 'is limited to the free exercise of democratic governance and it cannot be used in any manner as a right to independence'.<sup>500</sup> The European countries affirmed such view in the EC statement of 22 May 1992 in which it declared that it 'condemns in particular as contrary to [CSCE] principles and commitments any actions against territorial integrity or designed to achieve political goals by force'.<sup>501</sup>

Moreover, as mentioned hereinbefore, based on the state practice external self-determination could be considered lawful if it is duly exercised under the applicable domestic laws and received a wide external support accompanied with recognition by the vast majority of states, which in fact should mean that such unit would finally succeed in exercise of this right. As also discussed hereinbefore, consent of the parent state for successful secession is vital, as can be seen in the cases of the Baltic states, Montenegro and South Sudan. In the meantime, it should be emphasised that in the case of the former USSR republics, none of the secessionist units in Georgia, Azerbaijan and Moldova have received wide external support; neither has the consent of these states been expressed for their secession and nor have they succeeded in forming a real independent state.<sup>502</sup>

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<sup>499</sup> Helsinki Final Act (n 342); Vienna Convention on the Law of Treaties (1969) 1155 UN Treaty Series 331; Vienna Convention on Succession of States in respect of Treaties (1978) 17 ILM 1488; OAU Charter, 25 May 1963, (1969) 47 UN Treaty Series 45; African Charter of Human and Peoples' Rights (n 340); Decolonisation Declaration (n 341).

<sup>500</sup> Brown-John (n 490) 43.

<sup>501</sup> EC Press Statement (Brussels, 22 May 1992).

<sup>502</sup> *Chiragov and others v Armenia* (APP no 13216/05) 14 December 2011; *Ilascu* (n 100).

#### 4.1.1 Abkhazia and South Ossetia

Despite the attempts to differentiate the South Ossetian and Abkhaz conflicts,<sup>503</sup> they share many similarities. However, in both cases the main question for the legal research within the international legal framework is the legality of the two breakaway regions to exercise the right to external self-determination as well as Russia's recent recognition of the two separatist units.

The South Ossetian and Abkhaz cases are unique by their nature, since they can be compared only with Northern Cyprus. Whereas this entity was recognised only by one state (Turkey) and North Cyprus' declaration of independence was declared legally invalid by the UNSC,<sup>504</sup> in the cases of South Ossetia and Abkhazia there were some objections, but no strong reactions followed the recognition of these breakaway regions by Russia. However, today it can be argued that, along with the Russian recognition, the follow-up recognition of these separatist units by other states like Nicaragua,<sup>505</sup> Venezuela<sup>506</sup> and Nauru<sup>507</sup> makes these cases complicated.

As discussed in the previous chapters, secession was originally applied within the colonial context, and the international community does not recognise the right to external self-determination that may lead to the violation of the principle of territorial

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<sup>503</sup> A Aksenok, 'Self-Determination: Between Law and Real Politics' Russia in Global Affairs (4 Oct 2006) (In Russian) <<http://www.globalaffairs.ru/articles/6214.html>> accessed 17 January 2010; S Cornell, 'Abkhazia and South Ossetia: Differences Matter' The New York Times (12 Aug 2008) <<http://topics.blogs.nytimes.com/2008/08/12/abkhazia-and-south-ossetia-differences-matter>> accessed 7 November 2009.

<sup>504</sup> UNSC Res 541 (n 361).

<sup>505</sup> El Presidente de la República Nicaragua Decreto No 47-2008 <[http://www.cancilleria.gob.ni/publicaciones/r\\_abjasia.pdf](http://www.cancilleria.gob.ni/publicaciones/r_abjasia.pdf)> accessed 4 May 2010; Ria Novosti, 'Nicaragua recognizes South Ossetia and Abkhazia' (04 Sep 2008) <<http://en.rian.ru/world/20080904/116538071.html>> accessed 3 May 2010.

<sup>506</sup> Radio Free Europe (Radio Liberty), 'Chavez Recognizes South Ossetia, Abkhazia as Independent' <[http://www.rferl.org/content/Chavez\\_Visits\\_Russia\\_To\\_Discuss\\_Arms\\_Energy\\_Deals/1819273.html](http://www.rferl.org/content/Chavez_Visits_Russia_To_Discuss_Arms_Energy_Deals/1819273.html)> accessed 29 April 2010.

<sup>507</sup> Joint Eurasian Expert Network, 'Pacific island recognizes South Ossetia's independence' (17 Dec 2009) <[http://j-eeen.com/news\\_view/603](http://j-eeen.com/news_view/603)> accessed 3 April 2010.



integrity, ie impairment of the territorial, political and economic unity of a sovereign state. However, this position was ignored by the recognition of Kosovo by the Western World, and of Abkhazia and South Ossetia by Russia. In both cases, the parties initiating such recognition claimed their case to be ‘a specific unique non-precedent’ that cannot serve as a ground for similar action with respect to other situations. Nevertheless, it can be argued that the most recent cases of Abkhazia and South Ossetia do represent a serious danger to the existing system of international law by undermining its core principles such as the principle of territorial integrity and sovereign equality.

In cases where separatist groups illegally exercise the right to external self-determination, the parent state is entitled to prevent this process within its constitutional law frameworks.<sup>508</sup> Therefore, actions of the parent state against the separatist groups within the frameworks of that state complying with human rights requirements cannot be considered as a ground for exercise of external self-determination by such separatist groups. In fact, it can be argued that there are many precedents in which the central authorities even undertook military actions against the separatist units, and certain clashes leading to death of even civilians were never recognised as a ground for exercising external self-determination. Chechnya can be clearly given as an example where the Russian regular army killed not only combatants but also a substantial number of civilians.<sup>509</sup> Nevertheless, Russia’s actions violating fundamental human rights never qualified as grounds authorising Chechnya to secede from the Russian Federation.

Moreover, it is confirmed in the Declaration on Principles of International Law that the right to self-determination should not be used for impairment of the territorial

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<sup>508</sup> Crawford, *The Creation of States* (n 108) 134-138.

<sup>509</sup> S Richard, ‘Introduction: Why Chechnya?’ in R Sakwa (ed), *Chechnya: From Past to Future* (1st ed., Anthem Press, London 2005) 1-42.

integrity of a sovereign state.<sup>510</sup> It is an especially strong case against external self-determination if a sovereign state in reality creates all conditions for exercise of the right to internal self-determination.

There are certain controversial and ill-grounded views that the right to external self-determination can be admissible if certain groups are subject to the repressive regime.<sup>511</sup> According to some commentators, the right to self-determination can be transformed into the right of secession if certain minority groups are oppressed and if they are eliminated from the participation in the state's political life or if certain circumstances lead to gross violation of human rights, including the acts of genocide.<sup>512</sup> Nevertheless, it can be argued that the 'Remedial Theory' has no support in international law. Moreover, even if admit the 'Remedial Theory', in the case of Abkhazia and South Ossetia, no circumstances giving a ground for the application of this vague theory have ever existed. In fact, these minority groups were not subjects to any acts of genocide or gross violation of human rights by the central Georgian authorities. Russia often compares these two Georgian cases with the Kosovo one. However, in contrast to Abkhazia and South Ossetia, the Kosovo conflict was a purely ethnic conflict which resulted in genocide of the Albanian ethnic civilians residing in this region, and this was actively and speculatively used by the supporters of Kosovo's independence,<sup>513</sup> whereas the conflicts in Abkhazia and South Ossetia had a strong political nature without intentional discrimination of any groups or violations against humanity. There are no proven facts giving grounds to argue that the central authorities

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<sup>510</sup> GA Res 2625 (XXV) (24 October 1970) UN Doc A/8018.

<sup>511</sup> Raic (n 420) 366-372; B Simma, *The Charter of the United Nations a Commentary* (Vol I, 2nd ed) (Oxford, OUP 2002) 58.

<sup>512</sup> Cassese, *Self-Determination of Peoples* (n 328) 118-122; De Arechaga, 'International Law in the Past' (n 336) 110; K Doehring, *Volkerrecht* (2nd ed, Heidelberg, CF Müller 2004) 347.

<sup>513</sup> UNSC Res 1244(1999) (30 June 1999) UN Doc S/RES/1244; K Borgen, 'Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition' 12 ASIL Insights 2 <<http://www.asil.org/insights080229.cfm>> accessed 3 April 2010.

of Georgia systematically and extensively violated rights of Abkhazians or South Ossetians. Moreover, Abkhazians and South Ossetians were granted the right to internal self-determination during Soviet times, and since the beginning of the conflicts Georgia periodically offered extensive autonomy to both Abkhazia and South Ossetia.<sup>514</sup> Moreover, some commentators observe that South Ossetian and Abkhaz cases cannot be treated in the same way as Kosovo, since in the former no long-term unsuccessful negotiations ever took place.<sup>515</sup>

Under no circumstances can it be denied that Georgia never attacked South Ossetia. However, it has not been proven that Georgia was planning to commit an act of genocide and slay all civilians in South Ossetia. While under the CPPCG the act of genocide is an intent to destroy a certain ethnic, religious or racial group, the death of South Ossetian and Russian combatants cannot be accepted as being an act of genocide against South Ossetia.<sup>516</sup> In contrast, most reputable international organisations reported gross human rights violations as a result of illegal actions of separatist forces supported by Russia. For instance, Human Rights Watch reported that over a thousand homes of ethnic Georgians were burnt, forcing them to leave.<sup>517</sup> In the case of Abkhazia, although there was no attack by Georgia, the separatist unit claims that external self-determination was exercised in response to the Georgian military threat. Even if Georgia used force against South Ossetia, under no circumstances can it be treated as an attack upon Russia giving the latter the right to use military power against Georgia. The

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<sup>514</sup> 'Report of the Secretary-General on the situation in Abkhazia, Georgia' (2 April 2008) UN Doc S/2008/219, para 18.

<sup>515</sup> A Nußberger, 'The War between Russia and Georgia – Consequences and Unresolved Questions' (2009) 1(2) Göttingen Journal of International Law 360.

<sup>516</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russia)* [2008] <<http://www.icj-cij.org/docket/index.php?p1=3&p2=1&case=140>> accessed 12 September 2009.

<sup>517</sup> HRW, 'Georgian Villages in South Ossetia Burnt, Looted' (11 Aug 2008) <<http://www.hrw.org/en/news/2008/08/12/georgian-villages-south-ossetia-burnt-looted>> accessed 7 November 2009.

use of force by an external power for the impairment of Georgia's territory cannot be accepted as a legal ground for the justification of Abkhazia and South Ossetia's secession. It cannot be accepted in the light of prohibition of the use of force as *jus cogens* norm in international law.<sup>518</sup> It can be argued that since South Ossetia and Abkhazia are recognised as parts of Georgia, any military actions undertaken by Georgia were a matter of its internal affairs.<sup>519</sup>

The separatist units claim that in response to the so-called 'gross human rights violations' by Georgia the peoples of Abkhazia and South Ossetia exercised their rights to external self-determination and held referendums that expressed the will of Abkhazians and South Ossetians.<sup>520</sup> In Abkhazia and South Ossetia, both Abkhazians and South Ossetians were not majority groups. Nowadays, these groups exceed the number of Georgians only as a result of violent ethnic cleansing. It should be noted that the referendums held by the separatist units were not attended by two thirds of the indigenous population of these breakaway regions who were Georgians expelled from their places. Therefore, the legitimacy of the results of such referendums is highly doubtful.

However, based on the state practice it can be argued that there are still 'special cases' when the secession can be exercised lawfully. Such 'special' cases are those when a parent state expresses its consent to a breakaway unit's secession and this

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<sup>518</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* [1986] ICJ Reports 14, 100-101; J Frowein, 'Recognition' in R Bernhardt (ed), *Encyclopedia of Public International Law* (Vol. 6, 5th edn, Oxford, North-Holland 1984) 628.

<sup>519</sup> J Bolton, 'After the Russia's Invasion of Georgia, What Now for the West?' *Telegraph* (15 Aug 2008) <<http://www.telegraph.co.uk/news/worldnews/europe/georgia/2563260/John-Bolton-After-Russias-invasion-of-Georgia-what-now-for-the-West.html>> accessed 27 March 2013.

<sup>520</sup> G Hewitt, 'Abkhazia and South Ossetia, a Year On' *Opendemocracy* (11 August 2009) <<http://www.opendemocracy.net/article/abhazia-and-south-ossetia-a-year-on>> accessed 27 January 2010; E Adzhindzhal, *Abkhazia's Liberation and International Law* (Sukhum 2007) <<http://www.abkhaziya.org/foreign/liberation.html>> accessed 19 October 2009; G Hewitt, 'Abkhazia and South Ossetia: Heart of Conflict, Key to Solution' (*Opendemocracy*, August 2008) <<http://www.opendemocracy.net/article/abhazia-and-south-ossetia-heart-of-conflict-key-to-solution>> accessed 29 November 2009.

process receives wide international support. Examples are the secession of the three Baltic states from the USSR and the recent case of Montenegro's secession from the federative union with Serbia. Another vivid and classic 'special case' is the secession of Bangladesh from Pakistan where such external self-determination received wide support and, most importantly, was consented afterwards by Pakistan itself.<sup>521</sup> It is important to emphasise that in the cases of Abkhazia and South Ossetia, Georgia never agreed to their secession, and their secession is not supported by the international community, but in contrast is widely condemned.<sup>522</sup>

It is generally recognised in the legal doctrine that the exercise of the right to self-determination should take place within the democratic frameworks and without the use of force.<sup>523</sup> Under international law self-determination leading to any territorial changes can be exercised according to the will of the people and if declaration of independence is enacted by authorities who are not representatives of the people of the concerned territory, then such declaration would be considered void and illegal.<sup>524</sup> Moreover, it can be agreed with some commentators who argue that a will of people in such territories may be lawfully limited by the previous internal boundary arrangements which based on the principle of *uti possidetis juris* transformed into

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<sup>521</sup> M Kohen, *Secession: International Law Perspectives* (Cambridge, CUP 2006) 300-312; J Castellino, 'The Secession of Bangladesh in International Law: Setting New Standards' (2000) 7 Asian YBIL 83.

<sup>522</sup> 'OSCE Chair Condemns Russia's Recognition of Abkhazia, S. Ossetia, Civil Georgia' (Tbilisi, 26 Aug 2008) <<http://www.civil.ge/eng/article.php?id=19296>> accessed 6 April 2010; BBC News, 'US condemns Russia over Georgia', (4 Sep 2008) <<http://news.bbc.co.uk/2/hi/europe/7597336.stm>> accessed 4 December 2009; 'NATO's Response to Georgian Crisis' <[http://www.nato.int/cps/en/natolive/topics\\_38988.htm](http://www.nato.int/cps/en/natolive/topics_38988.htm)> accessed 13 November 2009; S Castle, 'EU Agrees to Support Georgia, but Stalls over More Severe Action' (*The New York Times*, 28 Aug 2008) <[http://www.nytimes.com/2008/08/28/world/europe/28iht-union.4.15721770.html?\\_r=1](http://www.nytimes.com/2008/08/28/world/europe/28iht-union.4.15721770.html?_r=1)> accessed 17 April 2010.

<sup>523</sup> Frowein (n 518) 628; H Köchler, 'The Use of Force in the New International Order' (Madrid, 20 Nov 1999) <<http://i-p-o.org/koechler-intervention.pdf>> accessed 17 December 2009; V Gudeleviciute, 'Does the Principle of Self-Determination Prevail over the Principle of Territorial Integrity?' (2005) 2(2) Int'l Journal of Baltic Law 48-74.

<sup>524</sup> Western Sahara Advisory Opinion (n 353) 55.

international boundaries of newly independent states.<sup>525</sup> A decision on secession by a minority group made under heavy pressure from an external force cannot be considered as an expression of the free will of such minority group.

Despite the statements of the Western world that the Kosovo case is a unique case for external self-determination and under no circumstances is a precedent for other situations, unfortunately it did serve as a precedent for Russia to have its own ‘unique case’ for Abkhazia and South Ossetia, although huge differences exist between these cases.<sup>526</sup>

Russia and the separatist units unanimously claim that Abkhazia and South Ossetia possess all features attributable to sovereign states.<sup>527</sup> Even if Abkhazia and South Ossetia claim that they possess some features of statehood provided for by the Montevideo Convention, it is hardly arguable that these breakaway regions can be regarded as sovereign independent states. Moreover, even if both breakaway regions possess certain features of a state, such as a defined territory and population, it is disputable that they have an effective public authority which is able to maintain public order and protect their territory. Undoubtedly, in terms of this feature the authorities of

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<sup>525</sup> J Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Oxford, Hard 2013) Ch. 4.

<sup>526</sup> W Slomanson, ‘Legitimacy of the Kosovo, South Ossetia, and Abkhazia Secessions: Violations in Search of a Rule’ (2009) 9 *Miskolc Journal of International Law* 1-27; D Tolksdorf, ‘Kosovo Precedent - Applicable in many Parts of the World, But Not Directly in the South Caucasus’ (2009) 3(1) *Caucasian Rev of Int’l Affairs* 103-107; H Cincotta, ‘Russia’s Use of Kosovo Analogy for Georgia False, Experts Say’ (25 Sep 2008) <<http://iipdigital.usembassy.gov/st/english/article/2008/09/20080925095254dmslahrellek0.7731439.html#axzz2OtRn3yOr>> accessed 17 March 2013; Z Oklopcic, ‘Reflections on Self-Determination, and the Status of Kosovo in light of the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia’ Filed under EJIL Analysis (31 Dec 2009) <<http://www.ejiltalk.org/reflections-on-self-determination-and-the-status-of-kosovo-in-light-of-the-report-of-the-independent-international-fact-finding-mission-on-the-conflict-in-georgia>> accessed 19 October 2009; D Phillips, ‘Abkhazia is Not Kosovo’ (*Transition Online*, 7 Feb 2008) <<http://www.tol.org/client/article/19333-abkhazia-is-not-kosovo.html>> accessed 3 March 2010.

<sup>527</sup> V Chirikba, ‘The International Legal Status of the Republic of Abkhazia In the Light of International Law’ (*AbkhazWorld*, 2 Sep 2009) <<http://www.abkhazworld.com/articles/analysis/285-int-legal-status-abkhazia-vchirikba.html>> accessed 27 January 2010; V Margiyev and S Kesayev, *Statehood of South Ossetia: Past, Present and Future* (In Russian) (Vladikavkaz 2009).

both Abkhazia and South Ossetia are dependent on Russia. Today the Russian troops guard the territories of these units and all high officials of these self-proclaimed states are approved by the Russian political administration. It is generally accepted that a state can be recognised if it is stable, independent and effective.<sup>528</sup> One of the examples of the lack of effective government is the issue of the separatist units' citizenship which in reality implies the Russian passport and citizenship. Both separatist units force the habitants of the breakaway regions, including the ethnic Georgians, to either accept the separatist units or Russian citizenship. The Abkhaz and South Ossetian authorities established the dual citizenship, forcing Georgians willing to return to their homes in Abkhazia and South Ossetia to apply for separatist unit citizenship in order to enjoy the full scope of rights. The main requirement for Georgians is to officially refuse from the Georgian citizenship and produce a document confirming such refusal.<sup>529</sup> Such discriminatory policy of the Abkhaz and South Ossetian separatist authorities was used also against other habitants of the breakaway region, including the Abkhazians and South Ossetians themselves. In fact, such discriminatory grant of dual Abkhaz-Russian citizenship should be considered illegal.

Moreover, under international law for formation as sovereign states Abkhazia and South Ossetia's political existence should be widely recognised by other states. However, the vast majority of states do not recognise these breakaway regions and such non-recognition can serve as an indicator of the undeniable fact that both Abkhazia and South Ossetia do not possess a capacity independently to enter into relations with other

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<sup>528</sup> D Devine, 'The Requirements of Statehood Re-Examined' (1971) 34 *Modern Law Review* 410-415; W Völkerrecht, *Vitzthum* (Berlin, Walter Gruyter 1997) 227.

<sup>529</sup> Council of the EU, 'Independent International Fact-Finding Mission on the Conflict in Georgia' (Sep 2009) 18 <<http://www.ceiig.ch>> accessed 19 October 2009.

states.<sup>530</sup> The capacity to enter into relations with other states and communicate with them independently without the support of any third states is one of the key features of an independent state. Such feature also encompasses an ability of the state to communicate independently with other states on the issue of its recognition.<sup>531</sup> In the case of Abkhazia and South Ossetia it is well known that both entities strongly depend on Russia. Undoubtedly, neither Abkhazia nor South Ossetia was able to enter into relations with the states which recognised them. Based on available facts it can be argued that almost all of those states which recognised Abkhazia and South Ossetia's independence received certain benefits from Russia either in the form of huge favourable credits or arms supply from Russia.<sup>532</sup> It is emphasised that Abkhazia and South Ossetia's incapacity to enter into relations with other states, especially on the matter of the recognition of their independence in the light of the existing dispute with Georgia, is a key fact giving solid ground to argue the lack of sovereignty and independence of these two breakaway regions.

From an international law perspective it is quite difficult to claim that a single precedent can be a source of international law, since it is generally recognised that a new norm of customary international law forms on the basis of state practice.<sup>533</sup> The factor of the existence of a sufficient number of permanent objectors to South Ossetia

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<sup>530</sup> FS Mirzayev, 'The Principle of *Uti Possidetis* in Modern International Law and its Application in the Post-Soviet Area: Theory and Practice (2004) 6(54) Law and Politics (In Russian) 43-53.

<sup>531</sup> Crawford, *The Creation of States* (n 108) 107.

<sup>532</sup> Radio Free Europe, 'Tiny Nauru in \$50 Million Russia Gambit' (14 Dec 2009) <[http://www.rferl.org/content/Tiny\\_Nauru\\_In\\_50\\_Million\\_Russia\\_Gamble/1903967.html](http://www.rferl.org/content/Tiny_Nauru_In_50_Million_Russia_Gamble/1903967.html)> accessed 19 March 2010; Y Maofeng and L Jingli, 'Russia, Venezuela Talk Weapons, Oil, Lubricate Relations' (*Xinhua World News Agency*, 11 Sep 2009) <[http://news.xinhuanet.com/english/2009-09/11/content\\_12033727.htm](http://news.xinhuanet.com/english/2009-09/11/content_12033727.htm)> accessed 7 January 2010; 'Why Nicaragua recognised South Ossetia and Abkhazia' Interview of Foreign Minister of Nicaragua Samuel Santos Lopez to Russia Today <<http://lolo.rt.com/programs/spotlight/why-nicaragua-recognised-south-ossetia-and-abkhazia/>> accessed 27 March 2013.

<sup>533</sup> *Nicaragua case* (n 518) 185-186; *Fisheries Jurisdiction Case* (n 252) 50; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Reports 4 at 42; M Akehurst, 'Custom as a Source of International Law' (1974-1975) 47 BYBIL 19; B Lepard, *Customary International Law A New Theory with Practical Applications* (Cambridge, CUP 2010).



and Abkhazia's independence is another ground preventing such unilateral secession becoming a new norm of customary international law falling within the requirements of article 38 of the ICJ Statute. However, precedents such as Kosovo, South Ossetia and Abkhazia have become a serious ground for further speculations arguing in favour of external self-determination.

While Georgia considers Abkhazia and South Ossetia as an integral part of its territory, the two breakaway regions claim that, based on the principle of self-determination, they have exercised the right to secession. Like other separatists units in the Post-Soviet territory, under the provisions of the Soviet Constitution South Ossetia and Abkhazia had no constitutional right to claim secession. As previously argued under the principle of *uti possidetis juris*, the internal administrative borders of the fifteen constitutional units of the USSR transformed into the international boundaries of newly established independent states. Abkhazia was among the twenty autonomous republics in the USSR which constituted an integral part of the Georgian SSR and it was reflected in article 85 of the 1977 USSR Constitution. The status of South Ossetia as the autonomous oblast within the Georgian SSR was provided in article 87 of the 1977 USSR Constitution. As mentioned above, all editions of Soviet constitutions including the latest 1977 Constitution explicitly determined the subjects of the right to secession, limiting their number by the Soviet republics, constitutional parts of the USSR.<sup>534</sup> Neither the Constitution of the Georgian SSR<sup>535</sup> nor the Constitution of the

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<sup>534</sup> AL Unger, *Constitutional Development in USSR* (London, Methuen 1981) 60.

<sup>535</sup> Constitution of the Georgian SSR (adopted on 15 Apr 1978) The Collection of the Constitutional Acts of Georgian SSR (1921-1978) (Tbilisi 1983) (In Russian) 249-293. For the English text see <[http://www.rrc.ge/law/Gkon\\_1978\\_04\\_15\\_e.htm?lawid=1387&lng\\_3=en](http://www.rrc.ge/law/Gkon_1978_04_15_e.htm?lawid=1387&lng_3=en)> accessed 13 February 2010.

Abkhazian ASSR<sup>536</sup> nor the Law on the South Ossetian AO<sup>537</sup> provided the right of these autonomous units to secede from either the Georgian SSR or the USSR.

Therefore, it can be argued that, under the principle of *uti possidetis*, the former administrative borders of the Georgian SSR have been transformed into the international boundaries of the independent Georgia, and that both Abkhazia and South Ossetia, being parts of the predecessor of the Georgian SSR, should be considered as integral parts of Georgia. In the case of these two conflicts, both Abkhazia and South Ossetia cannot be regarded as lawful holders of the right to external self-determination, since no legal grounds are available under international law for secession of these units from Georgia. As it was observed during the Five-Day War, the political goals of third states were simply justified by a necessity of exercising external self-determination by Abkhazia and South Ossetia targeting the territorial and political unity of Georgia.

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<sup>536</sup> 'Congresses of Soviets of USSR, Union and Autonomous Soviet Socialist Republics of the Transcaucas'. Collection of documents of 1923-1937 (Vol VI) (Moscow 1964) (In Russian) 686-700.

<sup>537</sup> Decree No 2 on Establishment of the Autonomous Oblast of South Ossetia. Adopted on 20 April 1922 by Georgian Central Executive Committee and the Council of Peoples' Commissars of Georgian SSR. State Archives of Georgia's Modern History, No 33, Tbilisi 1922 (In Russian) 81-84.

#### 4.1.2 Nagorno-Karabakh

Armenia claims that there are no grounds for Azerbaijan to claim the succession of boundaries of the Azerbaijan SSR, since the independent Azerbaijan has declared itself as a successor state of the ADR which existed in 1918–1920 with further non-recognition of the Soviet occupation. As a response to this argument, the references should be made to the principle of stability of boundary treaties.<sup>538</sup> It is generally accepted that the stability of boundary treaties, irrespective of the fundamental change of circumstances (*rebus sic stantibus*), is the norm of customary international law and has been incorporated into the 1969 Vienna Convention on the Law of International Treaties (art 62) which is recognised as a codification of relevant norms of customary international law.<sup>539</sup> Although such position can be challenged with an argument that the principle on stability of boundary treaties can be applied only with respect to the external boundaries of the USSR, in this case the status of the Soviet republics should be examined through the analysis of the Soviet legislation. All USSR republics, even parts of the Union, had exact internal boundaries between each other. It was affirmed in article 78 of the USSR Constitution that territories and boundaries of Soviet republics could not be changed without their consent and all boundaries between them should be changed in accordance with their mutual consent and under the bilateral treaties which

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<sup>538</sup> *Namibia Case* (n 346) 47; *Fisheries Jurisdiction Case* (n 252) 18, 21; AD McNair, *The Law of Treaties* (Oxford, Clarendon Press 1961) 656; I Sinclair, *The Vienna Convention on the Law of Treaties* (2nd ed, Manchester, Manchester University Press 1984) 5-29; S Rosenne, *Developments in the Law of Treaties 1945-1989* (Cambridge, CUP 1989) 121; J Klabbers, *The Concept of Treaty in International Law*, (The Hague, London, Boston, Kluwer Law International 1996) 41-44; P Reuter, *Introduction to the Law of Treaties* (The Hague 1995) 16-17; A Aust, *Modern Treaty Law and Practice*, (Cambridge, CUP 2004) 9-12.

<sup>539</sup> *Temple of Preah Vihear case* (n 202) 34; *Territorial Dispute Case* (n 293) 37; *Sovereignty and Scope of the Dispute Arbitration (Eritrea v Yemen) (Phase I: Territorial Sovereignty and Scope of the Dispute)* (1998) 114 ILR 48; Shaw, *International Law* (n 112) 950-951; RM Khan 'Vienna Convention on the Law of Treaties Article 62 Fundamental Change of Circumstances' (1973) 26(1) *Pakistan Horizon* 16-28; G Haraszti, *Some Fundamental Problems of the Law of Treaties* (Budapest, Akademiai Kiado 1973) 439; AN Talalayev, *Commentary to the Vienna Convention on the Law of Treaties* (Moscow Yuridicheskaya, Literatura 1997) (In Russian) 168-173.

should be furthermore approved by the Union's central authorities. It is known that there were no such agreements regarding the change of the territories or boundaries between Azerbaijan and Armenia, and the boundaries between these two Soviet republics were clearly defined at the beginning of the last century.<sup>540</sup> In the case of Azerbaijan, along with such internal delimitation agreements with the neighbouring Soviet republics, there is a still-valid multilateral treaty referred to as the Treaty of Kars concluded among the Azerbaijan SSR, the Georgian SSR and the Armenian SSR with the Turkish Republic with participation of the RSFSR.<sup>541</sup>

It should be also noted that neither the Azerbaijan SSR, nor independent Azerbaijan ever expressed its consent to the secession of Nagorno-Karabakh or its territorial transfer to Armenia or its predecessor, the Armenian SSR.

As stated above, USSR dissolution resulted in a consensual application of *uti possidetis juris* which served as the legitimisation of the boundaries of newly independent states in the territory of the former Soviet Union. It should be noted that the legal status of the NKAO pursuant to the Constitutions of the USSR and the Azerbaijan SSR was determined under the Law 'On Nagorno-Karabakh Autonomous Oblast' adopted by the Supreme Soviet of the Azerbaijan SSR on 16 June 1981.<sup>542</sup> Therefore, it should not raise any doubts that under the principle of *uti possidetis* the former administrative borders of the Azerbaijan SSR have been transformed into international boundaries of the independent Republic of Azerbaijan, and consequently the NKAO

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<sup>540</sup> *External Politics of USSR, 1917-1944 Collection of the Documents* (Vol I-IV) (Moscow, High Communist Party School of USSR's Communist Party 1944) (Note: *The Book is from USSR's secret archives and marked as 'For the Service Use'*); Potier (n 57) 119.

<sup>541</sup> 'Treaty of Friendship between Turkey, Azerbaijan SSR, the SSR Armenia and the SSR Georgia on one hand and Turkey on the other, concluded with the participation of the RSFSR' (Kars, 13 October 1921) ('Treaty of Kars'). Texts in Russian and English at <[http://en.wikisource.org/wiki/Treaty\\_of\\_Kars](http://en.wikisource.org/wiki/Treaty_of_Kars)> accessed 4 March 2013; English text at

<<http://azerbaijan.az/portal/History/HistDocs/Documents/en/05.pdf>> accessed 4 February 2013.

<sup>542</sup> Law of the Azerbaijan SSR on the Nagorno-Karabakh Autonomous Oblast (16 June 1981) (Azerneshr, Baku 1987) (In Russian).

(which was within the boundaries of the Azerbaijan SSR) should be considered as an integral part of the Republic of Azerbaijan. The Republic of Azerbaijan was recognised by the international community within its existing boundaries that also include the Nagorno-Karabakh region. Such position has been explicitly expressed by the PACE Special Rapporteur David Atkinson who emphasised that the boundaries of Azerbaijan were recognised by the international community in 1991 upon the recognition of its independence and definitely included the Nagorno-Karabakh region.<sup>543</sup>

The Armenian side often refers to the right to external self-determination of the Armenian population of Nagorno-Karabakh as a justification for the territorial claims to Azerbaijan, which in its opinion has to serve as a strong ground for the changes of the boundaries.<sup>544</sup> It should be first defined whether the Armenian population of Nagorno-Karabakh is a ‘people’ for the purposes of the right to external self-determination. As stated before, there is no explicit definition of ‘people’ under international law. However, it could be argued that the Armenian population could not be regarded as a ‘people’ since at the moment the Azerbaijani population forcefully expelled from Nagorno-Karabakh. As discussed hereinbefore, under modern international law the right to external self-determination cannot be granted in an unlimited way to all peoples, groups or minorities. It has been clearly addressed by Eide, the UN Special Rapporteur, who emphasised that it is highly negative to claim that all peoples of all territories have the right to external self-determination.<sup>545</sup> If one refers to Kelsen’s interpretation and

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<sup>543</sup> ‘Report of the Political Affairs Committee of the Parliamentary Assembly of the Council of Europe’ (Explanatory Memorandum by the Rapporteur David Atkinson) (29 November 2004) PACE Doc 10364, para 5.

<sup>544</sup> Barsegov (n 308) 117.

<sup>545</sup> A Eide, ‘Territorial Integrity of States, Minority Protection and Guarantee for Autonomy Arrangements: Approaches and Roles of the United Nations’ in UniDem Seminar (ed), *Local Self-government, Territorial Integrity and Protection of Minorities* (Lausanne, COE Publishing 25-27 April 1996) 33.

understanding of the term ‘people’ as a state,<sup>546</sup> then no legal grounds for the self-determination of the Armenian population of the Nagorno-Karabakh region could be produced by the Armenian side.

Even the legally vague and ill-grounded ‘Remedial Theory’ actively referenced by the separatist regime of Nagorno-Karabakh justifying the secession of minority groups as a response to the gross human rights violations preventing them from exercising the right to internal self-determination<sup>547</sup> is not applicable to the Nagorno-Karabakh conflict. There are no sufficient facts and arguments confirming the availability of any evidence on the violation of rights of the Armenian population of Nagorno-Karabakh by the central Azerbaijani authorities. Moreover, in the case of Nagorno-Karabakh since the establishment of the autonomous unit within the Azerbaijan SSR in 1923, the Armenian population (which became a majority during the twentieth century for the whole history of the NKAO until its secession campaign) enjoyed a wide scope of rights and freedoms. Therefore, it is believed that the Armenian population of the NKAO exercised its right to internal self-determination without any obstacles from the Azerbaijani central authorities. For instance, the right to use the Armenian language and its own culture by the Armenian population of the NKAO were confirmed in almost all legal acts of the Azerbaijan SSR starting from the Constitution up to the specific codes of the Soviet republic.<sup>548</sup> As stated above, the NKAO’s legal status was determined by the Law of the Azerbaijan SSR on the Nagorno-Karabakh Autonomous Oblast which proclaimed it as a national administrative territorial

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<sup>546</sup> Kelsen, *Recent Trends* (n 394) 51-52.

<sup>547</sup> Raic (n 420) 366-372.

<sup>548</sup> FS Mirzayev, ‘Azerbaijan on the Crossroads: Legal Evaluation of the Contemporary Territorial Issues Self-Determination v Territorial Integrity’: Summer University’s Best Papers’ Digest (Fribourg, University of Fribourg Press September 2005) 53-72.

establishment that was awarded with all the relevant rights and authorities.<sup>549</sup> The USSR Constitution guaranteed the representation of the NKAO's five MPs in the Council of Nationalities which was one of the Chambers of the USSR Parliament (the Supreme Soviet). In the meantime, twelve MPs represented the NKAO in the Supreme Soviet of the Azerbaijan SSR. The Soviet of the National Deputies of the NKAO was a state organ that had a wide range of rights and authorities allowing it to resolve almost all important local issues. Such broad rights and freedoms along with its representation in the governing authorities of the Azerbaijan SSR were solid evidences of the NKAO's effective exercise of the right to internal self-determination. The activity and paperwork of all state organs, including but not limited to the prosecutor's office, courts and administrative managements of public organisations, education institutions and cultural centres, were in the Armenian language.<sup>550</sup> Moreover, radio and TV broadcasting as well as newspapers and magazines were also in the Armenian language. Since the establishment of the NKAO, most of the public administration, legislative and communist party's managerial positions were in the hands of Armenians, and Armenian was the official language of the public management and economic activities in the NKAO. Therefore, it can be strongly argued that no discrimination took place in the NKAO by the central Azerbaijani authorities. Thus, the cultural and administrative nature of Nagorno-Karabakh region seriously contributed to the immigration of the Azerbaijani population from the region. It is accepted and supported by some writers that even if any problems existed within the NKAO in the past, any claims had not to be put forward against Baku, but against the local Armenians who ruled in the NKAO

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<sup>549</sup> Law of Azerbaijan SSR on the Nagorno-Karabakh (n 554).

<sup>550</sup> UNCERD 'Second report of States parties due in 1999: Azerbaijan' (1999) UN Doc CERD/C/350/Add 1/6.

since the first days of its creation.<sup>551</sup> The existence of a majority of Armenians in the NKAO also played a huge role in such prevailing positions of Armenians in the autonomous region.

No violent appointments of the head of the autonomous unit of Azerbaijani ethnicity in the history of the NKAO can be shown. The review of the historical facts allows arguing that, since the establishment of the autonomous unit, it was led by Armenians. There was also no evidence of violent settlement of the region by the Azerbaijani population. In contrast, the historical facts testify that the massive settlement of Karabakh by the ethnic Armenians took place by the Tsarist Russia and Soviet communist authorities.<sup>552</sup> Such policy of the massive re-settlement of various minorities all around the USSR carried out by Stalin was exercised against the background of unreal ‘Soviet communist brotherhood of the nations’.<sup>553</sup> Therefore, it can be concluded that Azerbaijan conducted a balanced and fair policy towards the Armenian population of the NKAO.

It is interesting that even Robert Kocharian, the former leader of ‘the Nagorno-Karabakh Republic’ and later the President of Armenia in his interview confirmed that Armenians of Nagorno-Karabakh were not living in difficult conditions from both political and socioeconomic points of view and he simply argued that it was ‘something

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<sup>551</sup> A Aldstadt, ‘O Patria Mia: National Conflict in Mountainous Karabagh’ in WR Duncan and GP Holman (ed), *Ethnic Nationalism and Regional Conflict* (Boulder, Westview Press 1994) 115-116; A Abdullayev, *Nagorno-Karabakh: Groundless Claims, Events, Tragedies* (Baku, Murercim 2001) (In Azerbaijani) 78-79; D Rieff, ‘Case Study in Ethnic Strife (Nagorno-Karabakh)’ (1997) v76, n2 (*Foreign Affairs*) <<http://www.cilicia.com/armo19e.html>> accessed 17 May 2008.

<sup>552</sup> Mahmudov and Shukurov (n 52) 307-330.

<sup>553</sup> EC Svante, ‘Autonomy as a Source of Conflict: Caucasian Conflicts in Theoretical Perspective’ (January 2002) 2 *World Politics* 245-276; N Nassibli, ‘The Karabagh Problem: Old Stubbornness and New Hopes’ (paper presented at the US Institute of Peace Conference in Washington DC, 24 March 1998) <<http://www.azerbaijan.com/Azerbaijani/nasibzade.htm>> accessed 27 March 2008; Y Slezkine, ‘USSR as a Communal Apartment, or How a Socialist State Promoted Ethnic Particularism’ (1994) 53(2) *Slavic Review* 414-52.



unexplainable drove Karabakhi Armenians to the independence'.<sup>554</sup> As a Western commentator emphasised, 'Armenian campaign had been carefully planned well in advance' and the intensified militarisation of the Armenian community of Nagorno-Karabakh was a part of such plan, and, obviously 'Azerbaijanis were caught unawares' by such sudden development of the situation around the NKAO.<sup>555</sup>

It can be argued that in the case of Azerbaijan the Council of Europe explicitly defined that in the event of the correlation of the two principles, the right to self-determination can be exercised only without violation of the principle of territorial integrity and only through peaceful means. In response to the request of Azerbaijani delegation, the Committee of Ministers of the Council of Europe stated that exercise of the right to self-determination should comply with all norms and principles of international law including the principle of territorial integrity, and can be exercised only through peaceful negotiations without the use of force being used for the illegal occupation of territories.<sup>556</sup> Therefore, after the UNSC the Council of Europe was the second authoritative organisation that confirmed that, in the case of Nagorno-Karabakh, the use of force is not acceptable for the exercise of external self-determination by Armenians through the violation of Azerbaijan's territorial integrity. It should be noted that the Nagorno-Karabakh Armenians did not even attempt to negotiate peacefully their right to self-determination with the central Azerbaijani authorities; in contrast, they chose the military way to secede from Azerbaijan and went far beyond through occupation of the additional surrounding territories.

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<sup>554</sup> Interview of R Kocharian to 1st Ostankino TV Channel, 'Moment of Truth' Programme (10 January 1994). Re-published in V Arutyunyan, *Events in Nagorno-Karabakh: Chronicle, February 1988-January 1989* (Vol V) (Yerevan, Armenian SSR Academy of Sciences Publishing House 1990) (In Russian) 271.

<sup>555</sup> De Waal (n 79) 15-18.

<sup>556</sup> Council of Europe, Committee of Ministers, Reply to the Written Question No 396 by Mrs Hajiyeva to the Committee of Ministers 'Recognition of the Territorial Integrity of Azerbaijan by Armenia' (19 September 2001) <<https://wcd.coe.int/ViewDoc.jsp?id=222923&Site=COE>> accessed 17 October 2008.

Since the beginning of the conflict, Azerbaijan has chosen a denial policy through non-recognition of Nagorno-Karabakh as a party to the conflict and through the rejecting of all arguments in favour of external self-determination of the Armenian population of Nagorno-Karabakh. For instance, the 10 December 1991 referendum in the Armenian-populated Nagorno-Karabakh that declared the NKAO as an independent state was void and null and was never accepted or approved by Azerbaijan or any of its state authorities. Azerbaijan basically demands the liberation of the occupied territories and the negotiating of the status of Nagorno-Karabakh, but with the primary condition of preserving its territorial integrity and the inviolability of internationally recognised boundaries that also include a breakaway region. Azerbaijan relies heavily on international law and the international community's recognition of its territorial integrity and boundaries.

The UNSC's four resolutions and the relevant resolutions of the PACE and other organisations also support Azerbaijan's position on the urgent need for liberation of the occupied territories of a sovereign state. This position is supported also by the commentators who contend that a solution of the Nagorno-Karabakh conflict can be achieved only upon ceasing the occupation of sovereign Azerbaijan's territories and granting the highest autonomous status to Nagorno-Karabakh.<sup>557</sup>

Azerbaijan's primary position is based on the three Lisbon Summit principles. In 1996 in the course of the OSCE Lisbon Summit the three principles for the resolution of the Nagorno-Karabakh conflict proposed by the Minsk Group were supported by all members except Armenia. The three principles were the following: (i) respect of the territorial integrity of the Republic of Armenia and the Republic of Azerbaijan; (ii) the legal status to be determined through granting of the highest autonomous status to

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<sup>557</sup> Baburin (n 424) 243-244.

Nagorno-Karabakh within Azerbaijan; and (iii) guaranteed security to Nagorno-Karabakh and its population, including the mutual fulfilment of the conflict resolution principles by the parties.<sup>558</sup> Like in case of Abkhazia and South Ossetia, legal argumentation for the Nagorno-Karabakh conflict pursuant to the above review should be based on priority of the principle of territorial integrity within the boundaries formed under the principle of *uti possidetis juris* which transformed the former administrative borders of the Azerbaijan SSR into the international boundaries of the Republic of Azerbaijan with no place for external self-determination by the breakaway region.

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<sup>558</sup> OSCE Lisbon Summit Final Document, Annex I, Statement of the OSCE Chairman-in-Office (3 December 1996) OSCE DOC S/1/96/15 <<http://www.osce.org/mc/39539?download=true>> accessed 19 March 2013.

#### 4.1.3 Transnistria

Today Transnistria contends that it is not a secessionist or breakaway entity.<sup>559</sup> The separatist regime refers to the history of Moldova's establishment as an independent quasi-state within the USSR. Transnistria questions the legality of Moldova's territorial claims to the breakaway region. Through the support of the Russian historians and lawyers, Transnistria explicitly refers to the vague historical facts took place before WWII.

It is notable that the separatist regime contends that Transnistria is a legal successor of the Moldovan Autonomous Soviet Socialist Republic as a result of Molotov–Ribbentrop Pact's denunciation by the Second Soviet Congress of People's Deputies in 1989.<sup>560</sup>

The separatist regime in Transnistria contends that the dissolution of the Moldavian SSR was proclaimed through the various legal instruments adopted by the Moldovan Parliament, announcing the Molotov–Ribbentrop Pact illegal and void *ab initio*.<sup>561</sup>

However, it can be argued that one of the crucial factors of the weakness of Moldova's position with regard to Transnistrian independence is the declaration of nullity of the Molotov–Ribbentrop Pact. It is evident that this declaration was made to justify the possibility to secede from the Soviet Union to which Moldova was annexed by this Pact. Nonetheless, this statement (repeated by Moldova in several documents) had a somewhat negative effect on its claims for being an independent state with Transnistria inside its borders.

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<sup>559</sup> The Unofficial Website of the 'Transnistrian Moldovan Republic' <<http://president-pmr.org/category/55.html>> accessed 6 March 2009.

<sup>560</sup> Kolsto and Yedemskii (n 93) 983.

<sup>561</sup> 27 August 1989 and 16 December 1990 Parliamentary Acts, and 27 August 1991 Declaration of Independence as cited in *Ilascu* (n 101) para 28-33.

Perhaps the key to the controversial situation in which Moldova found itself after dissolution of the USSR lies in those political steps that Moldova took during the period of independence. What sounds rather curious in the framework of the Moldovan claims for the integrated state are developed bilateral relations between Moldova and Transnistria that resemble interstate relations rather than relations between the parent state and a part thereof.

Perhaps the most evident example is the Memorandum on the Bases of the Normalization of the Relations between the Republic of Moldova and Transnistria, signed in Moscow on 8 May 1997.<sup>562</sup> This Memorandum is the only internationally recognised document that attempts to regulate the status of Transnistria.

Analysis of this document may give a ground to argue the uncertainty of the Moldovan attitude towards Transnistria. Despite its title, the concept and the terminology of this Memorandum are close to those of the international treaty between two subjects of international law. In the Preamble of the Memorandum the two Parties—Moldova and Transnistria—confirm their adherence to the principles of international law. Furthermore, paragraph 2 of the Memorandum states: ‘Parties will continue to establish ‘*inter-state legal relations*’ between them’.<sup>563</sup> One may be easily confused by this statement in the context of the international document that was designed as an outline of further relations between the independent state and its ‘separatist’, but not with a subordinate territorial unit. These relations in which Moldova engaged voluntarily are ‘horizontal’ rather than ‘vertical’ and impair the idea of the integrated state. Further paragraphs of this document do not clarify the status of Transnistria and in paragraph 3 of the Memorandum the Parties states: ‘Transnistria

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<sup>562</sup> The Moscow Memorandum (8 May 1997) <<http://www.osce.org/moldova/42309>> accessed 4 February 2013.

<sup>563</sup> *ibid* (emphasis added).

takes part in realisation of the international policy of the Republic of Moldova which is a subject of international law'.<sup>564</sup> In this case a question arises whether Transnistria is recognised as an undefined entity that has also acquired necessary characteristics of subject of international law. Paragraph 11 of the Memorandum is of high importance for understanding the status of Transnistria. It provides: 'Parties build their mutual relations in the framework of the common state within the borders of the MSSR as of January 1990'.<sup>565</sup> This clearly indicates a non-admissibility of Transnistria's secession. Moreover, several other bilateral documents were signed between Moldova and the breakaway region, among them the Agreement on the Measures of Promotion of Confidence and Contacts between the Republic of Moldova and Transnistria signed in Odessa on 20 March 1998.<sup>566</sup> This instrument again tried to place the relations between the Republic of Moldova and Transnistria under the umbrella of international law, which is hardly understandable in the context of the common state. Nonetheless, the guarantors of the Moldova–Transnistria negotiation process—Russia and Ukraine—on the same date signed a bilateral statement in which they declared the promotion of the 'special status of Transnistria within the territorially integrated Republic of Moldova' and 'restoration of the united economic, social and legal area'.<sup>567</sup> Such official declarations of the key players kept open the question whether these regional powers, including Russia are eager to commit heavily in convincing the Transnistrian regime to move forward with no secession settlement plan.

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<sup>564</sup> *ibid.*

<sup>565</sup> *ibid.*

<sup>566</sup> The Odessa Agreement (20 March 1998) <<http://www.osce.org/moldova/42310>> accessed 3 February 2013.

<sup>567</sup> Joint Statement by the Mediators in the Negotiations Process toward a Political Settlement of the Transdnistrian Problem from the OSCE, Russian Federation and Ukraine (18 January 2005) <<http://www.osce.org/moldova/40137>> accessed 4 February 2013.

Looking at the peculiarities of the Moldova–Transnistria bilateral relations, perhaps one of the most significant legal instruments would be the Protocol on Mutual Recognition in the Territory of Transnistria and Republic of Moldova of the Documents Issued by the Competent Authorities of the Parties signed in Tiraspol on 16 May 2001.<sup>568</sup> It is not frequently cited by the researchers and politicians and only recently leaked onto the Internet. From all points of view, once the Protocol was ratified by the Moldovan Parliament this Protocol could have been political suicide for Moldova in the Transnistrian puzzle. It sets a list of documents that are mutually recognised by the Parties which include driving licences, notarial documents, certificates, diplomas of educational institutions, etc. Furthermore, para 1(b) states that the Parties recognise passports issued by their competent authorities and para 2 of the Protocol provides that the documents should include the state symbols of the Parties and should be done in the languages used by the Parties.<sup>569</sup> Moreover, para 6 of the Protocol provides the mutual recognition and enforcement of court judgements between the Parties<sup>570</sup>, which is generally attributable to interstate relations. Ratification of such agreement could be the same as the outcome of Serbia-Kosovo agreement brokered by EU and signed by the parties in April 2013 which title sounds similar ‘Agreement of Principles Governing the Normalization of Relations’.<sup>571</sup> Analysis of this agreement indicates that by entering

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<sup>568</sup> Protocol on Mutual Recognition in the Territory of Transnistria and Republic of Moldova of Documents Issued by the Competent Authorities of the Parties (16 May 2001). Original text in Russian at <[http://www.olvia.idknet.com/documenti\\_yr.htm](http://www.olvia.idknet.com/documenti_yr.htm)> accessed 4 February 2013.

<sup>569</sup> *ibid.*

<sup>570</sup> *ibid.*

<sup>571</sup> ‘First Agreement of Principles Governing the Normalization of Relations’. Brussels, 19 April 2013. Full text <<http://www.europeanvoice.com/page/3609.aspx?&blogitemid=1723>> accessed 12 October 2013.

into such agreement Serbia has recognised that Kosovo is not longer a part of its territory and indirectly accepted that it is a state.<sup>572</sup>

It is obvious that such legal instruments support the claims for statehood of Transnistria. It raises the question whether Moldova and Transnistria share sovereignty or are in the process of forming separate sovereign units. From a legal point of view, the answer should be negative. Nonetheless, it is necessary to stress that Moldova should adopt more consistent and well-considered policy to protect its territorial integrity.

It is also worth referring to various multilateral documents in which Transnistria was evidently trying to act in its own name. The Protocol on Some Immediate Actions to Activate the Political Settlement of the Transnistria Problem signed at Odessa on 20 March 1998 was a political declaration which named Transnistria as a 'Party' among Russia, Ukraine and Moldova, and proposed to 'concentrate the attention of the Parties ... on the division and mutual delegation of powers and areas of jurisdiction'.<sup>573</sup> It may be argued that this was an attempt to put Transnistria in a position equal to Moldova.

However, it should be stressed that Moldova avoided any references to the words 'international relations' or 'international treaties' in all agreements signed with Transnistria. In paragraph 3 of the Memorandum on the Fundamentals of the Normalization of the Relations between the Republic of Moldova and Transnistria, this territorial unit is granted 'a right to independently establish and maintain international *contacts* in economic, scientific and cultural spheres, and also in other spheres upon the agreement of the Parties'.<sup>574</sup> Fortunately for Moldova, the language used in this

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<sup>572</sup> M Prelec, 'The Kosovo-Serbia Agreement: Why Less Is More'. ICG. Across Eurasia (7 May 2013) <<http://www.crisisgroupblogs.org/across-eurasia/2013/05/07/the-kosovo-serbia-agreement-why-less-is-more/>> accessed 3 November 2013.

<sup>573</sup> The Odessa Agreement (n 566).

<sup>574</sup> The Moscow Memorandum (n 562) (emphasis added).



provision cautiously avoids the term ‘international relations’. Nevertheless, it provides Transnistria with a certain level of political discretion and autonomous will.

In fact, a de facto regime (being a controller of a specific territory) can undertake certain measures in order to support the welfare of the population, sign agreements (not international treaties) and should definitely bear responsibility for the breach of international law. It can be assumed that Moldova signed various agreements with the separatist regime, since there was no-one who could sign on behalf of the breakaway region.

Transnistria also attempted to participate in certain multilateral regional instruments in the CIS framework. A rather clear example is the Minsk Convention on Mutual Assistance and Legal Relationship in Civil, Family and Criminal Matters of 22 January 1993<sup>575</sup> to which Transnistria tried to accede in 2003. Although Moldova ratified this Convention well in advance and it entered into force for Moldova on 26 March 1996, it did not specify the territorial application of this Convention and it can be assumed that the Convention applies also to Transnistria.

As described in previous chapters, there is no universally recognised right to secede under international law. Even the ‘Remedial Theory’ actively supported by the separatist Transnistrian regime is not justifiable in the case of this breakaway region. In fact, as the justification of its secession, the separatist regime often refers to the circumstances which took place in the late 1980s and early 1990s, when Moldova was intending to reunite with Romania and also to compel Transnistria forcefully to join such union without the consent of the Russian-speaking population of Transnistria.<sup>576</sup>

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<sup>575</sup> Convention on Mutual Assistance and Legal Relationship in Civil, Family and Criminal Matters (Minsk, 28 March 1997). The original text in Russian at the official website of CIS <<http://cis.minsk.by/reestr/ru/index.html#reestr/view/text?doc=192>> accessed 27 November 2012.

<sup>576</sup> P Bruno and others, *International Law and Independence of Transnistria* (Bendery, Tipografist 2007) (In Russian) 29-32.

Some writers comment that even the establishment of the MASSR was part of the aggressive plan on occupation of Bessarabia, and, therefore, such expansionist scheme cannot be treated as a legal ground for arguing that Transnistria is entitled to the right to external self-determination or to autonomy.<sup>577</sup> Attempts to secede from Moldova resulted in occurrence of threat to the peace and stability in the region. Moldova declared its independence and was recognised within the territory of the Moldovan SSR and therefore the administrative borders of these Soviet republics within the USSR should serve as *uti possidetis juris* lines for determination of the boundaries of the sovereign Republic of Moldova. The independent Moldovan state never expressed its consent to the change of its boundaries or territory nor did it consent to the Transnistrian secession.

It can be argued that no ‘carefully defined circumstances’<sup>578</sup> are available in the case of Transnistria entitling it to exercise the right to external self-determination. Moreover, as stated earlier, since there is no definition of ‘people’ in international law, it is doubtful whether the population of the breakaway Transnistria can be treated as ‘people’ for the purposes of external self-determination. Although the leadership of the Transnistrian regime contends that ‘people’ means a group with common aims and intentions,<sup>579</sup> it is aptly commented that the population of Transnistria is ‘more Ukrainians or Russians rather than Transnistrians’.<sup>580</sup>

In the case of Transnistria, the arguments on the restoration of the MASSR sound unreasonable since the separatist regime never enjoyed statehood nor was the MASSR entitled to the right to secession as the other Soviet republics were. Since the

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<sup>577</sup> Kolsto and Yedemskii (n 93) 983.

<sup>578</sup> *Reference re Secession of Quebec* (n 471) para 123.

<sup>579</sup> Preamble of the Constitution of the Transnistrian Moldovan Republic as of 6 August 2011. Original text in Russian <<http://newspmr.com/pridnestrove/konstituciya>> accessed 14 November 2012.

<sup>580</sup> King (n 93) 187.

Moldovan state has existed for more than sixty years and it has its recognised international boundaries and *uti possidetis* lines inherited from the Moldovan Soviet Socialist Republic, the arguments on external self-determination of Transnistria are groundless and rather weak. However, due to the current situation with this long-lasting conflict, the interests of the population of the breakaway region cannot be ignored and it should be able to fully enjoy the right to internal self-determination. This is important especially in the light of the military phase of the Transnistrian conflict and ignoring of non-Romanian minority rights in the early stages of the conflict.

Today, the supporters of the separatist regimes in the Post-Soviet area assert that Transnistria has been formed as de facto regime without official recognition.<sup>581</sup> They also refer to the effective control of the territory principle. However, some counter-arguments are brought in this regard in the subsequent sections stipulating that the MTR is an illegally existing regime in the territory of the independent Moldova and controlled by a third state.

As stated in previous case studies, under the Montevideo Convention<sup>582</sup> a state should possess numerous specifics.<sup>583</sup> However, it is generally accepted that the capacity to be engaged in formal relations with other such entities is a key feature of statehood.<sup>584</sup> Upon the analysis of all agreements signed between the Transnistrian regime, it may be argued that none of such legal instruments can be treated as an international treaty. It is obvious that under no circumstances can Transnistria be treated

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<sup>581</sup> D Ershov 'Transnistria: Recognition Factors' Ministry of Foreign Affairs of 'Transnistrian Moldovan Republic', (*Diplomatic Digest*, 5 May 2010) (In Russian) <<http://vestnik.mfa-pmr.org/index.php?newsid=15>> accessed 5 February 2013; Internet Source of Tiraspol School of Political Researches, 'Humanitarian Development Context for the Transnistrian Moldovan Republic' (Vol 8, October 1007) (In Russian) <<http://www.pmr21.info/article.php?art=57>> accessed 3 February 2013.

<sup>582</sup> Montevideo Convention on the Rights and Duties of States (1933) <<http://www.taiwandocuments.org/montevideo01.htm>> accessed 9 September 2007.

<sup>583</sup> 'State Defined' in *Restatement of the Law, Third of the Foreign Relations Law of the United States* (Washington DC, The American Law Institute Publishers 1986) para 201.

<sup>584</sup> *ibid.*

as a sovereign state if it is not able to survive independently without the support of the third state, which is the Russian Federation. This fact was expressly emphasised by the ECHR in the *Ilascu* case.<sup>585</sup>

Under the above-reviewed legal arguments, it can be concluded that based on the principle of *uti possidetis juris*, Transnistria should be within the territorial frameworks of the Republic of Moldova, and there are no legal grounds for this breakaway region to exercise the right to external self-determination under international law.

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<sup>585</sup> *Ilascu* (n 100).

## **4.2 Evaluation of the Four Post-Soviet Conflict Cases under Soviet Laws**

For the evaluation of the correlation of the principles of *uti possidetis juris* and self-determination, it is necessary to refer to the Soviet laws providing an express right to secession to the fifteen Soviet republics, which can be defined based on the 1977 USSR Constitution (article 72) and the determined internal administrative borders among these republics. In the meantime, the analysis of the USSR's domestic legislation is vital, since as discussed in previous chapters, international law refers the issues of self-determination to the internal jurisdiction of states. In other words, the issues of secession fall under the scope of the constitutional law of a specific state.

In fact, there are strong grounds to argue that the former USSR republics possessed some level of sovereignty with certain limitations and that such sovereignty was politically limited in favour of the Union. Article 76 of the USSR Constitution provided that all fifteen republics of the Union were sovereign states.<sup>586</sup> Moreover, under the requirements of the Montevideo Convention, they possessed the qualifications of a state such as territory, permanent registered population and public authority (Article 1).<sup>587</sup> Each republic had its own territory and permanent population. Moreover, each republic had its own fully operating government and even its own legal system (each republic had its own Constitution, Codes and court system). Nevertheless, one of the main qualifications—entering into relations with other states—was regulated by the Soviet Constitution. Article 80 of the USSR Constitution provided that each Soviet republic had a right to enter into international relations with other states and exercise an exchange of diplomatic and consular representatives and participate in international organisations. Although in practice the Soviet republics were limited in such right in

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<sup>586</sup> *ibid.*

<sup>587</sup> Montevideo Convention (n 582).

favour of the central Moscow Government, except for the UN membership of the Ukrainian SSR and the Byelorussian SSR, this right legally affirmed in the Soviet Constitution is a serious argument for claiming that the Union republics were states with limited sovereignty. In the meantime, reference should be made to some treaties determining territories and boundaries concluded by some of the former USSR republics with third states before the creation of the USSR in 1922.<sup>588</sup>

First of all, it should be noted that the administrative borders of the former fifteen USSR republics encompassed the territories which they proclaimed as their state territories after declaration of independence upon collapse of the Soviet Union. The aforementioned separatist units which declared their secession from the former USSR republics were integral parts of these republics under the latest 1977 Soviet Constitution. Under the 1977 USSR Constitution, Nagorno-Karabakh was an autonomous region of the Azerbaijan SSR, Abkhazia and South Ossetia were autonomous units of the Georgian SSR, and Transnistria was one of the geographic regions of the Moldavian SSR.<sup>589</sup> In contrast to the Chechen conflict where Russia managed to break the resistance of the separatist Chechen regime, other separatist regimes of Nagorno-Karabakh, Abkhazia, South Ossetia and Transnistria managed to succeed in the war phase and declare their independence with the support of external force(s). Nevertheless, save for a few recognitions of South Ossetia and Abkhazia, none of these separatist units have been recognised by the vast majority of states. Each case study considered herein developed in almost identical way or scenario and basically deals with the serious violation of the USSR Constitution and the constitutions of the Soviet republics.<sup>590</sup>

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<sup>588</sup> Treaty of Kars (n 541).

<sup>589</sup> Constitution of USSR (1977) (Moscow, GosYurIzdat Publishing 1977) (In Russian) 12-19.

<sup>590</sup> Mirzayev, The Principle of *Uti Possidetis* in Modern International Law (n 542) 43-53.

In the case of Abkhazia, serious escalation between Georgians and Abkhazians started in the late 1980s when the latter started claiming a separation from the Georgian SSR and a grant of Union republic status.<sup>591</sup> Immediately after adoption of the Secession Law in 1990 the Supreme Soviet of the Abkhaz ASSR passed a declaration on the sovereignty of Abkhazia as a SSR within the USSR.<sup>592</sup> This action was condemned by the authorities of the Georgian SSR as contradicting the Constitutions of the USSR and the Georgian SSR.<sup>593</sup>

The South Ossetian scenario, accompanying serious breach of the Soviet laws, started in 1989 when the South Ossetian National Front sent a petition to the Supreme Soviet of the USSR on reunification with North Ossetia within the Russian Federation.<sup>594</sup> On 10 November 1989 the local Soviet of South Ossetian AO made a decision on the upgrading of its status to the autonomous republic within the Georgian SSR.<sup>595</sup> In 1990 the Presidium of the Supreme Soviet of the Georgian SSR declared such decision void and adopted the Decree denouncing the treaty on USSR's establishment and declared void and null all Soviet laws adopted after sovietisation of Georgia.<sup>596</sup> In response at the end of 1990 South Ossetia declared its independence from the Georgian SSR as the South Ossetian Soviet Democratic Republic.<sup>597</sup> In 1991, when Georgia declared the restoration of its independence, South Ossetia first declared on its

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<sup>591</sup> D Lynch 'Separatist States and Post-Soviet Conflicts' (2008) 78(4) *International Affairs* 831-848.

<sup>592</sup> Text of Declaration In AI Doronchenkov, *To Union of Sovereign Peoples Collection of Documents of USSR's Communist Party, Legislative Acts, Declarations, Petitions and Presidential Decrees on Problems of National State Sovereignities* (Moscow, Institute of Theory and History of Socialism of Central Committee of USSR's Communist Party 1991) (In Russian) 246-250.

<sup>593</sup> Resolution of the Supreme Soviet of Georgian SSR (26 August 1990) Bulletin of the Supreme Soviet of Georgian SSR (No 8) (Tbilisi 1990) 97-98; RIA News Agency, 'Chronicles of Georgia-Abkhaz Conflict 1989-2000 Information Digest (In Russian) (4 May 2008) <<http://ria.ru/spravka/20080504/106510243.html>> accessed 19 August 2009; KI Kazenin, *Georgian-Abkhaz Conflict 1917-1992* (Moscow, Europa Publishing 2007) (In Russian) 170-220.

<sup>594</sup> Text in M Volkhonsky and others, *Conflicts in Abkhazia and South Ossetia Documents 1989-2006* (Moscow 2007) (In Russian) 20-21.

<sup>595</sup> *ibid.*

<sup>596</sup> Bulletin of the Supreme Soviet of Georgian SSR (No 3) (Tbilisi, 1990) 38-40 (In Russian).

<sup>597</sup> Text of Declaration in Soviet Ossetia Newspaper (No 193) 13 October 1990 (In Russian).

separation from Georgia and on remaining within the USSR and later after the collapse of the Soviet Union on its independence as the South Ossetian Republic.<sup>598</sup>

On 7 January 1991 the USSR President issued the Decree on Some Legal Acts Initiated in the Georgian SSR in 1990.<sup>599</sup> The Decree condemned and declared void the decisions of the Supreme Soviet of the South Ossetian AO on the upgrade of its status up to the autonomous republic and the relevant acts of the Supreme Soviet of the Georgian SSR abolishing the AO status of South Ossetia.<sup>600</sup> The Decree specifically stressed that the actions of the South Ossetian authorities were in conflict with article 87 of the USSR Constitution which provided that South Ossetia was a territorial unit of the Georgian SSR.<sup>601</sup> The same was reflected in the Resolutions of the Supreme Soviet of USSR of 20 February 1990 and of 1 April 1990.<sup>602</sup>

The Nagorno-Karabakh saga of violations of the Soviet laws started along with the military actions of Armenia against Azerbaijan during the late 1980s. Armenia also took certain actions that seriously breached the internal legislation of the USSR. The period of exchange of legal acts between the two conflicting sides was characterised as the ‘war of laws’.<sup>603</sup> That was a competition on the adoption of various decisions by the legislatures of the two conflicting parties.

The initial stage of the ‘war of laws’ started on 20 February 1988 when at the session of the Regional Soviet of the NKAO the Armenian representatives adopted a

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<sup>598</sup> ‘Resolution of the 1st Session of Soviet of Peoples Deputies of South Ossetia on Preparation and Conduct of USSR’s Referendum on 17 March 1991 in South Ossetia’ in M Volkhonsky and others (ed) (n 594) 94-95 (In Russian).

<sup>599</sup> Bulletin of the Congress of People’s Deputies and Supreme Soviet of USSR (Vol 2) (Moscow 1991) (In Russian) 118-119.

<sup>600</sup> *ibid.*

<sup>601</sup> *ibid.*

<sup>602</sup> Bulletin of the Congress of People’s Deputies and Supreme Soviet of USSR (Vol 9) (Moscow 1991) (In Russian) 278 – 279; Bulletin of the Congress of People’s Deputies and Supreme Soviet of USSR (Vol 15) (Moscow 1991) (In Russian) 493.

<sup>603</sup> F Mirzayev, *Contemporary Problems of Change of State Boundaries in International Law: Theory and Practice* (Baku, Qanun 2004) (In Russian) 59-82.



resolution ‘On petition to the Supreme Soviets of the Azerbaijan SSR and the Armenian SSR concerning the transfer of the NKAO from the Azerbaijan SSR to the Armenian SSR’.<sup>604</sup> The decision of the Armenian delegates of the NKAO on the secession from Azerbaijan of 12 July 1988 was in conflict not only with the USSR and the Azerbaijan SSR constitutions, but also with article 42 of the Law of the Azerbaijan SSR on the NKAO which provided that the Soviet of the People’s Deputies of the NKAO was entitled to make a decision pursuant to their defined authorities granted under the USSR and the Azerbaijan SSR constitutions. This article 42 of the Law stipulated the right of the Presidium of the Supreme Soviet of the Azerbaijan SSR to abolish any such unauthorised decisions. In fact, it was made by the Presidium of the Supreme Soviet of the Azerbaijan SSR which abolished the above secession decision and declared it null and void based on the requirements of article 87 of USSR Constitution, article 114 of the Azerbaijan SSR Constitution and article 42 of the Law of the Azerbaijan SSR on the NKAO.<sup>605</sup> The follow-up resolution of the Presidium of the Supreme Soviet of the Azerbaijan SSR recognised void and unconstitutional the secession decision of the NKAO’s legislature as contradicting the Soviet republic’s and the USSR legislation.<sup>606</sup> The culmination of the conflict took place when the Supreme Soviet of the Armenian SSR adopted the Act ‘On unification of the Armenian SSR and the NKAO’.<sup>607</sup> In January 1990 the Armenian Supreme Soviet voted to include Nagorno-Karabakh in the programme of its budget and this step was another move by Armenia within the ‘war of

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<sup>604</sup> V Arutyunyan, *Events in Nagorno-Karabakh: Chronic, February 1988- January 1989* (Vol I, Armenian SSR Academy of Sciences Publishing House, Yerevan 1990) (In Russian) 38.

<sup>605</sup> Resolution of the Presidium of the Supreme Soviet of Azerbaijan SSR ‘On abolition of the Decision of Soviet of People’s Deputies of the Nagorno-Karabakh Autonomous Oblast’ (12 July 1988) 13-14 Bulletin of the Supreme Soviet of Azerbaijan SSR (Baku 1988) (In Russian) 14-15.

<sup>606</sup> Resolution of the Presidium of the Supreme Soviet of Azerbaijan SSR ‘On unconstitutional action in NKAO’ (26 August 1989) 15-16 Bulletin of the Supreme Soviet of Azerbaijan SSR (Baku 1989) (In Russian) 21-22.

<sup>607</sup> Resolution of the Presidium of the Supreme Soviet of Armenian SSR ‘On Unification of Armenian SSR and Nagorno-Karabakh’ Communist Newspaper (Baku 2 December 1989) (In Russian).

laws'. It is notable since Armenia, which had been denying its direct involvement in the Nagorno-Karabakh conflict since its commencement, undertook certain provocative illegal steps for the legitimisation of its claims to the NKAO and made a unilateral decision on unification. It can be argued that the 1 December 1989 Decision of the Supreme Soviet of the Armenian SSR 'On unification of the Armenian SSR and the NKAO' was the clearest example of the direct involvement of Armenia in the Nagorno-Karabakh conflict since the first days.

It was an unprecedented step conflicting with all norms and principles of the Soviet Constitution and laws. Due to such illegal actions of Armenia, the Supreme Soviet and the Presidium of the USSR several times considered the situation surrounding the Nagorno-Karabakh crisis. The supreme USSR authorities unambiguously recognised the absence of any grounds for a change of the boundaries and national territorial frameworks of the Azerbaijan SSR and the Armenian SSR. In fact, Armenia's actions were unprecedented attempts to redraw the territorial map of the USSR<sup>608</sup> through groundless claims and illegal resolutions providing for the unification of the NKAO and Armenia. On 23 March 1988 the Presidium of the Supreme Soviet of the USSR in its Resolution 'On measures relating to the application of the Union republics with respect to the situation in Nagorno-Karabakh, the Azerbaijan SSR and the Armenian SSR' recognised it as being unacceptable to resolve the complicated territorial issues through the self-established entities that were trying to affect decisions of the supreme state authorities of the USSR.<sup>609</sup> In other words, the Presidium declared void the actions directed at the illegal change of the Soviet republics' boundaries, which were in conflict with the USSR Constitution. During the plenary session of the USSR

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<sup>608</sup> De Waal (n 79) 10-11.

<sup>609</sup> Resolution of the Presidium of the Supreme Soviet of USSR 'On measures relating to the application of the union republics with respect to the situation in Nagorno-Karabakh, Azerbaijan SSR and Armenian SSR' (23 March 1988) 13 Bulletin of the Supreme Soviet of USSR (Moscow 1988) (In Russian) 27-28.

Supreme Soviet on 18 July 1988 it was reaffirmed that the Nagorno-Karabakh region had to be preserved within the Azerbaijan SSR and Gorbachev blamed Armenians in undermining the communist regime and his policy of *perestroika*.<sup>610</sup>

In the Resolution dated 18 July 1988 ‘On decisions of the Supreme Soviets of the Armenian SSR and the Azerbaijan SSR regarding Nagorno-Karabakh issue’ the Presidium of the Supreme Soviet of USSR declared the change of the boundaries and national territorial structures of the Azerbaijan SSR and the Armenian SSR as being constitutionally impossible.<sup>611</sup> Such decision of the Presidium expressly referred to the provisions of article 78 of the USSR Constitution stipulating that territories of the Union republics could not be changed without their consent.<sup>612</sup> Finally, the Resolution of the Presidium of 10 January 1990 ‘On incomppliance of the acts of the Supreme Soviet of the Armenian SSR on Nagorno-Karabakh of December 1, 1989 and January 9, 1990 with USSR Constitution’ reaffirmed that the declaration on unification with Nagorno-Karabakh by the Armenian SSR without the consent of the Azerbaijan SSR was a serious breach of article 78 of the USSR Constitution.<sup>613</sup> Moreover, on 27 November 1991 the Constitutional Supervisory Committee of the USSR declared the 1 December 1989 Act of the Armenian SSR on unification with the NKAO as being void and illegal.<sup>614</sup>

The positions of the Presidium of the Supreme Soviet and the Constitutional Supervisory Committee of the USSR are a strong ground to argue that since the

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<sup>610</sup> M Malkasian, *Gha-ra-bagh!: The Emergence of the National Democratic Movement in Armenia* (Detroit, Wayne State University Press 1996) 116-117.

<sup>611</sup> Resolution of the Presidium of the Supreme Soviet of USSR (n 83) 20-21.

<sup>612</sup> *ibid.*

<sup>613</sup> Resolution of the Presidium of the Supreme Soviet of USSR ‘On Incomppliance of the acts of the Supreme Soviet of the Armenian SSR on Nagorno-Karabakh of December 1, 1989 and January 9, 1990 with the USSR Constitution’ 3 Bulletin of the Supreme Soviet of USSR (Moscow 1990) (In Russian) 38-42.

<sup>614</sup> Text in YG Barsegov, *Nagorno-Karabakh in International Law and World Politics Documents and Commentaries* (Vol I) (Moscow, KRUG Publishers 2008) (In Russian) 709-711.

beginning the actions of Armenia against Azerbaijan were illegal and seriously violated the USSR legislation. Only after the declaration of independence by Azerbaijan in response to the illegal actions of the Armenian Supreme Soviet and the declaration of independence by Nagorno-Karabakh on 2 September 1991, did the Azerbaijan legislature pass the Act revoking the NKAO on 26 November 1991. Azerbaijan argued that it was forced to abolish the NKAO due to the aggressive and illegal actions of both Armenia and the separatist regime of Nagorno-Karabakh.<sup>615</sup> As in case of the Act of the Supreme Soviet of Armenia proclaiming the unification with Nagorno-Karabakh, the USSR Constitutional Supervisory Committee recognised as void the 26 November 1991 NKAO abolition Act of the Azerbaijan SSR and proclaimed the establishment of the 1988 status quo. However, such decision of one of the USSR organs was no longer legally binding for the independent Azerbaijan and Armenia.

The Declaration of independence of 'the Nagorno-Karabakh Republic' of 2 September 1991 proclaiming the secession from Azerbaijan was a serious breach of the Soviet Constitution and legislation providing for those territories of the Union republics could not be changed without their consent and their boundaries could be changed only upon the achievement of mutual consent of the relevant republics that had to be approved by the official authorities of the USSR. Like the USSR Constitution, both the Azerbaijan SSR and the Armenian SSR constitutions provided for the impossibility of change of territory or boundaries without the express consent of these Soviet

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<sup>615</sup> Ministry of Foreign Affairs of the Republic of Azerbaijan, 'Nagorno-Karabakh Conflict' <[http://mfa.gov.az/eng/khojaly\\_en/index.php?option=com\\_content&task=view&id=29&Itemid=43](http://mfa.gov.az/eng/khojaly_en/index.php?option=com_content&task=view&id=29&Itemid=43)> accessed 10 September 2008; A Zverev, 'Ethnic Conflicts in the Caucasus 1988-1994' in Bruno Coppieters (ed), *Contested Borders in the Caucasus* (Brussels, VUB University Press 1996) <<http://poli.vub.ac.be/publi/ContBorders/eng/contents.htm>> accessed 13 December 2007.

republics.<sup>616</sup> Under the Law of the Azerbaijan SSR on the NKAO the boundaries of this autonomous region could not be changed without Azerbaijan's consent.

In the case of Moldova, the violation of the Soviet laws started with an attempt of the Moldovan Government to adopt a new law proclaiming the Romanian language as the only state language of the Moldovan SSR which led to mass protests of the Russian-speaking population of Transnistria.<sup>617</sup> On 29 January 1990 in Tiraspol, centre of Transnistria, the separatist political forces held a referendum on establishment of the Transnistrian Autonomous Socialist Republic, at which 90% of the Transnistrian population voted for autonomous status.<sup>618</sup> In June 1990 the Supreme Soviet of the Moldovan SSR approved the report of a special commission on the Molotov–Ribbentrop Pact, where the creation of the Moldovan SSR was declared as an illegal act resulting in occupation of Bessarabia and North Bukovina, historic Romanian territories.<sup>619</sup> The National Front of Moldova insisted on renaming the republic into the Romanian Republic of Moldova.<sup>620</sup> In response to this position, the nationalistic movements in Transnistria and Gagauzia held referendums on their independence from the Moldovan SSR within the USSR.<sup>621</sup> At the same time Transnistria elected its Supreme Soviet with its head, Igor Smirnov, who took the lead role in preparing the bill of the Transnistrian constitution.<sup>622</sup> Actions of the separatist unit through declaration of secession from the Moldovan SSR were serious breaches of the Soviet Constitution. It

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<sup>616</sup> S Markedonov, 'Soviet Caucasus in 1970s: Presentiment of Civil War' *Untouchable Reserve* (Vol 2, Issue No 52) (Moscow, 2007) 32.

<sup>617</sup> *History of the Republic of Moldova from Ancient Times to Nowadays* (Chisinau, H Milesku-Spetary Association of Young Scientists 2002) (In Russian) 327.

<sup>618</sup> IG Russu, *Notes on Uneasy Times* (Chisinau, 1999) (In Russian) 26.

<sup>619</sup> *Unrecognised Republic Essays Documents Chronicle* (Vol I) (Moscow 1997) (In Russian) 97.

<sup>620</sup> Text of Declaration in Soviet Moldavia Newspaper (Chisinau, 29 July 1990) (In Russian).

<sup>621</sup> Declaration of Independence of Transnistrian Moldovan Republic (Tiraspol, 25 August 1991) (In Russian) Official Website of the Ministry of Foreign Affairs of Transnistrian Moldovan Republic <<http://mfa-pmr.org/index.php?newsid=230>> accessed 9 July 2010; F Angeli, *Gagauz Autonomy People and Facts (1989-2005)* (Chisinau, 2006) (In Russian) 45-69.

<sup>622</sup> H Dabija, *Transdnistr Moldova – Our Ancient Land* (Chisinau, Hyperion 1990) (In Russian) 27-56.

was condemned not only by the Moldovan authorities in Chisinau, but also by the central authorities of the USSR. On 22 December 1990 the USSR President Gorbachev signed the Decree on measures on normalisation of the situation in the Moldovan SSR.<sup>623</sup> In this Decree the actions of Transnistria and Gagauzia creating autonomous units and forming new authorities were declared void and in breach of the constitutions of the Moldovan SSR and the USSR. The Decree also declared void the decisions of the Moldovan Parliament condemning the Molotov–Ribbentrop Pact and the decisions of the Transnistrian and Gagauz Supreme Soviets on declaration of the Gagauz Republic and the Moldovan Transnistrian SSR. Actions on formation of public authorities and conduct of referendums in these self-proclaimed separatist units were also declared void.

It should be noted that, pursuant to article 86 of the 1977 USSR Constitution, laws on autonomous units had to be adopted by the Supreme Soviets of the Union republics with the direct arrangement and involvement of the authorities of such autonomous units. Under article 86 of the USSR Constitution, Abkhazia was part of the Georgian SSR. There were only eight autonomous oblasts in the USSR and pursuant to article 87 of the USSR Constitution South Ossetia and Nagorno-Karabakh were accordingly parts of the Georgian SSR and the Azerbaijan SSR.

It is notable that all separatist units existing in the territories of Georgia, Azerbaijan and Moldova refer to article 72 of the 1977 USSR Constitution and the law with respect to the secession from the USSR which was adopted as an implementation of article 72. The 3 April 1990 USSR Law ‘On Solution of Questions Related to the

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<sup>623</sup> Decree on Measures on Normalisation of Situation in Moldovan SSR (22 December 1990) (No VII-1215) Izvestiya Newspaper (23 December 1990) (In Russian).

Secession of Soviet Republics from the USSR' ('the Secession Law')<sup>624</sup> was adopted in the light of rising trends of the Baltic states to obtain independence from the USSR.

First of all, it should be noted that the Secession Law was adopted pursuant to article 72 of the USSR Constitution which provided that the Union republics had a right to secession. Therefore, the main goal of the Secession Law was the establishment of the secession procedures for the Union republics based on the expression of a free will of the peoples of those Union republics through referendums. It is obvious that the main aim of this Law was the regulation of relations within the USSR through the establishment of certain procedures, which should be complied with by a Union republic that was intending to secede from the USSR. Under the Secession Law, secession from the USSR had to be exercised through the expression of a will of the republic's people by conducting a referendum by the Supreme Soviet of that republic.<sup>625</sup> Under the Secession Law the Union republics (which included autonomous republics, regions or districts) were required to hold referendums in each such autonomous unit separately. The Secession Law gave the right to the peoples of autonomous units to independently resolve the issues arising out of their legal status.<sup>626</sup> It should be noted that the secession of a Union republic from the USSR could be exercised only through overcomplicated and lengthy procedures and had to be subsequently approved by a decision of the Congress of National Deputies of the USSR.<sup>627</sup> Until the collapse of the Soviet Union, the Secession Law was not applied by Georgia, Moldova, Azerbaijan or Armenia, or by any other former Soviet republic.

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<sup>624</sup> Text in 'New Laws of USSR' (Issue No I) (Moscow, Legal Literature Publishing 1990) (In Russian).

<sup>625</sup> *ibid.*

<sup>626</sup> *ibid.*

<sup>627</sup> R Mullerson, *International Law, Rights and Politics: Developments in Eastern Europe and the CIS* (London, Routledge 1994) 75.

The legal analysis of the claims of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria under the Secession Law should be considered through the review of the Soviet legislation that was in force as of 1991. It is generally known and accepted that a Constitution is at the top level in the hierarchy of legal instruments in any legal system.<sup>628</sup> In article 173 of the USSR Constitution it was proclaimed that the Constitution had superior legal force and that all legal acts should be adopted in compliance with the USSR Constitution. However, there were certain inconsistencies between the Law on Secession and the latest USSR Constitution. Article 76 of the Constitution envisaged that all Soviet republics were sovereign states united under the auspices of the USSR with the right to secession from the Union (art 72).<sup>629</sup> Meanwhile, as previously stated, article 78 stipulated that the territories of the Soviet republics could not be changed without their consent and that all boundaries between the republics could be changed only upon the mutual consent of the Parties expressed in a written agreement.

Furthermore, article 86 defined the legal status of autonomous republics, regions and other units as integral parts of respective republics without delegating any sovereign rights to secede from the Union republics and determine their legal status. The same provision was expressly reflected in articles 79–82 and 83–84 of the Georgian SSR Constitution<sup>630</sup> and article 83 of the Azerbaijan SSR Constitution.<sup>631</sup> While Transnistria did not enjoy any autonomous status during the Soviet times and was rather a geographic region within the Moldavian SSR, it could not even rely on any arguments related to any specific status.

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<sup>628</sup> H Kelsen, *General Theory of Law and State* (A Wedberg tr, Re-printed 1945 ed., NJ, The Lawbook Exchange Ltd 1999) 124.

<sup>629</sup> USSR Constitution (n 589).

<sup>630</sup> Constitution of the Georgian SSR (n 535).

<sup>631</sup> Constitution of the Azerbaijan SSR (21 April 1978) (Baku, Azerneshr 1990) (In Russian) 42.



Article 3 of the Secession Law stipulated that the right to determine legal status of the autonomous units of Union republics was under competence of these units. In other words, the Secession Law legalised the right to secession of autonomous units from the Soviet republics and provided a ground upon which the separatist movements could justify their actions. Later, all separatist regimes in Nagorno-Karabakh, Abkhazia, South Ossetia and Transnistria would refer to this Law. Article 3 of the Secession Law specifically provided that referendums on secession from the Union republics or remaining within the USSR and determination of the legal status of the autonomous republics and oblasts of the Union republics had to be conducted by these autonomous republics and oblasts. If pursuant to article 78 of the USSR Constitution which stipulated that territories of Union republics could not be changed without the consent of such republics, the collision between the above-mentioned article 3 of the Secession Law and the relevant article of the USSR Constitution was obvious. As mentioned above, under the USSR Constitution any changes of territories or boundaries of the Union republics among themselves could be made only by the mutual consent of the relevant republics. Moreover, under the requirements of the Secession Law, the referendums on secession by the autonomous units within the Soviet Union republics could be recognised valid if no less than two thirds of the USSR citizens residing in this territory voted for such secession. The results of such referendums had to be reviewed by the Supreme Soviets of the Union republics and furthermore submitted to the Supreme Soviet of the USSR, and the latter was entitled to submit the results of such referendum to the USSR Congress of National Deputies.<sup>632</sup> After all these above-mentioned procedures, the Supreme Soviet of the USSR had to arrange the transition

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<sup>632</sup> Secession Law (n 639).

secession period for the seceded unit with the high authorities of this unit.<sup>633</sup> During the transition period conciliation, boundary commissions and special joint groups on the resolution of financial, military and property matters should work actively and effectively. Only after the expiration of the transition period, did the Supreme Soviet have to call the USSR Congress of National Deputies that was required to approve the secession, and only after the compliance with all of these procedures could the secession be regarded as completed and successful. Undoubtedly, the results of such referendums could not be regarded as lawful. In the cases of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria, after the ethnic cleansings the referendums held by the separatist units were not attended by two thirds of the indigenous Georgian, Azerbaijani or Moldovan population of these regions. Moreover, none of the Union republics, including Georgia, Moldova, Armenia and Azerbaijan, ever used the Secession Law due to the political circumstances and sudden collapse of the USSR. The same applies to Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria which never complied with the above-referred procedures for the secession from their parent states, former Soviet republics; therefore, any references by these separatist units to the Secession Law is completely unacceptable and unreasonable from the perspective of the Soviet laws.

As stated above, the Secession Law was much criticised by some scholars as ‘insurmountable hurdles to the implementation of the principle of self-determination’ by the former fifteen Soviet republics.<sup>634</sup> In Mullerson’s opinion, adoption of the controversial secession law by the Soviet leadership did not avoid USSR collapse but,

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<sup>633</sup> *ibid.*

<sup>634</sup> Cassese, *Self-determination of Peoples* (n 328) 264-265; Mullerson, *International Law, Rights and Politics* (n 642) 75.

in contrast, escalated the situation, and the majority started considering the minority groups as the supporters of Kremlin.<sup>635</sup>

Taking into account contradictions between the Secession Law and the USSR Constitution,<sup>636</sup> it can be argued that the Law was void *ab initio* since it did not comply with the USSR Constitution. It can be argued that the Secession Law adopted right before the Soviet Union's collapse was an intentional act by the central Moscow authorities directed at the prevention of secession by the Union republics through imposing complicated and lengthy secession procedures and creation a permanent threat of secession by the autonomous units of the Union republics.

In fact, under the USSR Constitution only fifteen republics possessed the right to external self-determination, ie to secede from the Union, whereas all other autonomous units were not entitled to exercise such right.<sup>637</sup> It is also important to refer to the opinion of Tunkin, one of the 'fathers' of the Soviet school of international law who commented on the status of the Soviet republics. Tunkin in his fundamental work—'Theory of International Law'—in the 1970s stated that:

'A nation has the right freely unite itself with another nation or nations, and depending upon the nature of the unification in this event, the corresponding national entity will or will not enter into international relations as a subject of international law (in USSR, the union republics are subjects of international law, whereas the autonomous republics and other national entities do not act independently in international relations).'<sup>638</sup>

Nevertheless, it still not clear why the Supreme Soviet of the USSR adopted a law which should be defined as an attempt to violate the sovereign rights of the Union republics proclaimed by the 1977 USSR Constitution. By its nature such law was in violation of the territorial integrity and boundaries of the Union republics, constitutive

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<sup>635</sup> *ibid.*

<sup>636</sup> USSR Constitution (n 589).

<sup>637</sup> *ibid.*

<sup>638</sup> Tunkin (n 364) 67-68.

parts of the USSR. It can be argued that an incomppliance of the provisions of the Secession Law with the USSR Constitution and fundamental principles of international law such as territorial integrity, inviolability of frontiers and respect of sovereignty is so obvious that it cannot be doubted. The analysis of the political reasons of the adoption of such Law one year before the collapse of the USSR is beyond the scope of these researches; however, the legal analysis of the validity of such Law under the USSR Constitution is essential for the purposes of these researches. Therefore, it can be concluded that any other arguments including political ones should not be taken into account in view of such strong legal grounds.<sup>639</sup>

In conclusion, it can be argued that pursuant to the above review of the USSR legislation, the claims of the separatist units in the Post-Soviet area under Soviet legislation were illegal and groundless. Therefore, the references made by all separatist units in Georgia, Azerbaijan and Moldova to the Secession Law and the USSR Constitution for the purposes of justifying the secession of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria lack any solid legal arguments and justification.

However, for the purposes of the current researches from an international law viewpoint, the main concentration should be on article 72 of the 1977 USSR Constitution which granted a secession right to the fifteen Soviet republics. The 1977 USSR Constitution preceded by the 1924 and 1936 constitutions explicitly determined the holders of the secession right, limiting their number to the fifteen Soviet republics, constitutional parts of the USSR.<sup>640</sup> The provision of the right to secession by the Soviet Constitution granting such right to the Union republics is essential for application of the principle *uti possidetis juris* in the part of its '*juris*' requirement. In this case, it is agreed with Professor Shaw that *uti possidetis* is operable only in cases where the

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<sup>639</sup> Mirzayev, 'Azerbaijan on the Crossroads' (n 548) 53-72.

<sup>640</sup> Unger (n 534) 60.

internal administrative borders were expressly defined, especially in a federal state.<sup>641</sup> In fact, in the federative-type states, administrative units enjoy much autonomy and possessed clearly defined administrative borders. In the case of the USSR, the references to the constitutional right to secession are important for determining the status of the administrative units and the scope of their rights over the territories that they possessed. It can be argued that the provisions of the USSR Constitution stipulating the right to secession of the 'sovereign Union republics' as well the ones proclaiming the impossibility of the change of such republics' territories, served as a solid ground for consensual application of the principle of *uti possidetis juris* transforming the former administrative borders into the international boundaries of the newly independent states. The reference to the secession right and other relevant provisions of the USSR Constitution, at the top of the hierarchy of legal instruments, should not raise any doubts about the explicit delimitation of the administrative boundaries within the Soviet Union and at the highest state level. Indeed specifying the administrative boundaries and defining the relevant legislation establishing or affirming such administrative boundaries presents a difficulty with the effective application of the principle of *uti possidetis juris* as well as with determining the international boundaries on the basis of the old administrative borders.<sup>642</sup>

The Badinter Commission explicitly argued in favour of the application of the *uti possidetis* principle towards the administrative borders of the former constitutional units of the SFRY.<sup>643</sup> In its Opinions the Badinter Commission stated that, following the secession of six of the SFRY republics, the former internal federal borders would

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<sup>641</sup> Shaw, 'Territorialism and Boundaries' (n 1).

<sup>642</sup> *El Salvador v Honduras* (n 130) 387-388.

<sup>643</sup> 'EC Yugoslav Arbitration Commission' (n 259) 183-185; C Szacz, 'The Fragmentation of Yugoslavia' (1994) *Proceedings Am Soc Int L* 34; M Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' (1992) 86 *AJIL* 591.

transfer into the international boundaries of currently independent states after their successful secession and wide international recognition as independent states.<sup>644</sup> The Commission argued that such position is based on the principle of the territorial integrity of newly recognised independent states and the principle of *uti possidetis juris*.<sup>645</sup>

The Badinter Commission's opinions on the correlation of external self-determination and *uti possidetis* in the case of Yugoslavia and the inadmissibility on the use of external self-determination for the change of existing boundaries of newly independent states that were constitutional units of the SFRY<sup>646</sup> can be similarly applied to the USSR. Undoubtedly, there are many similarities between these two socialist federations, their constitutions and federative organisation structures. Like the collapse of Yugoslavia,<sup>647</sup> in the course of the USSR's dissolution the international community did not recognise the right of autonomous republics and oblasts to external self-determination.<sup>648</sup> In the case of Yugoslavia, it was expressly stated that the former autonomous units, being parts of the six former constitutional units of the SFRY, were entitled to the right to external self-determination neither under the SFRY Constitution (which lacked any provisions on secession right of the autonomous units) nor under the modern international law protecting territorial integrity and internationally recognised boundaries of sovereign states.<sup>649</sup> The Badinter Commission referred to the 1974 SFRY

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<sup>644</sup> European Community: Declaration on Yugoslavia and Guidelines on the Recognition of New States, UN Doc S/23293, (1991) Annexes 1 & 2, reprinted in (1992) 31 ILM 1485, 1486; International Conference on the Former Yugoslavia Documentation on the Arbitration Commission Under the UN/EC Geneva Conference: Advisory Opinions No. 11-15 of the Arbitration Commission, Opinion No 11, 16 July, 1993, (reprinted in 1993) 32 ILM 1586, 1587.

<sup>645</sup> 'EC Yugoslav Arbitration Commission' (n 260) 1488, 1499.

<sup>646</sup> 'EC Yugoslav Arbitration Commission' (n 259) 168.

<sup>647</sup> *ibid.*

<sup>648</sup> EC Declaration on Recognition, (n 351) 1487.

<sup>649</sup> 'EC Yugoslav Arbitration Commission' (n 259) 182-185; Sharma, *Territorial Acquisition* (n 451) 228-229.

Constitution, which stipulated that territories and borders of the six constitutional units of the SFRY could not be changed without their consent.<sup>650</sup>

An identical stance can be applied to the USSR republics, where article 78 of the 1977 USSR Constitution expressly provided that the territories of the Soviet republics could not be changed without their consent.<sup>651</sup> While the former autonomous units were not entitled under the Soviet Constitution to the secession right, claims of the separatist units in the Post-Soviet area on the exercise of the right to secession from their parent states upon the USSR's dissolution appear groundless. As opined by some commentators, there could be no 'cession from cession' by the autonomous units of the former Soviet republics since these units have a right to secession neither under domestic laws nor under international law.<sup>652</sup> As mentioned above, the position of various states and international organisations remains unchanged and there is no support for the external self-determination impairing the territorial integrity of existing sovereign states.<sup>653</sup> In fact, the dissolution of the USSR was more peaceful than that of the SFRY. Based on provisions of the Soviet Constitution providing the secession right to the former fifteen constitutional units of the USSR within their former administrative borders, they peacefully agreed on the transformation of such borders into the international boundaries of newly independent states. Such decision was expressly reflected in numerous bilateral and multilateral treaties and instruments initiated and signed within the CIS format. Therefore, it can be argued that *uti possidetis juris* has a consensual nature in the case of the Post-Soviet area, since upon exercising their right to self-determination the former USSR republics agreed on the transformation of the

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<sup>650</sup> 'EC Yugoslav Arbitration Commission' (n 260) 1500.

<sup>651</sup> USSR Constitution (n 589).

<sup>652</sup> M Weller 'Setting Self-Determination Conflicts: Recent Developments' (2009) 20(1) EJIL 111-165.

<sup>653</sup> *Reference re Secession of Quebec* (n 471) 217; *Katangese People's Congress v Zaire* (n 458) 389; *United Communist Party of Turkey and Others v Turkey* (ECHR Judgements 30 January 1998) 63 (1998-I) Reports 26-27.

former administrative borders into the international boundaries of the newly independent states. Due to the fact that internal administrative borders within the USSR as a federative state were explicitly determined and expressly guaranteed by the constitutional right to secession and the states further agreed on transformation of such borders into the international boundaries, it can be argued that the principle of *uti possidetis juris* was indeed applied and that it has solid grounds to override the right to external self-determination by some former autonomous units. The same approach is taken by scholars who argue that in the case of the USSR and the SFRY it was nothing but the application of the principle of *uti possidetis juris*.<sup>654</sup>

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<sup>654</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-507.



### **4.3 Legal Analysis of Four Post-Soviet Conflict Cases under International Law**

For the purposes of determining the correlation between the principle of *uti possidetis* and external self-determination it is essential to examine the four case studies under international law. The main emphasis here should be on assessing whether there is a right to secession of South Ossetia, Abkhazia, Nagorno-Karabakh and Transnistria. It is especially important in the light of claims of the separatist units on the availability of legal grounds to exercise external self-determination, while Georgia, Azerbaijan and Moldova contend that their international boundaries should be determined based on the former internal administrative borders of the USSR under the principle of *uti possidetis juris*. For these reasons, the emphasis should be made on the legal arguments of both sides and the relevant grounds for their claims under international law.

#### **4.3.1 *Uti Possidetis Juris v Self-Determination in the Four Post-Soviet Conflict Cases***

As discussed in previous chapters, there are sufficient grounds to contend that the principle of *uti possidetis* was applied to determination of the international boundaries of the fifteen former Soviet republics.

As also discussed in the previous chapter, the principle of *uti possidetis* refers to the stability of boundaries. The doctrine of the stability of borders was confirmed by the ICJ in the *Temple of Preah Vihear* case, where the Court held that the fundamental goal of the Parties upon conclusion of the agreement on the establishment of frontiers was the achievement of stability and a finality.<sup>655</sup> It is widely accepted that the stability of boundary treaties regardless of the fundamental change of circumstances is a norm of customary international law and it was incorporated into the 1969 Vienna Convention on the Law of International Treaties which is widely recognised as a scope of norms of

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<sup>655</sup> Temple of Preah Vihear case (n 202) 6, 34; RY Jennings, *The Acquisition of Territory in International Law* (New York, Oceana Publications 1963) 70.

customary international law.<sup>656</sup> Article 6 of the Vienna Convention provides that the doctrine of *rebus sic stantibus* is not applicable to boundary treaties. It has even been contended that boundary treaties ‘establish an objective special territorial regime valid *erga omnes*’.<sup>657</sup> Moreover, the same provisions have been included in the 1978 Convention on Succession of States (article 11).<sup>658</sup> A similar position was taken by the ICJ in the Territorial Dispute case, where the Court declared that the stability of boundaries is a fundamental principle and, once agreed, boundary agreement does not depend on ‘the continuing life of the treaty’.<sup>659</sup>

The boundaries of Georgia, Azerbaijan and Moldova were clearly defined in the last century through numerous delimitation arrangements between these republics and their neighbours which affirmed the final demarcation and delimitation of the boundaries between them.<sup>660</sup> As was mentioned before in the case of Georgia and Azerbaijan, along with such internal agreements with respect to the change of borders with three Soviet republics (the Azerbaijan SSR, the Armenian SSR and the Georgian SSR), there are still valid Soviet–Turkish Treaties expressly determining the boundaries between these three Soviet republics and Turkey.<sup>661</sup> Under article 3 of the Moscow Treaty of 16 March 1921 concluded between the Soviet Russia and the Kemalist Turkey, the Parties defined their exact boundaries.<sup>662</sup> The logical continuation of this Treaty was the Treaty of Kars of 13 October 1921 concluded among Turkey and three Transcaucasian republics separately—the Azerbaijan SSR, the Armenian SSR and the

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<sup>656</sup> *Namibia Case* (n 346); *Fisheries Jurisdiction Case* (n 252) 3, 18, 21; *Libya v Chad* (n 293) 6, 37; *Eritrea v Yemen* (n 539) 48; McNair (n 538) 656; Sinclair (n 538) 5-29; Rosenne (n 538) 121.

<sup>657</sup> *Eritrea v Yemen* (n 539) 48; Shaw, *International Law* (n 112) 950-951.

<sup>658</sup> ‘Vienna Convention on Succession of States in respect of Treaties’ (Vienna 23 August 1978) (Vol 1946) UN Treaty Series, 3.

<sup>659</sup> *Libya v Chad* (n 293) 6, 37.

<sup>660</sup> *External Politics of USSR* (n 540) (Vol II-IV).

<sup>661</sup> *ibid.*

<sup>662</sup> *ibid.*

Georgian SSR.<sup>663</sup> The Moscow/Kars Treaties defined the boundary lines among the Transcaucasian republics and Turkey, whereas it was clearly accepted by all parties the territorial delimitation among the concerned signatories.<sup>664</sup> It should be also mentioned that these treaties were concluded before the creation of the USSR in 1922 and were concluded formally by the sovereign Soviet Transcaucasian republics<sup>665</sup> which possessed with expressly defined borders upon entering this agreement. In fact, having considered the historical background of the Treaty of Kars, it can be argued that this boundary agreement legally re-confirmed the borders among the three Soviet Transcaucasian republics. In the case of Moldova, it was the Molotov–Ribbentrop Pact<sup>666</sup> which served as a ground for establishing the Moldavian SSR and then internal delimitation arrangements between the Ukrainian SSR, the Moldavian SSR and RSFSR,<sup>667</sup> which were further re-affirmed in a post-war bilateral treaty between Romania and the USSR.<sup>668</sup>

It can be argued that under international law the above-referred boundary agreements between and among the former USSR republics and their agreements with third states are still valid despite the collapse of the USSR which was the fundamental change of the circumstances. Therefore, the boundary lines established by these treaties may serve as *uti possidetis* lines for the determination of the state boundaries of the newly independent states of Georgia, Azerbaijan and Moldova. Moreover, based on the

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<sup>663</sup> Treaty of Kars (n 541).

<sup>664</sup> M Ismayil, 'The 1921 Moscow-Kars Treaty as Reflected in Azerbaijani and Russian Records and the Issue of Territorial Integrity in Northern Azerbaijan' (2002) 246 *Bulleten Vol LXVI* 517-529.

<sup>665</sup> Mammadov and Musayev (n 66) 75-76.

<sup>666</sup> Molotov–Ribbentrop Pact (n 95).

<sup>667</sup> *External Politics of USSR* (n 540).

<sup>668</sup> 'USSR – Romania Treaty on Delimitation of Boundaries 1949' (Moscow 25 November 1949) Full text in Russian in (1957) 24 *Collection of Bilateral Treaties of the Ministry of Foreign Affairs of USSR*, 157; 'Protocol on Specification of Boundary Line between USSR and the Peoples Republic of Romania' (Moscow, 4 February 1948) Full text in Russian in (1956) 13 *Collection of Bilateral Treaties of the Ministry of Foreign Affairs of the USSR* 266; *Case concerning Maritime Delimitation in the Black Sea (Romania v Ukraine)* [2009] ICJ Rep 32.

doctrine of stability of boundaries, it may be argued that such boundary agreements in the Post-Soviet area are serious argument in favour of application of the principle of *uti possidetis juris*, whereas such boundary lines should serve as '*juris*' lines for limitation of the right to external self-determination by the separatist units existing in their territories.

Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria argue the impossibility of transformation of the former internal administrative borders within the USSR into the international boundaries of Georgia, Azerbaijan and Moldova, claiming that most of such boundaries were artificially established during Soviet times by the central authorities of the Soviet Union without the will of the local population.<sup>669</sup> However, such arguments are rather vague and do not have any reasonable grounds and justification. In fact, in the case of Azerbaijan and Nagorno-Karabakh reference should be made to the historical background of this conflict set out in previous chapters; it is clearly seen that in the early 1920s even before the sovietisation of Azerbaijan and the creation of the NKAO, the local Armenian population unanimously expressed their consent to be within Azerbaijan and it happened during the temporary occupation of Azerbaijan by the British forces of commander Thomson and even later during the early stages of the sovietisation of Azerbaijan.<sup>670</sup> The same happened with South Ossetia and Abkhazia, where the population was queried about the unification with Georgia and no mass protests were ever recorded in historical sources.<sup>671</sup> In the case of Transnistria,

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<sup>669</sup> NV Bagapsh, 'The Models of Ethno-Demographic Development of Unrecognized States on Post-Soviet Space' (Sukhumi 2001) (In Russian)  
<[http://apsnyteka.narod2.ru/b/modeli\\_etnograficheskogo\\_razvitiya\\_nepriznannih\\_mezhdunarodnim\\_soobshchestvom\\_gosudarstv\\_na\\_postsovetском\\_prostranstve/index.html](http://apsnyteka.narod2.ru/b/modeli_etnograficheskogo_razvitiya_nepriznannih_mezhdunarodnim_soobshchestvom_gosudarstv_na_postsovetском_prostranstve/index.html)> accessed 4 February 2012; N Kharitonova, *Transnistrian Conflict and Problems of Unrecognised States in the Post-Soviet Area at the End of XX and Beginning of XXI Centuries* (PhD Dissertation unpublished) (In Russian) (Moscow, MSU 2008); M Agadjanian, *Nagorno-Karabakh Conflict in the light of Protection of Human Rights: Political and Legal Aspects* (Yerevan, Institute of Political Researches 2009) (In Russian) 27-68.

<sup>670</sup> Altstadt (n 55).

<sup>671</sup> *External Politics of USSR* (n 540) (Vol I-II).

instead the local population of Bessarabia (the territory occupied by Soviet forces in early 1940) welcomed the Soviet troops as a result of liberation from the Nazi Romanian regime of Antonescu.<sup>672</sup> Moreover, the internal borders within the USSR in the case of Georgia and Azerbaijan were defined and had existed for over seventy years and in the case of Moldova for over forty years, providing a ground to argue about the consistent practice of existence of such boundaries without any internal and external objectors to such boundaries. It should also be argued that the boundaries established by the central authorities of the USSR were valid under its internal legislation which had a sovereignty over the entire territory of the Soviet Union. Like in the case of Latin America, Africa, Asia and Europe (as considered in the previous chapter), such delimitation decisions of the central authorities should serve as a solid ground for determination of the international boundaries of independent states based on the principle of *uti possidetis juris*.<sup>673</sup> Even the argument that those territories cannot be considered as those which possessed administrative borders due to the fact that they were forcefully incorporated into the USSR by Russia is irrelevant, since the use of force at that time was lawful under international law. For these reasons, the internal and international agreements as well as delimitation decisions made by the central Soviet authorities establishing the boundaries of Georgia, Azerbaijan and Moldova should be respected and serve as a ground for transformation of their former internal Soviet administrative borders into the international boundaries under the principle of *uti possidetis juris* following the multilateral consensual affirmation within the CIS format.

The separatist regimes in the Post-Soviet area and their protectors also claim that such artificially established borders of the former Soviet republics were not clearly determined and that such borders cannot serve as *uti possidetis* lines for the determining

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<sup>672</sup> King (n 93) 54.

<sup>673</sup> *El Salvador v Honduras* (n 130).

of the international boundaries of newly independent states.<sup>674</sup> However, as set out in the previous chapters, in order to argue in favour of the principle of *uti possidetis*, the relevant parties may require to refer to the texts of old boundary delimitation treaties, geographical maps and other evidences. The geographical maps to a certain extent should serve as an evidence for the position of the boundary lines. Especially important ones are the maps that were attached to the boundary treaties since such maps clearly reflect the delimitation lines pursuant to the provisions of the treaties.<sup>675</sup> It is believed and widely supported that the maps published by the official authorities of a state with the indication of its boundaries reflect the official position of that state with respect to its territorial limits.<sup>676</sup> It is obvious that in the twentieth century it was possible to clearly define and put on maps the boundaries of states or constitutive parts of a state and their administrative borders. It is not difficult to refer to the officially published maps of the USSR produced by the relevant state authorities, where the boundaries of the former Soviet republics can be clearly defined and visually seen. If in the case of Latin America and Africa the absence of the clear geographic maps did not allow the parties to determine the former administrative borders of the former colonial units and it created huge problems for the concerned parties,<sup>677</sup> in the case of the USSR there was a sufficient number of high-quality maps clearly defining the former administrative borders among the former Soviet republics, including the borders of the Georgian SSR, the Azerbaijan SSR and the Moldavian SSR. These maps were final, published in huge numbers in the USSR and abroad, and were approved by experts in cartography. Such maps published in the USSR pursuant to the cartography rules and with the application

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<sup>674</sup> NV Bagapsh (n 685); N Kharitonova (n 685); M Agadjanian (n 685).

<sup>675</sup> Y Kolosov and V Kuzetsov, *International Law* (Moscow, Mejdunarodnie Otnoshenia 1995) (In Russian) 84.

<sup>676</sup> *Colombia v Venezuela* (n 156) 223-228; Cukwurah (n 111) 114; De la Pradelle (n 141) 86-87.

<sup>677</sup> *Beagle Channel Case*, (n 156) 93-125; Cukwurah (n 111) 114.

of modern technologies and measurements instruments allow today to determine the boundary lines of the former Soviet republics pursuant to requirements of the principle of *uti possidetis juris*.<sup>678</sup>

As discussed in the previous chapters, the principle of *uti possidetis* somehow connected with self-determination upon the gaining of independence and the creation of a new state. However, the practice of international law shows that the principle of *uti possidetis* is called to protect newly created states from the application of the self-determination principle in the form of aggressive separatism by certain minority groups. With reference to the numerous facts and arguments considered therein, it should be accepted that upon the collapse of the USSR and the SFRY the international community achieved a unanimous consensus that boundaries of the newly independent states had to be determined on the grounds of the principle of *uti possidetis juris* transforming the former administrative borders of the former constitutional units of these socialist federations into the international boundaries of the newly independent states of the Post-Soviet area and the former SFRY.<sup>679</sup> Moreover, the Badinter Commission held that self-determination is not a ground for the change of existing boundaries for the purposes of forming newly independent states or joining others.<sup>680</sup> In the case of Yugoslavia, the Commission held that only the six former republics of the SFRY which were constitutionally defined units were entitled to the right to external self-determination within their former administrative borders, which now should be considered as international frontiers. It should be referred to Opinion No 2 of the Badinter Commission wherein it was stated that while international law has clarified all meanings of self-determination, under any circumstances the right to self-determination

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<sup>678</sup> Mirzayev, *Contemporary Problems* (n 603) 63-67.

<sup>679</sup> Eide (n 545) 282.

<sup>680</sup> Sharma, *Territorial Acquisition* (n 451) 229.

should not encompass changes of existing boundaries under the principle of *uti possidetis* upon the achievement of independence, if the parties have not agreed otherwise.<sup>681</sup> Undoubtedly, as it mentioned in the previous chapters, the state practice, the Frontier Dispute case and the Opinion of the Badinter Commission contributed much in application of the principle of *uti possidetis juris* beyond decolonisation. It can be agreed with Pellet that the principle of *uti possidetis* emphasises the importance of the principle of respect of boundaries existing upon the achievement of independence.<sup>682</sup>

It should be noted that international law recognises any attempts to infringe peace and security as a serious violation of the UN Charter and such actions will be declared illegal by the UNSC, as in the case of the Katangese province of Congo.<sup>683</sup> As previously stated, modern international law does not permit secession as a tool for the re-drawing of the recognised international boundaries, and such position was also expressed in Advisory Opinion No 2 of the Badinter Commission.<sup>684</sup> Again, reference should be made to the position of the international community in the Aaland dispute, where it was stated that the compromise to national minorities with respect to the secession from the society and the state to which they belong on the basis of lingual, religious and ethnic differences would result in accession of anarchy in the international arena which in turn contradicts the concept of state as a territorial and political unit.<sup>685</sup>

Moreover, reference should be made to the status of the fifteen Soviet republics within the USSR which allows one to argue that under both the Soviet laws and international law only the fifteen former Soviet republics being constituent units were

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<sup>681</sup> 'EC Yugoslav Arbitration Commission' (n 260) 1499-1500.

<sup>682</sup> Pellet, 'Note sur la Commission d'Arbitrage' (n 273) 180.

<sup>683</sup> UNSC Res 169 (24 November 1961) UN Doc (S/5002).

<sup>684</sup> 'EC Yugoslav Arbitration Commission' (n 259) 183-184.

<sup>685</sup> Reports by the Commission of Rapporteurs (n 235) 28.



entitled to exercise external self-determination, while the others were not the lawful holders of such right. Secession of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria in the early 1990s enjoys no legal argumentation of justification, and these units should rather seek the internal self-determination within their parent states. Such position was also expressed by the Supreme Court of Canada in the Quebec case, which stated that the population of Quebec is not entitled to the right to external self-determination under international law impairing the territorial integrity of sovereign Canada, and it should seek ways for self-determination within the existing state.<sup>686</sup> In *Katangese Peoples' Congress v Zaire*, the African Commission of Human Rights emphasised that the exercise of self-determination by Katanga should comply with the factors of the sovereignty and territorial integrity of Zaire.<sup>687</sup> The same position was taken by the ECHR in the *United Communist Party of Turkey and Others v Turkey*, where it was stated that the rights of minority groups to self-determination should be exercised within the state boundaries of Turkey on a mutual basis with democratic restructuring and without damaging the territorial integrity of Turkey.<sup>688</sup>

It is clear from the researches of the four Post-Soviet conflict cases that their secession from the metropolitan states was accompanied by the use of force, whereas territorial changes in independent existing states through the use of force cannot be treated lawful and therefore would not be recognised. Under such circumstances, the recognition of such illegal acquisition of the territory in the case of the Post-Soviet area should be treated as interference into internal affairs of that state and infringement of the sovereign state's sovereign rights.<sup>689</sup>

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<sup>686</sup> *Reference re Secession of Quebec* (n 471) 217.

<sup>687</sup> *Katangese People's Congress v Zaire* (n 458) 389.

<sup>688</sup> *United Communist Party of Turkey and Others v Turkey* (n 668) 26-27.

<sup>689</sup> L Damrosch and others, *International Law, Cases and Materials* (St Paul, West Group 2001) 267.

There are precedents when entities such as Manchukuo and Rhodesia created by the use of force and which were under the de facto control of other state(s) were not recognised and condemned by the international community.<sup>690</sup> In case of Manchukuo the League of Nations refused to accept Manchuria's claim to independence due to vivid continued political, economic and military involvement of Japan and the latter's de facto control over Manchukuo.<sup>691</sup> None of the four separatist entities in the Post-Soviet area considered herein meet factual statehood criteria under the Montevideo Convention and their dependence as 'puppet entity' on third state is of highest degree including the most vital feature such as external relations<sup>692</sup> as it could be observed in Manchukuo case.

Moreover, under Articles on Responsibility of States for Internationally Wrongful Acts (articles 28–31 and 34–37) which can be considered as a codification of the norms of customary international law, it is Russia's obligations in the cases of Abkhazia, South Ossetia and Transnistria, and Armenia's obligations in the case of Nagorno-Karabakh, to cease the occupation of Georgian, Moldovan and Azerbaijani territories and to return the displaced population back, to undertake an obligation to refrain from similar actions in the future and to make compensation and restitution for the damages caused.<sup>693</sup>

Moreover, as discussed in the previous chapters, there is no much room for the 'Remedial Theory' to serve as a legal justification for the separatist regimes of

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<sup>690</sup> League of Nations 'Special Committee Report Evaluating Dispute between Japan and China over the Recognition of Manchukuo' (1933) O.J. 56 112; Crawford, *The Creation of States* (n 108) 62; UNSC Res 1202 (XX) (6 May 1965) UN Doc S/PV1202.

<sup>691</sup> HJ Timperley, 'Japan in Manchukuo' (1934) 24 *Foreign Affairs* 295; PC Jessup, *The Birth of Nations* (New York, Columbia University Press 1974) 334;

<sup>692</sup> *Customs Regime between Germany and Austria (Germany v Austria) (Judgment)* [1931] PCIJ (Ser A/B) No 41, 46; *Rights of Nationals of the United States of America in Morocco (France v US) (Judgment)* [1952] ICJ Rep 176, 183; *French Indemnity of 1831 (US v France)* [1831] US Claims Commission 5 Moore's Int Arb 4447-4485.

<sup>693</sup> Articles on Responsibility of States for Internationally Wrongful Acts, UNGA Res 56/83 (12 December 2001) UN Doc A/56/49(Vol I) Corr 4.

Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria. However, even if the above-mentioned vague and controversial theory is accepted, the lack of sufficient evidences, and most importantly the absence of grounds, to support any gross violations of the human rights of the populations of these separatist units as being of a continuing nature make the references to it irrelevant and illogical. The separatist entities including Nagorno-Karabakh and Transnistria refer to the effective control theory which in their opinion is a prerequisite for recognition, since in their opinion they exercise effective control over their territories.<sup>694</sup> However, such views are controversial and disputable, and sometimes such effective control cannot be sufficient for recognition, and even in the case of these four separatist units it was argued that effective control is exercised by third states, but not by the separatist authorities on their own.<sup>695</sup>

Moreover, as previously discussed herein, the definition of ‘people’ is not defined under international law. In the Secession of Quebec case, the Supreme Court of Canada stated that the definition of ‘people’ was ‘somewhat uncertain’.<sup>696</sup> In the Aaland Islands dispute, the international experts argued that a small group of people could not be treated as a nation for the purposes of self-determination.<sup>697</sup> In the cases of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria, the population of these territories cannot be considered as ‘people’ for the purposes of the external self-determination and expression of their will through referendums after massive ethnic cleansing committed by the separatist authorities and the exodus of Georgians, Azerbaijanis and Moldovans from these territories. As stated above, the same position was taken by the Badinter Commission with respect to the Bosnia and Herzegovina independence case, where it

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<sup>694</sup> *Ilascu* (n 100); *Catan and Others v Moldova and Russia* (APP no 43370/04, 8252/05 and 18454/06) ECHR 19 October 2012; *Chiragov* (n 502).

<sup>695</sup> *ibid.*

<sup>696</sup> *Reference re Secession of Quebec* (n 471) 123.

<sup>697</sup> ‘The Aaland Islands Question’ Report (n 232) 1921.

was stated that self-determination through referendum could be exercised only if all citizens of a certain territorial unit participate in such referendum.<sup>698</sup>

Moreover, the capacity of an entity to enter into any relations with other states has a direct link with the formal recognition of the statehood of that entity by other states.<sup>699</sup> Moreover, as previously mentioned, the will of the metropolitan state to consent to the secession of the breakaway entity is one of the pre-conditions for such entity's capacity to enter into any relations with other states. In the case of Rhodesia, Great Britain refused to accept the independence of Rhodesia and it played a serious role in depriving Rhodesia of the capacity to enter into relations with other states.<sup>700</sup> It was aptly commented by Doebling that if the recognition of such seceded entity was made in the absence of the injured state's consent, it should be considered as the infringement of the sovereign state's rights.<sup>701</sup> Therefore, it can be argued that, for recognition of the seceding entity, the consent and the recognition of the predecessor state is required and that such actions are the main criterion for the statehood of such breakaway entity.<sup>702</sup> As stated above, in the case of Post-Soviet separatist entities, none of the metropolitan states of Georgia, Azerbaijan and Moldova ever accepted the independence of the breakaway entities, and none of such entities has been recognised or gained capacity to enter into relations with other states.

As discussed in the previous chapters, the support of the international community is also vital for the successful secession. However, in this respect Arechaga aptly states that external self-determination in the form of secession could be considered lawful if it has received the 'external support and finally succeeded' and, as an example,

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<sup>698</sup> 'EC Yugoslav Arbitration Commission' (259) 182-185; Sharma, *Territorial Acquisition* (n 451) 228-229.

<sup>699</sup> DA Ijalaye 'Was Biafra At Any Time a State in International Law?' (1971) 65 AJIL 554.

<sup>700</sup> *ibid.* 552.

<sup>701</sup> K Doebling 'Effectiveness' in R Bernhardt, *Encyclopedia* (n 138) 47.

<sup>702</sup> C Haverland 'Secession' in R Bernhardt (ed), *Encyclopedia* (n 138) 357

cites Bangladesh, where the international community recognised the right of Bangladeshis to external self-determination.<sup>703</sup> Unlike Bangladesh which is the only unique case where its wide recognition led to prompt admittance to the UN and played a key role in formation of statehood without the parent state's consent,<sup>704</sup> in case of the four Post-Soviet conflicts neither the UN nor the EU or other key states supported separatist entities. In the case of the Post-Soviet separatist entities, except for the recognition of Abkhazia and South Ossetia by Russia and some of its overseas regimes, none of them was recognised or widely supported by the vast majority of states.

Non-recognition by the international community of the independence of Katanga is a clear example of the general attitude to illegal secession.<sup>705</sup> In some cases the recognition of secession cannot be accepted by the international community. In the case of the Turkish Republic of Northern Cyprus, it was only Turkey who formally recognised its independence, but such recognition was not welcomed by the UNSC.<sup>706</sup> In fact, even the recognition of Abkhazia and South Ossetia by Russia and some of its overseas allies does not change the situation with the legitimisation of their secession, since these entities still lack the status of the truly independent statehood features like in the case of Nagorno-Karabakh and Transnistria. In fact, the state practice argues in the favour of the non-recognition of unilateral declarations on secession of separatist entities like Abkhazia, South Ossetia and Transnistria. By way of example, in the case of Southern Rhodesia the unilateral declaration of independence by a minority white group was condemned and not recognised by the international community.<sup>707</sup>

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<sup>703</sup> De Arechaga, 'International Law in the Past' (n 336) 111.

<sup>704</sup> A Orakhelashvili (n 121) 8.

<sup>705</sup> M Weller, 'The Self-Determination Trap' (2005) 4 *Ethnopolitics* 33.

<sup>706</sup> UNSC Res 541 (n 361).

<sup>707</sup> Damrosch (n 689) 266.

#### 4.3.2 Issues Arising under CIS Legal Format

Some commentators criticise the Badinter Commission's position on referring to the principle of territorial integrity and *uti possidetis juris*.<sup>708</sup> They also question the argument on legal grounds for the six constitutional units' secession right based on the principle of *uti possidetis* allowing transformation of former internal administrative borders into international boundaries.<sup>709</sup> By way of argument they refer to the fact that internal federal borders of the SFRY were not international boundaries and transformation of such internal administrative borders based on *uti possidetis* is not applicable since the concerned parties achieved no mutual agreement on such determination of boundaries.<sup>710</sup> However, even if such position on the SFRY is accepted, it is clearly not the case for the former republics of the USSR which expressly agreed on transformation of former internal borders into the international boundaries either in the bilateral treaties format (Russia and the Baltic States, the Baltic States among themselves and Russia and Ukraine) or in the multilateral CIS format (among the remaining eleven (and Georgia as the twelfth in specific periods) former Soviet republics).

Considering the historical background of the USSR collapse, the whole process of delimitation of the boundaries of the former Soviet republics clearly indicates that the former constitutive parts of the USSR agreed to apply the principle of *uti possidetis juris* with respect to their boundaries and territories. For example, it can be agreed with the comments of some writers that the collapse of the USSR can be divided into two

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<sup>708</sup> P Radan (n 310) 50, 53.

<sup>709</sup> *ibid.*

<sup>710</sup> *ibid* 58.

absolutely different periods.<sup>711</sup> The first period is 1991, the time when the primary aim of the former Soviet republics was the achievement of independence from Moscow authorities. It is notable that upon the collapse of the USSR, the republics paid primary attention to the achievement of political independence and postponed the determination of boundaries among themselves to a later stage for the further peaceful settlement of disputes.<sup>712</sup>

It should be noted that, like the Declaration on Principles of International Law, the Decolonisation Declaration, the Cairo Declaration and other international and regional legal instruments, the acts entered into within the CIS format also confirmed the recognition of the prevailing force of the principles of territorial integrity and inviolability of frontiers over the external self-determination targeting the territorial unity of sovereign states. The second period, according to Weerts, came in 1993 when newly independent republics—members of the CIS—signed additional agreements and adopted the CIS Charter. During this period the former republics of the USSR—newly independent member states of the CIS—officially expressed their consents on recognition of the existing boundaries.<sup>713</sup> To support the above-mentioned ideas expressed by some commentators, it can be argued that there were two stages of the application of the principle of *uti possidetis juris* with respect to the boundaries of the former USSR republics. It can be argued that recognition of the former Soviet administrative borders as international boundaries of the newly established independent states in 1993 is a strong argument in favour of arguing that the principle of *uti possidetis juris* was applied by the former constitutional units of the USSR regardless of

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<sup>711</sup> L. Weerts, 'Heurs et Malheurs du Principe de l'Uti Possidetis: le cas du Démembrement de l'URSS' in O. Corten (ed), *Démembrement d'Etats et Délimitations Territoriales: l'Uti Possidetis en Question* (Bruxelles, Bruylant 1999) 107.

<sup>712</sup> *ibid.*

<sup>713</sup> *ibid.*

the absence of any direct references to the principle in the Almaty Declaration or the CIS Charter.

Debates over the determination of boundaries of the newly established CIS member states strongly encouraged the parties involved to fix their positions in the agreements that would guarantee the inviolability of boundaries existing within the former USSR.<sup>714</sup> Most of the former Soviet republics supporting the idea of inviolability of frontiers relied on instability in the region, threat to the peace and security, and common principles of international law. Even the EC Guidelines on Recognition of New States in Eastern Europe and Soviet Union of 16 December 1991 explicitly stated the respect of all existing boundaries that could be changed only through and upon achievement of mutual consent.<sup>715</sup>

Article 5 of the 8 December 1991 Agreement on establishment of the Commonwealth of Independent States signed in Minsk proclaims that the Parties should recognise and respect the territorial integrity and the inviolability of existing boundaries within the CIS.<sup>716</sup> It was reaffirmed in the 21 December 1991 Alma-Ata Declaration signed by the eleven former republics of the former USSR with a follow-up upon Georgia's joining to all these instruments. This Declaration affirms the obligations of member states of the CIS to recognise and respect the territorial integrity and the inviolability of the existing boundaries of the member states.<sup>717</sup> The CIS Charter adopted on 22 January 1993 in Minsk in article 3 affirms a respect of the territorial integrity of member states and recognition of the existing boundaries, ie the transformation of the former administrative borders of the former USSR republics into

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<sup>714</sup> *ibid* 119.

<sup>715</sup> EC Declaration on Recognition of New States in Eastern Europe and Soviet Union (16 December 1991) (1992) 31 ILM 1487.

<sup>716</sup> Minsk Agreement (n 279).

<sup>717</sup> Alma-Ata Declaration (n 284).



the international boundaries.<sup>718</sup> Moreover, in 1994 the member states of the CIS signed the new Declaration on Respect of Sovereignty, Territorial Integrity and Inviolability of Boundaries of Member States<sup>719</sup> which reinforced the application of the principle of *uti possidetis juris* to the territory and boundaries of the former USSR republics.

In this connection, it is surprising that Armenia (through the occupation of 20% of Azerbaijan's territory and supporting the separatist regime in Nagorno-Karabakh through the use of force) violated its obligations both under the UN Charter and the CIS Charter as well as numerous legal instruments adopted within the CIS.<sup>720</sup> The same could be said of Russia which supports the separatist regimes in Georgia and Moldova. In this case, Professor Shaw rightly observes that such agreements within the CIS and the position of the European Community expressed in the Guidelines give grounds to the application of the principle of *uti possidetis* and deprive the separatist movements of Abkhazia and South Ossetia from seceding from the Republic of Georgia, Nagorno-Karabakh from the Republic of Azerbaijan, and the Russian-populated Transnistria from the Republic of Moldova.<sup>721</sup>

Legally speaking, it meant that despite the existing territorial disputes the former Soviet constitutional units took the *uti possidetis juris* principle as a legal instrument for establishing stability and as a tool preventing the defragmentation of the newly independent states. It provides a ground to argue the prevailing force of *uti possidetis juris* over the right to external self-determination whose exercise is claimed by the breakaway units of such newly independent states of the Post-Soviet area.<sup>722</sup> As

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<sup>718</sup> CIS Charter (n 281).

<sup>719</sup> CIS Declaration on Respect of Sovereignty, Territorial Integrity and Inviolability of Boundaries of Member States (15 April 1994) (1994) 7 Bulletin of International Agreements (In Russian) 9-10.

<sup>720</sup> Mirzayev, 'Azerbaijan on the Crossroads' (n 548).

<sup>721</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>722</sup> J Castellino, *International Law and Self-Determination: The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial 'National' Identity* (The Hague, Martinus Nijhoff 2000) 120.

discussed hereinabove, the practice of the former USSR republics and the legal grounds expressed in the instruments signed and adopted within the CIS format contributed greatly to the strengthening of the principle of *uti possidetis*.<sup>723</sup> It should be emphasised that even the absence of direct references to the principle of *uti possidetis* in the key legal instruments adopted within the CIS format provides a ground to argue that one of the primary goals of the former USSR republics was the intention to apply the principle of *uti possidetis* for the legitimisation of the transformation of former administrative borders inherited from the Soviet Union into the international boundaries of the newly independent states. It can be agreed with Professor Shaw that although both Minsk and Almaty declarations directly referred to the principle of territorial integrity, in fact the parties' true intention was the application and strengthening of the principle of *uti possidetis* for the purposes of the legitimisation of new boundaries on international, regional and national levels that had emerged from the former administrative borders of the Union republics.<sup>724</sup>

It should be noted that the international community also expressed its position towards the secessionist movements in the former republics of the former USSR. The UNSC condemned the secessionist movements in Georgia and Azerbaijan. The respect of the territorial integrity and inviolability of Azerbaijan's state boundaries was affirmed in numerous UNSC resolutions.<sup>725</sup> Since the beginning of the Nagorno-Karabakh conflict, the territorial integrity and inviolability of Azerbaijan's boundaries, as well as occupation of Azerbaijan's territory by the Armenian forces and the illegal separatist activity in the Nagorno-Karabakh region, were confirmed at the Lisbon

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<sup>723</sup> Shaw, 'The Heritage of States' (n 142) 110-111; Eide (n 545) 282; Weerts (n 711) 107.

<sup>724</sup> Shaw, 'The Heritage of States' (n 142) 110-111.

<sup>725</sup> UNSC Res 822 (1993) (30 April 1993) UN Doc S/ES/4; UNSC Res 853 (1993) (29 July 1993) UN Doc S/ES/853; UNSC Res 874 (1993) (14 October 1993) UN Doc S/ES/874; UNSC Res 884 (1993) (12 November 1993) UN Doc S/ES/884.

Summit,<sup>726</sup> in the Resolution of Council of Europe,<sup>727</sup> in resolutions of the Organisation of the Islamic Conference<sup>728</sup> and by other organisations.<sup>729</sup> The similar position was taken with respect to the territorial integrity and boundaries of Georgia.<sup>730</sup> There are also some legal instruments on Moldavian Transnistria.<sup>731</sup> The above-mentioned facts show that in each case the territorial integrity and state boundaries of the states concerned—the former republics of the USSR—have been recognised as territories and boundaries of the newly independent states.

It is also notable for the state practice in the Post-Soviet area that in the Agreement between Ukraine and Russia of 19 November 1990 the Parties agreed to respect the territorial integrity and state boundaries of each other, inherited from the delimitation made within the Soviet Union,<sup>732</sup> ie they applied the principle of *uti possidetis*. Ukraine initially referred to *uti possidetis* as a legal ground for the delimitation of boundaries between the former USSR republics.<sup>733</sup> Ukraine's position was connected with the desire to retain Crimea—historical region of Russian dominance transferred to the Ukrainian SSR by RSFSR in the 1960s during the reign of

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<sup>726</sup> Lisbon Summit Final Declaration (n 558) Annex 1.

<sup>727</sup> PACE Resolution No 1416 (25 January 2005) CE Doc 10364.

<sup>728</sup> Resolution No 12/8-p (is) (1997); Resolution No 18/8-e(is) (1997); Resolution No 21/9-p(is) (2000); Resolution No 21/9-e(is) (2000); Resolution No 25/9-c (is) (2000); Resolution No 10/31-P (2004), Full texts at <<http://www.karabakh.az/en/sb/solution/position-of-international-organisations-towards-the-conflict-settlement/organization-of-the-islamic-conference-oic>> accessed 6 February 2013.

<sup>729</sup> International Organization for Migration *Migration in the CIS 1997-1998* (IOM 1999) 40; HRW, *Seven Years of Conflict*, (HRW, Helsinki 1994) 36; US Committee for Refugees (USCR), *World Refugee Survey 2000 Country Report - Azerbaijan* (31 December 2000) (Washington DC, USCR 2000).

<sup>730</sup> UNSC Res 876 (1993) (19 October 1993) UN Doc S/RES/876; UNSC Res 881 (1993) (November 1993) UN Doc S/RES/881; UNSC Res 892 (1993) (22 December 1993) UN Doc S/RES/892; UNSC Res 896 (1994) (31 January 1994) UN Doc S/RES/896; UNSC Res 906 (1994) (25 March 1994) UN Doc S/RES/906; UNSC Res 937(1994) (21 July 1994) UN Doc S/RES/937; UNSC Res 993 (1995) (12 May 1995) UN Doc S/RES/993; UNSC Res 1036 (1996) (12 January 1996) UN Doc S/RES/1036.

<sup>731</sup> See n 568.

<sup>732</sup> Full text in Russian in *Rossiyskaya Gazeta* (25 January 1991)

<sup>733</sup> Lalonde (n 4) 220.

Nikita Khrushchev, Ukrainian-origin First Secretary of the Communist Party of the USSR.<sup>734</sup>

Thus, from the foregoing it may be argued that under the CIS Charter and other legal instruments jointly signed and adopted by the former USSR republics within the CIS, the principle of *uti possidetis juris* was applied by the former Soviet republics.<sup>735</sup> However, as it was reviewed before the right to self-determination had been formed as a fundamental norm of international law, the international acceptance of this principle in the form of secession from an independent state has not been recognised.<sup>736</sup> The position of the international community in the process of the USSR and the SFRY dissolution through the support of the territorial integrity of the newly independent states has shown that it was seriously concerned with matters of international peace and stability, which may be threatened by boundary and territorial conflicts. In fact, the dissolution of the Soviet Union raised the question on the current status of the right to self-determination in the form of secession.<sup>737</sup>

Obviously, by signing the UN Charter, the CIS Foundation Agreement, the Almaty Declaration, the CIS Charter and a number of other relevant legal instruments without any stipulations, Armenia has recognised the territorial integrity and inviolability of boundaries of the Republic of Azerbaijan, which certainly implies that Nagorno-Karabakh is part of Azerbaijan's territory, and Russia respectively recognised

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<sup>734</sup> Baburin (n 424) 247-251.

<sup>735</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492; Mullerson, 'New Developments' (n 284) 299; FS Mirzayev, 'The Principle of Uti Possidetis in Modern International Law and its Application in the Post-Soviet Area: Theory and Practice' (2004) 6(54) Law and Politics (In Russian) 43-53; FS Mirzayev, Principle of Uti Possidetis: History and Modern Reality (n 6) 36-47.

<sup>736</sup> G Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?' (1995) 16 Mich J Int'l L 738; D Cass, 'Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories' (1992) 18 Syracuse J Int'l L & Com 27-29.

<sup>737</sup> L Eastwood, 'Secession: State Practice and International Law After The dissolution Of Soviet Union and Yugoslavia' (1993) 3 J Comp & Int'l L 300.

and accepted the international boundaries of Georgia and Moldova that encompass South Ossetia, Abkhazia and Transnistria accordingly.<sup>738</sup>

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<sup>738</sup> V İbayev, *Armenia-Azerbaijan Nagorno-Karabakh Conflict within International Legal Framework* (Baku, Elm Publishing 2006) (In Azerbaijani) 78-123.

#### **4.4 'Third State(s)' Factor in the Four Conflict Cases**

##### **4.4.1 Russia's Special Role in the Abkhaz and South Ossetia Conflicts**

It is argued that the fifteen years of peace negotiations basically led by Russia (and passively by the UN and other international organisations) gave nothing to the settlement of Abkhaz or the South Ossetian conflict. The only success of such mediating was the ceasefire that ended loss of life.

If the Russian-dominated CIS peacekeeping forces played some positive role at the early stages of the conflict, they were used by Russia as the demonstration of Russian support to the separatists at the later stages. All forms of Russian support to these two breakaway regions are considered by Georgia as aggression against its territorial integrity, boundaries and sovereignty as well as interference in its internal affairs. Georgia was opposing to the Russian strong political and economic presence in the breakaway regions and claimed to replace Russian peacekeeping forces, blaming them for the lack of neutrality.<sup>739</sup>

After the 'Rose Revolution' and Michael Saakashvili's political triumph, Georgia's relations with Russia started worsening day by day. Georgia undertook certain measures to bring the conflicts into the international arena and condemned Russia's non-constructive role as a mediator.<sup>740</sup>

The Five-Day War in South Ossetia and the ceasefire between Georgia and Russia dramatically changed the whole picture of these two conflicts. In the course of the Russian–Georgian war the Russian troops not only pushed back the Georgian troops from the breakaway region, but also illegally occupied other Georgian territories for a

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<sup>739</sup> G Sepashvili, 'Resolution on Peacekeepers Leaves Room for More Diplomacy'. Civil Georgia (16 Feb 2006) <<http://www.civil.ge/eng/article.php?id=11833>> accessed 26 December 2009.

<sup>740</sup> 'M Saakashvili's UN Speech Focuses on Conflict Resolution, Relations with Russia' Civil Georgia (21 Sep 2004) <<http://www.civil.ge/eng/article.php?id=7888>> accessed 25 December 2009.

short time period.<sup>741</sup> Such illegal occupation of the Georgian territory and illegal actions of Russia in the occupied territories of Georgia were strongly condemned.<sup>742</sup> Georgia itself considered the Russian military interference as occupation of its territory. For these purposes, immediately after the war Georgia declared South Ossetia and Abkhazia as occupied territories and passed the respective law ‘On Occupied Territories’,<sup>743</sup> governing the legal status of these lands which was welcomed by the Council of Europe.<sup>744</sup>

Along with recognition of South Ossetia, Russia recognised the independence of Abkhazia after defeating Georgia in the military campaign of 2008. Immediately after the recognition of Abkhazia’s independence, the separatist unit signed and ratified agreement with Russia on a military base to be located in Abkhazia.<sup>745</sup> Abkhazia has also granted a right to guard Abkhazia’s borders to the Russian troops.

Recognition of South Ossetia and Abkhazia by Russia was expressed in the Presidential Decree of 26 August 2008.<sup>746</sup> Announcing this Decree, the Russian President Dmitry Medvedev referred to various international legal instruments like the

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<sup>741</sup> M Schwirtz and others, ‘1,500 Reported Killed in Georgia Battle’ New York Times (9 Aug 2008) <<http://www.nytimes.com/2008/08/10/world/europe/10georgia-2.html>> accessed 16 February 2010.

<sup>742</sup> ‘OSCE Chair Condemns Russia’s Recognition of Abkhazia, South Ossetia’ Civil Georgia (26 Aug 2008) <<http://www.civil.ge/eng/article.php?id=19296>> accessed 7 August 2009; BBC News, ‘US condemns Russia over Georgia’ (4 Sep 2008) <<http://news.bbc.co.uk/2/hi/europe/7597336.stm>> accessed 17 September 2009; ‘NATO’s Response to Georgian Crisis’ <[http://www.nato.int/cps/en/natolive/topics\\_38988.htm](http://www.nato.int/cps/en/natolive/topics_38988.htm)>; S Castle, ‘EU agrees to support Georgia, but stalls over more severe action’ (*The New York Times*, 28 Aug 2008) <[http://www.nytimes.com/2008/08/28/world/europe/28iht-union.4.15721770.html?\\_r=1](http://www.nytimes.com/2008/08/28/world/europe/28iht-union.4.15721770.html?_r=1)> accessed 7 January 2010.

<sup>743</sup> ‘Law on Occupied Territories’ No 431-III 23 October 2008. The Official Website of the Parliament of the Republic of Georgia. Available in English <<http://www.ilo.org/dyn/natlex/docs/SERIAL/81268/88220/F1630879580/GEO81268.pdf>> accessed 18 March 2013.

<sup>744</sup> Council of Europe Venice Commission, ‘Opinion on the Law on Occupied Territories of Georgia’ Opinion no 516/2009 CDL-AD(2009)015. 78<sup>th</sup> Plenary Session (Strasbourg, 17 March 2009) <[http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2009\)015-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2009)015-e)> accessed 19 March 2013.

<sup>745</sup> ‘Russia and Abkhazia Signed a Treaty on United Military Base in the Territory of the Abkhaz Republic’ *Rossiyskaya Gazeta* (17 February 2010) (In Russian) <<http://www.rg.ru/2010/02/17/baza-anons.html>> accessed 18 March 2013.

<sup>746</sup> President Medvedev’s Statement of 26 August 2008 <[http://archive.kremlin.ru/eng/speeches/2008/08/26/1543\\_type82912\\_205752.shtml](http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml)> accessed 26 March 2013.

UN Charter, the 1975 Helsinki Final Act and the 1970 Declaration on Principles of International law. It was a great surprise for the whole international community since quite recently Russia was the main persistent objector to the recognition of Kosovo's independence. The country's position quite recently of opposing the recognition of Kosovo's independence and permanently referring to the norms of international law and expressing its concerns on saving the current international system based on the principles of territorial integrity and inviolability of state boundaries has changed dramatically.

It is obvious that the actions of the Russian Federation constitute a direct violation of the fundamental norms and principles of international law affirmed in the UN Charter such as non-use of force, respect of the territorial integrity and boundaries of sovereign states and non-interference in the internal affairs of sovereign states. Furthermore, Russia's occupation of the territories formally constituting the territory of Georgia is nothing but an armed attack and interference in the internal affairs of another sovereign member state of the UN.<sup>747</sup> In fact, it can be argued that Russia's actions can be qualified as a support of and direct involvement in an 'illegal occupation'.<sup>748</sup> In order to justify the use of force against Georgia, Russia referred to the vague 'Remedial Theory',<sup>749</sup> and claimed that the Russian humanitarian intervention in Georgia was a response to the latter's military actions against South Ossetia. However, it is obvious that Russia's actions against Georgia were nothing but a political attempt at Russian self-expression in response to the previous actions of the Western world in the former Yugoslavia, Iraq and Kosovo. Russia simply tried to hide its political ambitions with a justification of its actions by the 'Remedial Theory' and 'humanitarian intervention'

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<sup>747</sup> Dissenting Opinion of Judge Simma in *Uganda v DRC Case* [2005] ICJ Reports 334-335.

<sup>748</sup> *Nicaragua case* (n 518) 100-101; Nußberger (n 527) 341-364.

<sup>749</sup> A Buchanan, 'Theories of Secession' (1997) 26(1) *Philosophy and Public Affairs* 34-35.



which were absolutely denied by Russia previously. In his hypocritical speech President Medvedev justified Russia's actions as a chance to save the lives of innocent civilians.<sup>750</sup>

It may be assumed that Russia's actions on recognition of Abkhazia and South Ossetia was some kind of a revenge action in response to the West's categorical and uncompromised support of Kosovo's independence. In the meantime, the general position of the international community on Kosovo is unique and expressed in a formula that 'Kosovo is a special case' that cannot be a precedent for other cases.<sup>751</sup> However, the block of countries led by Russia stated that recognition of Kosovo's independence is not a special case, but a precedent of threat to the whole international system.<sup>752</sup>

Despite Russia's own recognition and the follow-up recognition by other states initiated by Russia due to the latter's economic aid and supply of armed weapons, as of today the vast majority of states have not recognised Abkhazia and South Ossetia. The Russian recognition of Abkhazia and South Ossetia was condemned by the international community, stating that Georgia's territorial integrity and boundaries cannot be violated under the norms and principles of international law.<sup>753</sup>

The Russian President Medvedev's references to the various international legal instruments in his recognition declaration should be treated as cynical. For instance,

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<sup>750</sup> President Medvedev's Statement (n 746).

<sup>751</sup> UNSC, 'Statements by UK and US Representatives at the Emergency Session of the Security Council', 5839<sup>th</sup> Meeting (PM) (18 February 2008) UN Doc SC/9252; Bureau of International Information Programs, US Department of State <<http://www.america.gov/st/washfile-english/2007/March/20070321142711MVyelwarC0.6473047.html#ixzz0mwCi6HA8>> accessed 7 June 2009.

<sup>752</sup> J Devdariani, 'Russian Diplomacy Uses 'Kosovo Precedent' for Tactical Advantage on Abkhazia' Central Asia-Caucas Analyst (Vol 8, No. 3) (8 February 2006) 3-5; A Aksenock, 'Self-Determination between Law and Realpolitik' (2006) 5 Rossiya v Globalnoy Politike (In Russian) 127-134.

<sup>753</sup> 'Reaction of the International Community to Russia's Recognition of Abkhazia and South Ossetia' Collection of Statements and Press-Releases, Ministry of Foreign Affairs of the Republic of Georgia <[http://mfa.gov.ge/index.php?lang\\_id=ENG&sec\\_id=511](http://mfa.gov.ge/index.php?lang_id=ENG&sec_id=511)> accessed 25 April 2010.

Russia's references to the Declaration on Principles of International Law for the justification of Abkhazia and South Ossetia's right to external self-determination sound unreasonable. In the Recognition Declaration, Russia claims that under the above-mentioned Declaration both Abkhazia and South Ossetia have a right to exercise the right to self-determination and should be recognised as independent states with equal rights with other subjects of international law. However, Russia does not pay attention to other 'safeguard clauses'<sup>754</sup> of the Declaration, proclaiming that nothing stipulated therein can be considered as an authorisation for actions directed at the dismemberment or impairment territorial, political and economic integrity of a sovereign state.<sup>755</sup> In the meantime, the Declaration expressly provides: 'Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country'.<sup>756</sup> In this context it can be argued that Russia's actions in the case of Abkhazia and South Ossetia should be considered as violation of the fundamental norms and principles of international law, including those reflected in the Declaration.

It is still disputable as to on what basis Russia used military force against Georgia, since only the presence of Russian peacekeeping forces in the territory of Georgia was consented to by the latter. The placement of Russian peacekeeping forces in the territory of Georgia was based on two agreements: the Bilateral Agreement of 24 June 1992 between Russia and Georgia on the principles of resolving the Georgian–Ossetian conflict ('Sochi Agreement')<sup>757</sup> and the Agreement on the Ceasefire and Secession of Forces of 14 May 1994 signed between Georgia and Abkhazia ('Moscow

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<sup>754</sup> De Arechaga, 'International Law in the Past' (n 336) 109-110.

<sup>755</sup> UNGA Res 2625 (XXV) (24 October 1970) UN Doc A/RES/25/2625.

<sup>756</sup> *ibid.*

<sup>757</sup> Sochi Agreement (n 45).

Agreement') with Russian mediation.<sup>758</sup> For instance, article 3(5) of the Sochi Agreement stipulated a peaceful solution of any violations thereof. Therefore, under international law the invasion by the regular Russian troops into the territory of Georgia within its internationally recognised boundaries without the latter's consent can be considered as an act of aggression accompanied with the illegal use of force. In the meantime, the fact of Russia's refusal to withdraw its peacekeeping troops from Georgia after the termination of their mandate can be considered as continuing occupation.

Moreover, it is generally accepted that the use of force under the modern international law is acceptable only upon a necessity to exercise the right of self-defence (art 51 of the UN Charter). In the case of Georgia, Russia cannot claim the use of force for self-defence purposes, since all operations took place in the territory of Georgia and with a huge difference in military powers between Russia and Georgia. For these reasons Russia does not justify its actions by self-defence, but claims that it was nothing but the defence of its citizens and the peacekeepers.<sup>759</sup> However, it is almost impossible to justify such argument, since international law does not allow the use of force against other states for the protection of own citizens. As stated above, the use of force can be admitted under international law in certain exceptional cases such as self-defence.<sup>760</sup> Therefore, the use of force against Georgia by Russia for the so-called protection of own citizens should be considered as a breach of article 2(4) of the Charter of the United Nations. Modern international law grants to states specific forms of protection of their citizens basically in the form of diplomatic or consular protection, including

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<sup>758</sup> Declaration on Measures for a Political Settlement of Georgian-Abkhaz Conflict (signed in Geneva, 4 April 1994) (*Free Georgia Newspaper*, No 52, 5 April 1994) (In Russian).

<sup>759</sup> President Medvedev's Statement (n 746).

<sup>760</sup> *Nicaragua* case (n 518) 14, 100-101.

judiciary and other means.<sup>761</sup> However, under no circumstances does international law authorise the use of armed forces for the protection of own citizens in the territory of other state(s).

It is notable that Russia did recognise Georgia's territorial integrity and international boundaries under the principle of *uti possidetis juris* through recognition of the former administrative borders of the Georgian SSR that also included Abkhazia and South Ossetia as the boundaries of the independent Georgia. Such recognition was given by Russia at the international level and within the CIS format. Moreover, being one of the permanent members of the UNSC, Russia directly participated in the adopting of a huge number of UNSC's Resolutions recognising and reaffirming Georgia's territorial integrity.<sup>762</sup> UNGA also recognised Georgia's jurisdiction over Abkhazia through adopting on 15 May 2008 the Resolution No 62/249.<sup>763</sup> Taking into account that under article 25 of the UN Charter UNSC resolutions have binding force on all UN members, any such resolutions can be overruled only by another resolution

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<sup>761</sup> ILC 'Draft Articles on Diplomatic Protection' (Art. 1) 58th Session (2006) A/61/10 para. 13; *Kaunda v President of South Africa* CCT 23/04, [2004] ZACC 5, 26–27; *Van Zyl v Government of RSA* [2007] SCA 109 (RSA), 1; W Geck, 'Diplomatic Protection' in R Bernhardt (ed) *Encyclopedia of Public International Law* (Amsterdam 1992) Vol X 1053; C Gray, *Judicial Remedies in International Law* (Oxford, OUP 1987).

<sup>762</sup> UNSC Res 876 (1993) (19 October 1993), UN Doc S/RES/876; UNSC Res 881 (1993) (November 1993), UN Doc S/RES/881; UNSC Res 892 (1993) (22 December 1993), UN Doc S/RES/892; UNSC Res 896 (1994) (31 January 1994), UN Doc S/RES/896; UNSC Res 906 (1994) (25 March 1994), UN Doc S/RES/906; UNSC Res 937(1994) (21 July 1994), UN Doc S/RES/937; UNSC Res 971 (1995) (12 January 1995), UN Doc S/RES/971; UNSC Res 993 (1995) (12 May 1995), UN Doc S/RES/993; UNSC Res 1036 (1996) (12 January 1996), UN Doc S/RES/1036; UNSC Res 1065 (1996) (12 July 1996), UN Doc S/RES/1065; UNSC Res 1096 (1997) (30 January 1997), UN Doc S/RES/1096; UNSC Res 1124 (1997) (31 July 1997), UN Doc S/RES/1124; UNSC Res 1150 (1998) (30 January 1998), UN Doc S/RES/1150; UNSC Res 1187 (1998) (30 July), UN Doc S/RES/1187; UNSC Res 1225 (1999) (28 January 1999), UN Doc S/RES/1255; UNSC Res 1255 (1999) (30 July 1999), UN Doc S/RES/1255; UNSC Res 1287 (2000) (31 January 2000), UN Doc S/RES/1287; UNSC Res 1311 (2000) (28 July 2000), UN Doc S/RES/1311; UNSC Res 1339 (2001) (31 January 2001), UN Doc S/RES/1339; UNSC Res 1364 (2001) (30 March 2001), UN Doc S/RES/1364; UNSC Res 1393 (2002) (31 January 2002), UN Doc S/RES/1393; UNSC Res 1427 (2002) (29 July 2002), UN Doc S/RES/1427; UNSC Res 1462 (2003) (30 January 2003), UN Doc S/RES/1462; UNSC Res 1494 (2003) (30 July 2003), UN Doc S/RES/1494; UNSC Res 1524 (2004) (30 January 2004), UN Doc S/RES/1524; UNSC Res 1554 (2004) (29 July 2004) UN Doc S/RES/1554; UNSC Res 1582 (2005) (28 January 2005) UN Doc S/RES/1582; UNSC Res 1615 (2005) (29 July 2005), UN Doc S/RES/1615; UNSC Res 1666 (2006) (31 March 2006), UN Doc S/RES/1666; UNSC Res 1752 (2007) (13 April 2007), UN Doc S/RES/1752; UNSC Res 1781 (2007) (15 October 2007) UN Doc S/RES/1781; UNSC Res 1808 (2008) (15 April 2008), UN Doc S/RES/1808.

<sup>763</sup> UNGA Res 62/249 (15 May 2008) UN Doc A/RES/62/249.

adopted by the same UNSC. Therefore, Russia's unilateral action against Georgia and further recognition of the two separatist units are serious violations of the UN Charter and the fundamental principles of international law.

Moreover, it is quite important to stress that in contrast to the UNSC Resolution No 1244 on Kosovo<sup>764</sup> which did not contain anything demanding placement of Kosovo under a single sovereignty or restricting secession of the unit from Serbia, some UNSC resolutions on Georgia adopted at the same time with the Resolution No 1244 in 1999 expressly stated that Abkhaz conflict should be settled within the territorial integrity of Georgia with determining the political status of Abkhazia.<sup>765</sup> While nothing similar was stated in Resolution No 1244 and it was not clearly determined by the UNSC that Kosovo's status should be decided within the territorial frameworks of Serbia. This argument was actively used by Kosovo's independence supporters, who stated that the Resolution No 1244 does not mean that Kosovo should remain within Serbia's territory.<sup>766</sup> It is aptly argued that most likely this argument affected the ICJ who accepted such position through declaring that the Resolution No 1244 does not prohibit the independence declaration by Kosovo marking the Resolution as a tool establishing an interim regime for further political settlement of Kosovo's status without Serbia's consent.<sup>767</sup>

Another new factor in Post-Soviet territorial and boundary conflicts is the factor of granting citizenship of third states to habitants of the separatist units. This factor can also be observed in the case of Abkhazia and South Ossetia, where Russia granted its

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<sup>764</sup> UNSC Res 1244 (n 525).

<sup>765</sup> UNSC Res 1225 (n 780) 3; UNSC Res 1225 (n 780) 5.

<sup>766</sup> H Corell, 'Remarks' (2008) Proceedings of Amer Soc of Int'l L 134.

<sup>767</sup> S Murphy, 'Reflections on the ICJ Advisory Opinion on Kosovo: Interpreting Security Council Resolution 1244 (1999)' (2013) GW Legal Studies Research Paper No 2013-118  
<[http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2216&context=faculty\\_publications](http://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2216&context=faculty_publications)>  
accessed 2 November 2013.

citizenship to the residents of these breakaway regions. Even in the course of war, the Russian troops together with the separatist forces offered the ethnic Georgians to either accept Russian citizenship or leave their places of residence.<sup>768</sup> According to some sources, about 80% of Abkhazians and South Ossetians have been issued Russian passports, but they do not pay taxes or serve in the Russian Army.<sup>769</sup> It can be argued that the unique Soviet citizenship was transferred into citizenship of newly independent states, the fifteen constituent units of the Soviet Union. In this regard the habitants of Abkhazia and South Ossetia automatically became citizens of the Republic of Georgia, and they are still lawful holders of Georgian citizenship unless they are officially refused it. By granting its citizenship to habitants of these breakaway regions, Russia used this factor for justifying its military actions as protection of the Russian citizens. However, even if habitants of these regions freely chose Russian citizenship, it can hardly be considered as lawful justification for the military actions by Russia. It was also confirmed by the Council of EU's Independent International Fact-Finding Mission on the Conflict in Georgia which established that:

The mass conferral of Russian citizenship to Georgian nationals and the provision of passports on a massive scale on Georgian territory, including its breakaway provinces, without the consent of Georgian Government runs against the principles of good neighbourliness and constitutes an open challenge to Georgian sovereignty and an interference in the internal affairs of Georgia.<sup>770</sup>

The effective control exercised by Russia over the region could be observed not only in the military involvement of Russia, but also in the economic support including

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<sup>768</sup> D McElroy, 'South Ossetian Police Tell Georgians to Take a Russian Passport, or Leave Their Home', (*Telegraph*, 30 Aug 2008) <<http://www.telegraph.co.uk/news/worldnews/europe/georgia/2651836/South-Ossetian-police-tell-Georgians-to-take-a-Russian-passport-or-leave-their-homes.html>> accessed 30 April 2010.

<sup>769</sup> ICG, 'Europe Report No 176' (15 Sep 2006, retrieved on 30 May 2007) 10.

<sup>770</sup> Council of the EU, 'Independent International Fact-Finding Mission on the Conflict in Georgia' (Sep 2009) 18 <<http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,fr&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=484042:cs&page>> accessed 19 October 2012.

the use of Russian rouble in Abkhazia. The fact of the Russian effective control was confirmed by the OSCE. For instance, in July 2008 the OSCE Parliamentary Assembly passed a resolution calling the Russian authorities to cease the maintenance provided to the separatist units expressed in military, economic and political support, and to respect other OSCE member states' territorial integrity and refrain from the threat or use of force.<sup>771</sup>

The issues stressed by the ECHR in the *Ilascu* case<sup>772</sup> can be similarly applied to the Abkhazia and South Ossetia cases. Undoubtedly, Russia's state agencies and officials and officers are directly involved in actions undertaken by the separatist units. Similar to Transnistria, Russia exercises a full control over Abkhazia and South Ossetia expressed in full political, economic and military control over the breakaway regions which can be qualified as an effective control.<sup>773</sup> Based on the available facts and omitting the political grounds, it can be argued that, like in the case of Transnistria where the ECHR underlined Russia's role in the creation of and continued existence of the separatist unit,<sup>774</sup> Russia plays an important role in the existence of these breakaway regions seceded from Georgia. All legal matters related to the Russian effective control emphasised by the ECHR in the *Ilascu* case are available in the case of Abkhazia. It was evidenced by the Russian military campaign against Georgia in the course of the Five-Day War.<sup>775</sup> Moreover, Georgia is making huge efforts in order to get its own 'Georgian *Ilascu* case' which will give it the legal arguments to prove Russia's negative role in the conflicts in the territory of Georgia. It will also prove the existence of Russia's effective

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<sup>771</sup> OSCE Parliamentary Assembly, Resolution 'On the Security Environment in Georgia' (adopted at 17th Annual Session in Astana 29 June- 3 July 2008) <<http://www.oscepa.org/meetings/annual-sessions/2008-astana>> accessed 7 March 2010.

<sup>772</sup> *Ilascu* (n 100).

<sup>773</sup> *Loizidou* case (n 445).

<sup>774</sup> *Ilascu* (n 100).

<sup>775</sup> King, *The Five-Day War* (n 47)

control over the separatists units of Georgia. For instance, on behalf of 132 applicants supported by the Georgian Young Lawyers' Association and the European Human Rights Advocacy Centre have submitted numerous applications representing 34 groups against Russia who suffered during the heavy Russian military campaign in the course of the Five-Day War.<sup>776</sup> The applications claim that Georgian civilians residing in the territory of the breakaway region of South Ossetia were killed and injured during the Russian attacks in 2008, while their property was damaged and destroyed. Georgians pursue the goal of legally proving the exercise of effective control by Russia over the separatist unit. The ECHR will be asked by the applicants to evaluate the level of Russia's responsibility for the actions of its regular troops and the military forces of South Ossetia.<sup>777</sup> The complaints against Russia refer to the incidents which occurred in South Ossetia and the territories surrounding the breakaway region where the Russian regular troops undertook certain military operations.<sup>778</sup> The complaints refer to certain provisions of the European Convention of Human Rights that were violated by Russia and the separatist forces controlled by the former. The complaints refer to the various rights provided in the European Convention of Human Rights such as the right to life (art 2), prohibition of torture and inhuman and degrading treatment (art 3), right to liberty and security of the person (art 5), right to respect for private and family life (art 8), effective remedy (art 13), prohibition of discrimination (art 14), right to peaceful enjoyment of property (art 1, Protocol 1) and freedom of movement (art 2, Protocol

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<sup>776</sup> 'Financial Georgians Lodge Suit against Russia at ECHR over August War' (16 Feb 2010) <[http://www.finchannel.com/Main\\_News/Politics/58427\\_Georgians\\_Lodge\\_Suit\\_Against\\_Russia\\_at\\_EC\\_HR\\_over\\_August\\_War](http://www.finchannel.com/Main_News/Politics/58427_Georgians_Lodge_Suit_Against_Russia_at_EC_HR_over_August_War)> accessed 18 Apr 2010.

<sup>777</sup> EHRAC, 'Georgians take Russia to European Court of Human Rights over August 2008 Armed Conflict', London Metropolitan University <[http://www.londonmet.ac.uk/londonmet/fms/MRSite/Research/HRSJ/EHRAC/Press%20releases/EHRAC%20Press%20Release%2062%20Russia-Georgia%20conflict%20apps%20lodged%2010\\_2\\_10.pdf](http://www.londonmet.ac.uk/londonmet/fms/MRSite/Research/HRSJ/EHRAC/Press%20releases/EHRAC%20Press%20Release%2062%20Russia-Georgia%20conflict%20apps%20lodged%2010_2_10.pdf)> accessed 27 March 2010.

<sup>778</sup> *ibid.*



4).<sup>779</sup> The decision of the ECHR is eagerly awaited by the legal community as to whether the ‘Georgian Ilascu case’ will be available for Georgia to argue about the Russian effective control. Should the Court decide on Russia’s effective controller role, it will give Georgia grounds to claim Russia’s responsibility for violations committed by its army and the separatist forces. Indeed the ECHR case law is not a legal tool for the settlement of territorial disputes, however, like in the *Ilascu* case it may serve effectively for determining the clear picture and key legal facts of the conflicts in Abkhazia and South Ossetia.

It is undeniable that independence of Abkhazia and South Ossetia was not achieved through democratic ways, but rather as a result of interference of a third powerful state. It can be argued that Russia, as a power exercising the effective control<sup>780</sup> over Abkhazia and South Ossetia, should bear full responsibility for the actions against Georgia in the course of the military campaign in 2008. Based on these facts, Georgia initiated proceedings in the ICJ for the alleged acts of racial discrimination against Georgians in Abkhazia and South Ossetia.<sup>781</sup> In this case, Georgia was attempting to prove the exercise of an effective control by Russia in Abkhazia and South Ossetia and its negative role in these unresolved conflicts. In its application Georgia claimed that Russia, through its state authorities, agents and officers and through the separatist forces of Abkhazia and South Ossetia, committed ethnic cleansing of Georgians residing in the breakaway regions. Georgia considered

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<sup>779</sup> Radio Netherlands Worldwide, ‘Georgia Takes Russia to Court over 2008 War’ (15 Feb 2010) <<http://www.rnw.nl/international-justice/article/georgia-takes-russia-court-over-2008-war>> accessed 28 April 2010.

<sup>780</sup> S Talmon, ‘The Responsibility of Outside Powers for Acts of Secessionist Entities’ (2009) 58 ICLQ 493-517; S Barbour, Z Salzman, ‘The Tangled Web: the Right of Self-Defence against Non-State Actors in the Armed Activities Case’ (2008) 40 NY Univ JILP 70-79; A Abbas, ‘Proving State Responsibility for Genocide: The ICJ in Bosnia v Serbia and the International Commission of Inquiry for Darfur’ (2008) 31 Fordham ILJ 890-896.

<sup>781</sup> ICJ Press-Communication of 12 August 2008 <<http://www.icj-cij.org/docket/files/140/14659.pdf>> accessed 23 April 2010.

such actions of Russia as an intentional plan aimed at impairment of Georgia's territorial integrity and violation of its sovereignty and independence.<sup>782</sup> Georgia requested the Court to indicate provisional measures. On 15 October 2008 the ICJ in its Order indicated provisional measures urging all parties to refrain from any acts of racial discrimination, assisting, supporting and sponsoring racial discrimination, and to facilitate humanitarian assistance.<sup>783</sup> In its judgments the ICJ held that it had not jurisdiction to entertain the Application filed by Georgia on 12 August 2008. The ICJ dismissed Georgia's application on the grounds of jurisdiction and it would not proceed to the merit stage of proceedings.<sup>784</sup> The Court also concluded that although there was a legal dispute between the parties with respect to Russia's compliance with the norms of the Convention on the Elimination of All Forms of Racial Discrimination, Georgia did not fulfil a precondition for the Court to seize the case, ie Georgia did not endeavour to amicably negotiate this dispute and it was stressed that not all the remedies to address the dispute were exhausted before referring the case directly to the ICJ. The ICJ further stated that for these reasons it would not carry out a legal evaluation of the questions raised in Georgia's application, referring basically to international humanitarian law and international human rights law.<sup>785</sup> The position of the ICJ, an authoritative international legal forum, on this case was somewhat disappointing, not only for Georgians but also for eminent international legal experts who were anticipating a judgment of the 'World Court' in the light of today's Kosovo, Abkhazia, South Ossetia, Nagorno-Karabakh,

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<sup>782</sup> S Ghandhi, 'International Court of Justice: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) Provisional Measures Order of 15 October 2008' 58(3) ICLQ 713.

<sup>783</sup> ICJ Press-Communication of 12 August 2008 (n 799).

<sup>784</sup> *Georgia v Russian Federation* Judgment of 1 April 2011 <<http://www.icj-cij.org/docket/files/140/16398.pdf>> accessed 17 May 2011.

<sup>785</sup> *ibid.*

Transnistria and many other conflicts. Unfortunately, Georgia could not rely on this case to strengthen its international legal argumentation.

Georgia also brought the legal dispute with Russia on the breakaway regions to other forums. It instituted inter-state proceedings with the ECHR against Russia, accusing it of discrimination and violation of the rights of Georgians who were residing in the Russian Federation.<sup>786</sup> The application was filed in April 2009 with the ECHR by Georgia against the Russian Federation under article 33 (Inter-State cases) of the European Convention of Human Rights concerning the alleged harassment of the Georgian immigrant population in the Russian Federation following the arrest in Tbilisi on 27 September 2006 of four Russian service personnel on suspicion of espionage against Georgia. Georgia's claim against Russia brought to the ECHR refers to basically article 3 (prohibition of inhuman and degrading treatment and punishment); article 5 (right to liberty); article 8 (right to respect for private and family life); article 13 (right to an effective remedy); article 14 (prohibition of discrimination); article 18 (limitation on the use of restrictions on rights) of the Convention; articles 1 (protection of property) and 2 (right to education) of Protocol No 1; article 4 (prohibition of collective expulsion of aliens) of Protocol No 4; and article 1 (procedural safeguards relating to expulsion of aliens) of Protocol No 7.<sup>787</sup> Georgia initiated these proceedings in the ECHR in order to show the intentional nature of the Russian Government's policy against Georgians residing in the territory of Russia and their collective expulsion therefrom. Moreover, Georgia claims that Russia's actions deprived Georgian nationals deported from Russia of various transportation means due to the closing of the borders with Georgia.<sup>788</sup> The ECHR has admitted the case to its hearings and ruled on 'exhaustion of domestic

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<sup>786</sup> ECHR, State Complaint Georgia v Russian Federation (*Georgia v Russia*) (No 1) (no 13255/07) 2009.

<sup>787</sup> *ibid.*

<sup>788</sup> *ibid.*

remedies in respect of the allegations of individual violations of the rights guaranteed by the Convention'.<sup>789</sup> In general, Georgia lodged three inter-state applications against Russia with the ECHR in connection with the Russian–Georgian August war.<sup>790</sup> Georgia blames Russia in that it 'allowed, or caused to develop, an administrative practice through indiscriminate and disproportionate attacks against civilians and their property in the two autonomous regions of Georgia – Abkhazia and South Ossetia – by the Russian military forces and the separatist forces under its control'.<sup>791</sup> However, the final judgment is still pending, attracting much attention from both sides and legal experts.

It can be argued that all of the attempts of the Russian Federation to justify its actions in South Ossetia and Abkhazia with arguments such as the protection of its citizens and peacekeepers, as well as by acts to prevent to 'genocide', lack any solid legal arguments under international law. Although the Russian authorities stated that the Abkhaz and South Ossetian cases were 'special' based on the exercise of the right to external self-determination,<sup>792</sup> political grounds can be clearly assumed in these cases. There was nothing in the case of Abkhazia and South Ossetia that could serve as grounds for the lawful exercise of external self-determination. Despite the statements of the high Russian officials that 'Abkhazia and South Ossetia are unique cases and should not be a precedent for other secessionist situations',<sup>793</sup> they cannot guarantee the current international system from threats of repeating similar scenarios in the future. All these

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<sup>789</sup> *ibid*

<sup>790</sup> ECHR Inter-State Applications Table <[http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes\\_inter%C3%A9tatiues\\_ENpdf](http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes_inter%C3%A9tatiues_ENpdf)> accessed 12 October 2011.

<sup>791</sup> ECHR, Registrar of ECHR Press Release 150 (2011) (22 September 2011).

<sup>792</sup> Ministry of Foreign Affairs of Russian Federation, 'Transcript of Remarks by Sergey Lavrov, Minister of Foreign Affairs of Russian Federation' (presented at an Enlarged Meeting of the Federation Council International Affairs Committee) (Moscow 18 September 2008) MID Doc 1387-18-09-2008 <[http://www.un.int/russia/new/MainRoot/docs/off\\_news/180908/newen1.htm](http://www.un.int/russia/new/MainRoot/docs/off_news/180908/newen1.htm)> accessed 23 October 2008.

<sup>793</sup> *ibid*.

facts and arguments give strong grounds to claim that South Ossetia and Abkhazia cases are of purely political nature with a ‘special’ role of a third state, rather than an attempt to seek an exercise of the right to external self-determination under international law.

#### 4.4.2 Armenia's Negative Role and the Russian Factor in the Nagorno-Karabakh Conflict

As highlighted by various commentators, in some cases the ethnic minority can be a destabilising factor in some states, and their desire to join to the neighbouring country of the same ethnicity also plays a negative role in escalation of the conflict.<sup>794</sup> The 'third force assistance' factor is a key element in most of such ethnic conflicts. The same ethnicity state's politically correct position plays a huge role in the positive resolution of such conflicts. For instance, Turkey's positive role in resolution of the Gagauz conflict in Moldova was enormous, whereas it used its influence over the Turkic-speaking minority to convince them not to undertake any radical steps to secede from Moldova and stay within it.<sup>795</sup>

The position of Armenia in the Nagorno-Karabakh conflict can be observed as non-constructive and substantially negative.<sup>796</sup> One of the controversial elements of the Armenian foreign policy towards the Nagorno-Karabakh conflict is its official denial of any direct involvement in the conflict.<sup>797</sup> Although since the beginning of the conflict Armenia is officially denying its direct involvement in the conflict and represents it as a conflict between Azerbaijan and Nagorno-Karabakh, a bundle of legal arguments provide grounds to argue otherwise.

One of the simplest examples is the resolution which is referred by some commentators as the 'annexation resolution',<sup>798</sup> adopted by the Supreme Soviet of the Armenian SSR which was never abolished even after dissolution of the USSR. Moreover, in support of this 'annexation resolution' in 2003 the Armenian authorities

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<sup>794</sup> Eide (n 545) 282.

<sup>795</sup> L Benko, 'Autonomy in Gagauzia: A Precedent for Central and Eastern Europe?' <<http://ewwg.vlamynck.eu/cst/cst-mold/levente.html>> accessed 21 March 2013

<sup>796</sup> Chiragov (n 502) 16-21.

<sup>797</sup> *ibid.*

<sup>798</sup> Resolution of the Supreme Soviet of Armenian SSR (n 607); J Rau, *The Nagorno-Karabakh Conflict between Armenia and Azerbaijan A Brief Historical Outline* (Berlin, Verlag Dr Koster 2008) 41.

undertook another violating action declaring the resolution as a valid instrument. In the course of the presidential pre-election campaign, the Armenian opposition raised the issue of the legitimacy of Robert Kocharian's citizenship of Armenia, stating that being from the NKAO of the Azerbaijan SSR and from a legal point of view, the collapse of the USSR led to de jure automatic granting of the Azerbaijani citizenship to Kocharian.<sup>799</sup> In response to the claims of the Armenian opposition, the court in Yerevan produced a legally vague and ambiguous judgment stating that the 'annexation resolution' adopted by the Supreme Soviet of the Armenian SSR and by the Parliament of 'Nagorno-Karabakh Republic' was legally valid and that it covered not only the reunification issues but also various areas including the citizenship matters.<sup>800</sup>

It can be argued that the adoption of the 'annexation resolution' by the Armenian Parliament, together with the official statements and positions of the Armenian presidents and the above-referred ruling of the Armenian court, is a clear example that all three powers in Armenia have documented the claims of Armenia to Azerbaijan with respect to the Nagorno-Karabakh region. It is agreed with the statement of Professor Rau that in such circumstances all facts confirm Armenia's direct political, military, economic and legal involvement in the Nagorno-Karabakh conflict.<sup>801</sup> Therefore, it can be asserted that Armenia's argument on non-involvement in the conflict is groundless since solid evidences and facts have been collected either by Azerbaijan or various international organisations. As of today Armenia has a full control over 20% of Azerbaijani territory, including Nagorno-Karabakh and seven

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<sup>799</sup> UNHCR, Armenia: 1) Groups currently at risk in Armenia, 2) Armenia's present position on Nagorno-Karabakh', United States Bureau of Citizenship and Immigration Services (24 June 1998) <<http://www.unhcr.org/refworld/docid/3df08f584.html>> accessed 12 January 2005; T Likhanova, 'In Armenia – Minus One' 23 (1664) Nevskoe Vremya (St-Petersburg 7 February 1998); E Herzig, *The New Caucasus: Armenia, Azerbaijan and Georgia* (Royal Institute of International Affairs, London 1999) 70.

<sup>800</sup> A Papazian, 'Kocharian Wins Second Round Amid Allegations of Fraud' Central Asia-Caucasus Institute (3 December 2003) <<http://www.cacianalyst.org/?q=node/282>> accessed 12 August 2008.

<sup>801</sup> Rau (n 798) 41-42.

surrounding regions. Such occupation of the sovereign Azerbaijan's territories resulted in expelling hundreds of thousands of Azerbaijanis from these areas.<sup>802</sup>

It is also notable that despite Armenia's declaration on non-involvement in the conflict and its arguments on a full independence of Nagorno-Karabakh struggling with Azerbaijan,<sup>803</sup> as of the date Armenia has not even recognised Nagorno-Karabakh's independence. In contrast to Turkey which recognised Northern Cyprus, and Russia which recently recognised Abkhazia and South Ossetia, Armenia has not yet recognised the independence of Nagorno-Karabakh. As of today the self-proclaimed 'Nagorno-Karabakh Republic' has not been recognised by even a single state. Armenia did not undertake any serious steps on recognition of the separatist regime except for once in the mid-1990s, when within the CIS format it proposed the draft Declaration on equality and peoples' right to decide their destiny.<sup>804</sup> The strangely-named provocative Declaration proposed by Armenia was rejected by the CIS members. The Draft Declaration provided such provocative provisions as the right of peoples to secede from the states that violently hold them, and obligations of the member states to provide assistance to the peoples that are violently held within the CIS member states. Armenian draftsmen emphasised in the Draft that prevention of such peoples to exercise their right to external self-determination should be considered as violating the goals and principles of the UN Charter.<sup>805</sup>

It is obvious that in most cases the occupation forces conceal their violent aggressive actions through the establishment of puppet regimes in the occupied territories. Such occupation forces do their best in order to show such entities as

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<sup>802</sup> De Waal (n 79) 3.

<sup>803</sup> *Chiragov* (n 502).

<sup>804</sup> Draft Declaration on Equality and peoples' right to [decide their destiny] [self-determination] by the expert groups of the CIS member states (1994-1995) cited in Mammadov and Musayev (n 66) 90-91.

<sup>805</sup> *ibid.*



democratic and self-governed quasi-states. In the case of ‘the Nagorno-Karabakh Republic’, Armenia is trying to represent the puppet separatist regime as a well-established independent state with all normally functioning public authorities, territory and population. However, as discussed hereinabove, in reality ‘the Nagorno-Karabakh Republic’ is an entity fully controlled by Armenia. Armenia’s role as a controlling force of the separatist unit can be proved by a number of evidences considered hereinbelow.

The existing facts and arguments are so clear that they raise no doubts about Armenia’s role in the military actions against Azerbaijan in the Nagorno-Karabakh conflict. There are a number of facts clearly testifying its direct participation in the military actions against Azerbaijan.<sup>806</sup> It is still strange that the country denying its direct involvement in the conflict at a state level reflects in its national military strategy that Armenia is a military guarantee for ‘the Nagorno-Karabakh Republic’.<sup>807</sup> Such position is often confirmed by the high-ranking Armenian officials.<sup>808</sup> Even if Armenia is trying to show to the world that ‘the Nagorno-Karabakh Republic’ is an independent and democratic state, it is obvious that such democracy cannot be built through the gross violation of human rights and occupation of the neighbouring state’s territory through the use of force. In fact, international law cannot accept such justification of real occupation by the triumph of democracy.<sup>809</sup>

In addition to the mutual military trainings in the occupied territories of Nagorno-Karabakh and other surrounding regions of Azerbaijan, Armenia has undertaken some political steps for the further incorporation of Nagorno-Karabakh into

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<sup>806</sup> HRW, *Seven Years of Conflict* (n 729) 36; Report of Rapporteur Atkinson (n 543).

<sup>807</sup> Ministry of Defence of the Republic of Armenia, ‘Strategy of the National Security of the Republic of Armenia’ (7 February 2007) <<http://www.mil.am/files/NATIONAL%20%20SECURITY%20STRATEGYeng.pdf>> accessed 17 March 2013.

<sup>808</sup> Interview with Armenian Prime-Minister Serzh Sargsyan, (16 May 2007) 4(1) *Caucasus Context* 43-44.

<sup>809</sup> A Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights’ (2006) 100 *AJIL* 580.

its territorial frameworks. In May 1998 the Armenian Minister of Foreign Affairs and the Minister of Foreign Affairs of 'the Nagorno-Karabakh Republic' signed the Protocol on mutual consultation and co-operation between the foreign affairs ministries of the two contracting sides.<sup>810</sup> The Protocol provides for the consultations on regional and national levels that should be transformed into diplomatic relations.<sup>811</sup> On 15 May 1998 the Parliament of Armenia and the 'parliament' of the separatist regime of Nagorno-Karabakh signed in Khankendi (Stepanakert) an agreement on co-operation between the legislatures of the two contracting sides.<sup>812</sup> This agreement provides for the establishment of an inter-parliament co-operation commission and, more particularly, the inclusion of the representatives of 'the Nagorno-Karabakh Republic' into the parliamentary delegation of the Armenian Republic in the course of the representation of Armenia's interests in the international arena.<sup>813</sup>

Another vivid evidence of the Armenian aggression against Azerbaijan is the occupation of seven regions of Azerbaijan surrounding Nagorno-Karabakh which together with Nagorno-Karabakh constitute about 20% of Azerbaijan's territory. Until now Azerbaijan has insisted upon the liberation of these seven occupied regions as a preliminary requirement for the resolution of the Nagorno-Karabakh conflict. Armenia considers these seven regions as subject to bargain with Azerbaijan and has proclaimed it as a 'buffer zone' of 'the Nagorno-Karabakh Republic'. It has been declared several times by Armenia that it is ready to liberate the seven occupied regions only in the event of the final resolution of the dispute over Nagorno-Karabakh's status.<sup>814</sup>

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<sup>810</sup> Snark-Yerevan in Russian at 0420 GMT (12 May 1998) (13 May 1998) FBIS-SOV-98-132.

<sup>811</sup> *ibid.*

<sup>812</sup> Reference at the Official Website of the Parliament of the Republic of Armenia <<http://www.parliament.am/international.php?lang=eng>> accessed 12 July 2010.

<sup>813</sup> Interfax English at 1243 gmt (15 May 1998) (19 May 1998) FBIS-SOV-98-135.

<sup>814</sup> M Shukurov, *Historical, political and ideological aspects of the Nagorno-Karabakh Conflict* (Baku, Qartal 1999) (In Azerbaijani) 81-85.

Based on investigated facts, the PACE Special Rapporteur David Atkinson explicitly stated that in the course of the Nagorno-Karabakh conflict not only did local Karabakhi Armenians fight for the region, but also Armenians from Armenia were actively involved in the war against Azerbaijan.<sup>815</sup> In the course of personal interviews with the representatives of the Armenian youth conducted upon a visit to Armenia, it has been revealed that most of the soldiers of the Armenian national army serve in the military detachments based in the occupied territories of Nagorno-Karabakh and the surrounding territories. Similar statements were made by Azerbaijan with provision of the relevant proofs by certain international fact-finding mission reports.<sup>816</sup> Atkinson also confirmed this fact in his report and emphasised that today soldiers from Armenia are based in Nagorno-Karabakh region, and the people residing in the region have Armenian passports and the Government of Armenia officially transfers funds from the state budget to Nagorno-Karabakh.<sup>817</sup> As discussed hereinbefore, the passportisation policy is another serious argument to be used by the Armenian side claiming protection of its citizens in the event of a military clash with Azerbaijan. Therefore, similar to Russia's passportisation policy, Armenia is following the same route.

Reputable international NGOs also confirm the above facts. For instance, after the investigations in Armenia and Nagorno-Karabakh, the ICG confirmed that the well-trained 'self-defence army' of Nagorno-Karabakh is in reality the land forces of Armenia supported from the Armenian budget.<sup>818</sup> Furthermore, this international NGO concludes that the military presence of Armenia in the occupied territories of

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<sup>815</sup> HRW, *Seven Years of Conflict* (n 729); Report of Rapporteur Atkinson (n 543).

<sup>816</sup> Chiragov (n 502).

<sup>817</sup> HRW, *Seven Years of Conflict* (n 729); Report of Rapporteur Atkinson (n 543).

<sup>818</sup> ICG, 'Nagorno-Karabakh: View on the Conflict from the Ground' Report No 166 (14 September 2005) 11

<[http://www.crisisgroup.org/~media/Files/europe/166\\_nagorno\\_karabakh\\_viewing\\_the\\_conflict\\_from\\_the\\_ground.pdf](http://www.crisisgroup.org/~media/Files/europe/166_nagorno_karabakh_viewing_the_conflict_from_the_ground.pdf)> 17 February 2013.

Azerbaijan is supported by the troops comprising ten thousand citizens of Armenia.<sup>819</sup> One of the important facts revealed by the ICG is that the soldiers recruited from Armenia are forced to serve in the occupied territories of Azerbaijan, which is in conflict with the statements of the high-ranking Armenian officials who assert that only volunteers from Armenia support ‘the self-defence army’ of the separatist regime.<sup>820</sup> Finally, this reputable NGO also argues that there is a high level of integration between the national army of Armenia and the military forces of the separatist regime of Nagorno-Karabakh.<sup>821</sup> Human Rights Watch also found that even Armenians, citizens of the Armenian Republic from its capital Yerevan, serve in troops located in the occupied territories of Azerbaijan.<sup>822</sup>

Consideration should also be given to the issue raised in 1998 by the OSCE Office for Democratic Institutions and Human Rights, whereby the organisation was concerned with the fact that during the presidential elections in Armenia one of the mobile ballot boxes was sent to the occupied Kelbajar region of Azerbaijan for the voting of Armenian soldiers serving there.<sup>823</sup> It is notable that after Serzh Sargsian became the Minister of Defence following leaving his position of the Minister of Defence of ‘the Nagorno-Karabakh Republic’ in 1993, the thin line between the military forces of Armenia and the separatist regime was removed. Human Rights Watch Helsinki in its Report of 1994, based on visits to Nagorno-Karabakh and its own independent investigations and interviews with soldiers, explicitly stated that the participation of the Armenian regular forces in the military actions against and in the

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<sup>819</sup> *ibid.*

<sup>820</sup> *ibid*; See also: Interview with Armenian Prime-Minister Serzh Sargsyan (16 May 2007) 4(1) Caucasus Context 43-44.

<sup>821</sup> ICG, *Nagorno-Karabakh: View on the Conflict* (n 818).

<sup>822</sup> HRW, *Seven Years of Conflict* (n 729) 67-73.

<sup>823</sup> OSCE, ‘Final Report of the ODIHR’ (9 April 1998)

<<http://www.osce.org/odihr/elections/armenia/14192>> accessed 2 March 2013.

territory of Azerbaijan had made Armenia a part of this sanguinary conflict, and therefore it should be treated as a conflict between Armenia and Azerbaijan.<sup>824</sup> All these facts and evidences give strong grounds to argue that Armenia violated the fundamental norms and principles of international law such as non-use of force and respect of territorial integrity and inviolability of state boundaries of sovereign state affirmed in the UN Charter and other universal and regional legal instruments, including the CIS format.

Another clear example of the lack of independence of the separatist regime is its economic dependence upon Armenia. It is stated by some international organisations that a considerable part of ‘the Nagorno-Karabakh Republic’ budget constitutes interest-free loans from Armenia, and that most of the goods produced in Nagorno-Karabakh are marked as ‘Made in Armenia’.<sup>825</sup> Moreover, Armenia has granted concession rights and Yerevan granted official licenses to some foreign companies for gold and copper mining in the occupied territories, which should be considered as illegal actions and infringement of Azerbaijan’s sovereign rights.<sup>826</sup> It can be argued that such illegal exploitation of natural resources by Armenia in Nagorno-Karabakh is similar to the illegal use of natural resources by third states in the East Timor, which granted concessions to major companies from other states.<sup>827</sup> A similar situation can be observed in the Northern Cyprus where Turkey as a power exercising effective control granted concessions to TPAO, Turkish state-owned company in exploration and

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<sup>824</sup> HRW, *Seven Years of Conflict* (n 729) 67-73; *Chiragov* (n 502).

<sup>825</sup> ICG, *Nagorno-Karabakh: View on the Conflict* (n 818).

<sup>826</sup> UNGA, ‘Letter dated 11 November 2004 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the UNGA’ 59<sup>th</sup> Session, Agenda item 163 (11 November 2004) UN Doc A/59/568; K Cooke, ‘Armenia’s Controversial Gold Rush’ (BBC News, 9 January 2008) <<http://news.bbc.co.uk/go/pr/fr/-/2/hi/business/7153794.stm>> accessed 23 March 2008.

<sup>827</sup> *East Timor Case* (n 355) 29-30.

exploitation major oil and gas fields in Iskele.<sup>828</sup> In both cases the position of the international community was expressed in condemning the illegal concessions and it called to restore the sovereign rights of concerned states over the natural resources in occupied territories.

The illegal activity of Armenians in the occupied territories was also brought to the attention of the UN, which passed Resolution No 60/285 expressing its concern regarding the environmental damage caused by Armenians and called the Council of Europe to conduct the relevant expertise of the occupied territories.<sup>829</sup> The investigations conducted by the expertise groups of the OSCE-led Environmental Assessment Mission have confirmed the illegal activity of Armenians in the occupied territories causing serious environmental damage, including the intentional burning of forests.<sup>830</sup>

Armenia is also changing the demographic picture of the occupied territories through the massive settlement of Armenian families not only in Nagorno-Karabakh but also in the occupied surrounding territories. Azerbaijan has raised this issue with most international organisations and succeeded in conduct of several special commissions by various international organisations which confirmed the facts of the massive settlement of the occupied territories of Azerbaijan, which was treated by the mediators as a threat to the peace talks.<sup>831</sup> The IRCC also expressed its concern on the massive settlement of

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<sup>828</sup> 'Protest as Turkey Drills for Oil in Northern Cyprus' BBC News (26 April 2012) <<http://www.bbc.co.uk/news/world-europe-17852182>> accessed 12 October 2013.

<sup>829</sup> UNGA Res 60/285 (7 September 2006) UN Doc A/Res/60/285.

<sup>830</sup> UNGA, 'Annex to the Letter dated 20 December 2006 from the Permanent Representative of Belgium to the United Nations addressed to the Secretary-General, OSCE-led Environmental Assessment Mission to Fire-Affected Territories in and Around the Nagorno-Karabakh Region. Report to the OSCE Chairman-in-Office from the Coordinator of OSCE Economic and Environmental Activities' UNGA 61<sup>st</sup> Session, Agenda Item 17 (12 January 2007) UN Doc A/61/696.

<sup>831</sup> UNGA, 'Report of the OSCE Fact-Finding Mission (FFM) to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh (NK) Annex II to the Letter dated 18 March 2005 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General' UNGA 59<sup>th</sup> Session, Agenda Item 163 (21 March 2005) UN Doc A/59/747-S/2005/187; UNCHR (Sub-Commission

Armenians in the occupied territories of Azerbaijan, stating that such state of affairs may seriously result in humanitarian problems.<sup>832</sup>

The OSCE Minsk Group mediating the Nagorno-Karabakh conflict explicitly stated that preserving the mass settlement situation by Armenians might negatively affect the peace negotiation between the conflicting parties.<sup>833</sup> Modern international law prohibits the settlement of occupied territories by the occupying forces, as confirmed by numerous international and regional instruments. Article 49(6) of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides for the prohibition of settlement of occupied territories.<sup>834</sup> State practice formed in particular after WWII has transformed such prohibition into the norm of customary international law.<sup>835</sup>

If, to make parallels between the situation in Transnistria and in that in Nagorno-Karabakh, the following specifics emphasised by the ECHR in the *Ilascu* case<sup>836</sup> can be applied also to the Nagorno-Karabakh conflict. Such attempts to get its own *Ilascu* case is clearly demonstrated in the *Chiragov and others v Armenia* case admitted by the

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on Promotion and Protection of Human Rights Working Group on Minorities) Report (5 May 2003) UN Doc E/CN4/Sub2/AC5/2003/WP7; Council of Europe, 'PACE Recommendation 1570' (2002) <<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EREC1570.htm>> accessed 23 December 2007; OSCE, 'Report on the Activities of the Personal Representative of the OSCE Chairman-in-Office on the Conflict Dealt with by the OSCE Minsk Conference' (1 September-31 October 2004) 48, para 48; US Committee for Refugees, 'World Refugee Survey 2002 Country Report, Armenia' <<http://www.unhcr.org/refworld/country,,USCRI,,ARM,,3d04c13fc,0.html>> accessed 21 March 2013.

<sup>832</sup> UNGA, 'Verbal Note of the International Committee of the Red Cross of 10 November 2000 addressed to the Permanent Mission of Azerbaijan to the United Nations, cited in Annex to the Letter dated 11 November 2004 from the Permanent Representative of Azerbaijan to the United Nations addressed to the President of the UNGA' UNGA 59<sup>th</sup> Session, Agenda Item 163 (11 November 2004) UN Doc A/59/568.

<sup>833</sup> UNGA, Report of the OSCE Fact-Finding Mission (n 831).

<sup>834</sup> Text in A Roberts and R Guelff, *Documents on the Laws of War* (3rd edn) (Oxford, OUP 2003) 299-369.

<sup>835</sup> E Benvenisti, *The International Law of Occupation* (Princeton, Princeton University Press 2004) 140; Y Blum, 'East Jerusalem is not Occupied Territory' (1973) 27 *Hapraclit* 183; J Pictet, *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross, Geneva 1958) 283; JM Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, CUP 2005) 463.

<sup>836</sup> *Ilascu* (n 100).

ECHR<sup>837</sup> and which is of great relevance to the legal appraisal of the Nagorno-Karabakh conflict and providing clear picture of the long lasting conflict. Based on available facts and evidences, it can be argued that Armenia, its state agencies, officials and officers are directly involved in the illegal actions against the territorial integrity of Azerbaijan, its boundaries and civilian population constituting the breach of international obligations of Armenia. Like in the case of Transnistria where Russia exercises an effective control over the separatist region, Armenia has a full and effective political and military control over the Nagorno-Karabakh region. Such control is exercised through the military presence and economic dependence of the puppet regime of Nagorno-Karabakh from Armenia. This position was expressed by the applicants and Azerbaijan in the *Chiragov* case.<sup>838</sup> In this case the responsibility of Armenia is clear and should be considered as a result of its illegal actions constituting the breach of international law even through its puppet separatist regime.<sup>839</sup> Azerbaijan produced a sufficient number of the facts and arguments in the *Chiragov* case, in which it stated that Armenia exercises a full control over Nagorno-Karabakh and stations its soldiers in the occupied territories.<sup>840</sup> In its statements Azerbaijan referred to other ECHR cases for legal support of its position.<sup>841</sup>

As it is known, the use of force is prohibited under international law, and the only exception is in the case of the self-defence provided under article 51 of the UN Charter. For justification of the occupation of Azerbaijani territories, the Armenian side refers to the self-defence of the separatist regime of Nagorno-Karabakh against

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<sup>837</sup> *Chiragov* (n 502).

<sup>838</sup> *ibid* 463.

<sup>839</sup> *Loizidou* case (n 445); *Ilascu* (n 100); *Bankovic and Others v Belgium and Others* (App no 522207/99, 59-61) ECHR 2001.

<sup>840</sup> *Chiragov* (n 502) 18.

<sup>841</sup> *Harutyunyan v Armenia* (App no 36549/03) ECHR 28 June 2007; *Zalyan, Sargsyan and Serobyan v Armenia* (App no 36894/04 and 3521/07) ECHR 11 October 2007.



Azerbaijan's military actions on restoration of Azerbaijan's jurisdictional control over the region. However, it should be mentioned that only states can be recognised as beneficiaries of the right to self-defence. This was confirmed in the ICJ's *Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, where the Court stated that the self-defence right could be used only upon the attack of one state by another one.<sup>842</sup> In the case of Nagorno-Karabakh, the puppet separatist regime controlled by Armenia and not recognised by even a single state cannot be regarded as a state possessing the self-defence right. Even the texts of four UNSC resolutions<sup>843</sup> adopted in 1993 also refer to the local Armenian forces, but not to Armenia. Therefore, the separatist regime of Nagorno-Karabakh is not entitled to the self-defence right which is in fact used by Armenians as an occupation instrument.

In the meantime, the recent signing of the Moscow Declaration by only the Armenian President and not by the representative of the 'Nagorno-Karabakh Republic' has reaffirmed Azerbaijan's claims that the conflict is inter-state and based on territorial claims of Armenia to Azerbaijan, and furthermore it is not the exercise of the self-determination by the Armenian population of Nagorno-Karabakh. The fourth paragraph of the Moscow Declaration calling the two presidents of Azerbaijan and Armenia to continue negotiations and use their best efforts to achieve the settlement of the conflict once again has finally and explicitly determined the conflicting parties, which are Armenia and Azerbaijan.<sup>844</sup> Undoubtedly, it can be contended that by signing the

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<sup>842</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep para 139.

<sup>843</sup> UNSC Resolutions (n 730).

<sup>844</sup> Full Text in Russian at the Official Website of Russian President  
<<http://www.kremlin.ru/text/docs/2008/11/208670.shtml>> accessed 19 November 2008.

Moscow Declaration, Armenia has explicitly recognised its direct involvement in the conflict and its responsibility for the achievement of the conflict's settlement.

In the case of the Nagorno-Karabakh conflict, it is clearly seen that Armenia's actions are an attempt to justify its aggression against Azerbaijan under the umbrella of self-determination, whereas its violation of the fundamental norms and principles of international law is clear in the current case.

*a. Other 'Third States' Factors*

In contrast to other case studies analysed herein, in the case of Nagorno-Karabakh conflict along with Armenia there is another express 'third state' factor playing a huge role in this long-lasting conflict. In fact, the two conflicting sides have made their choices of alliance and 'polarised their international attitudes'.<sup>845</sup> Azerbaijan much relies on the West, represented in the region by Turkey, one of the key regional geopolitical players, whereas Armenia essentially counts on Russia and Iran which support it both economically and militarily.<sup>846</sup>

There are no doubts that both sides inherited a huge number of weapons from the Soviet Army; however, in the active phase of the military clashes in Nagorno-Karabakh, only Armenia was receiving additional weapons from the third states. One of the scandalous exposures of such military support of Armenia by Russia was the famous General Rokhlin's case. General Rokhlin accused the high Russian military leadership and Yeltsin of a non-constructive attitude and the illegal supply of weapons

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<sup>845</sup> De Waal (n 79) 4.

<sup>846</sup> R Freitag-Wirringhaus, 'Prospects for Armenia and Azerbaijan between Eurasia and the Middle East' in D Hamilton and G Mangott (ed) *The Wider Black Sea Region in the 21st Century: Strategic, Economic and Energy Perspectives* (Baltimore, Johns Hopkins Univ. 2008) 53-86.

and ammunition worth more than USD 1 billion to Armenia.<sup>847</sup> The former Armenian President, Levon Ter-Petrosian, confirmed the supply of weapons to Armenia and stated that Russia and Yeltsin wanted nothing but to establish a military balance between the conflicting parties, since he believed that Azerbaijan inherited more weapons from the Soviet Army than Armenia.<sup>848</sup> Official Russian militaries confirmed that the weapons from the Soviet bases located in Armenia and Nagorno-Karabakh were given to Armenians and used against Azerbaijanis, and such ‘military assistance’ was not limited to the transfer of weapons, but also included the provision of military personnel for the offensives against Azerbaijanis.<sup>849</sup>

Notwithstanding the requirements of the UNSC Resolution No 853(1993) and the PACE Resolution No 1416(2005) ‘urging all member states to refrain from the supply of any weapons and munitions which might lead to an intensification of the conflict or the continued occupation of territory’, Russia violated the provisions thereof through supplying weapons to Armenia for more than USD one billion and strengthening its military co-operation with the Armenian armed forces through the increasing and strengthening of its military bases located in Armenia.<sup>850</sup> It can be assumed that, through reference to and alienation from the UNSC Resolution No. 853(1993) on prohibition of supply of weapons and military munitions to the conflict parties, the PACE warned the third states like Russia on the illegality of such arms supply to one of the parties of the conflict.<sup>851</sup> Most recent diplomatic scandals between Azerbaijan and Russia on the free supply of modern Russian weapons to Armenia for

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<sup>847</sup> L. Rokhlin, ‘A Special Operation or a Commercial False?’ (1997) 13 *Nezavisimoe Voennoe Obozrenie* (In Russian) 3.

<sup>848</sup> Interview with the Former Armenian President Ter-Petrosian by T De Waal cited in De Waal (n 77) 199.

<sup>849</sup> A Petrov, ‘Karabakh is a Lesson for the Politicians and Second Afghanistan for the Soldiers’ *Krasnaya Zvezda* (19 February 1992) (In Russian).

<sup>850</sup> Rokhlin, A Special Operation (n 865).

<sup>851</sup> PACE Resolution No 1416 (n 727).

the amount of USD 800 million at the end of 2008 is another clear example of Russia's destabilising 'third state' role in the conflict.<sup>852</sup> Azerbaijan's Ministry of Foreign Affairs expressed an immediate reaction and its concern to such circumstances, criticising the non-constructive and provocative actions of Russia which, as one of the co-chairmen of the Minsk Group, should be unbiased and comply with the neutrality requirements.<sup>853</sup>

Therefore, based on the existing facts it is apparent that Russia's role as 'a third state factor' in the Nagorno-Karabakh conflict is huge. It is undeniable that, through the military, economic and political support of Armenia and its separatist puppet regime of Nagorno-Karabakh, Russia plays a huge negative role as a destabilising factor in the conflict. The independent Western researcher has also confirmed that the role of Russia and its military interference was key in the Armenian battle victory over Azerbaijan in the Nagorno-Karabakh conflict.<sup>854</sup> Such negative role played by Russia in the Nagorno-Karabakh conflict and its indirect military assistance to Armenia in the Nagorno-Karabakh conflict provide grounds to argue that this powerful state violates fundamental norms and principles of international law such as respect of territorial integrity and state boundaries and non-interference in internal affairs of sovereign states<sup>855</sup> affirmed in numerous legal instruments adopted at the universal and regional formats, where Russia actively participates.

In *Nicaragua* case the ICJ set up 'Nicaragua test' clearly stating that 'training, arming, equipping, financing, supplying or otherwise encouraging, supporting and aiding' the forces acting against the territorial sovereignty and political independence of a sovereign state should be qualified as interference in the internal affairs and the use of

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<sup>852</sup> E Danielyan, 'Russia again Denies Arms Supplies to Armenia' (Yerevan, 16 January 2009) <<http://www.armtown.com/news/en/rfe/20090116/200901161>> accessed 20 January 2009.

<sup>853</sup> Official Statement of the Ministry of Foreign Affairs of the Republic of Azerbaijan (Baku 15 January 2009) <<http://www.azembassy.be/EVENTS/Press-releases/50.html>> accessed 22 January 2013.

<sup>854</sup> De Waal (n 79) 206.

<sup>855</sup> *Nicaragua case* (n 518).

force against other states which is a breach of Article 2(4) of the UN Charter and the relevant norm of customary international law.<sup>856</sup> Therefore, since Armenia is directly involved in Nagorno-Karabakh conflict and together with Nagorno-Karabakh regime is acting against the territorial sovereignty of Azerbaijan under the ‘Nicaragua test’<sup>857</sup> through supply of arms to Armenia Russia can be held liable for violations of international law principles such as non-interference in the internal affairs of other states and refrain from the use of force.

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<sup>856</sup> *ibid*, 106.

<sup>857</sup> A Cassese, ‘The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia’ (2007) 18 (4) EJIL 649-668.

#### 4.4.3 Russia's Special Role in the Transnistrian Conflict

When considering the 'third state' factor in the Transnistrian conflict, the main emphasis should be made on the role of such third state in either the direct participation or indirect support of the separatist unit breaching the territorial integrity of the Republic of Moldova. Under modern international law the states shall refrain from interference in the internal affairs of other states, including the resolution of domestic conflicts. It is undeniable that the non-interference principle backs onto such fundamental principles of respect of sovereignty, self-determination and peaceful coexistence. It is obvious that the guarantors or negotiators should play an active role in the solution of the conflicts, but not in intentional political and military interference or support of the other party.

As one of the commentators aptly comments, the Transnistrian conflict has become an issue of the day and 'the new frontline' in the relationship between the West and Russia.<sup>858</sup> In fact, numerous facts available with respect to this case argue in favour of a dominance of political and geopolitical factors rather than purely legal issues arising under international law. Transnistria is one of a few territories representing geopolitical and military interest for Russia in the Eastern Europe outside of the Russian borders. This was confirmed by the ECHR in the *Ilascu* case, where the Court concluded that the 14th Russian Army and the Russian Government were key players in the creation and continued existence of 'the Moldovan Transnistrian Republic'.<sup>859</sup> Speaking about the role and interference of third states, it should be mentioned that in contrast to Russia's role in the Transnistria conflict, as already mentioned Turkey

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<sup>858</sup> D Lynch 'Shared Neighbourhood or New Frontline? The Crossroads in Moldova' (2005) 2 *Russie Cei* Visions 33-51.

<sup>859</sup> *Ilascu* (n 100).

played a positive role in the resolution of the Gagauz issue.<sup>860</sup> In the meantime, it is notable that Romania, being the same ethnicity neighbouring state of Moldova, took the liberal position of not actively interfering in this conflict.<sup>861</sup>

In fact, nothing provides a clearer picture of Russia's special role in the Transnistrian conflict than the ECHR's *Ilascu* case.<sup>862</sup> Another most recent case, which reaffirmed the facts and arguments made in the *Ilascu* case, is *Catan and others v Moldova and Russia*.<sup>863</sup> In the *Ilascu* case, Moldova expressly pointed out that it was not exercising any control over the separatist unit and was prevented from doing so by a third state,<sup>864</sup> which meant that Moldova could not be held liable for any actions taking place in the territory of Transnistria.<sup>865</sup> Moldova was permanently objecting and bringing to the attention of the international community the fact of Russia's direct involvement in the Transnistrian conflict.<sup>866</sup>

Independent research undertaken by the experts of the Association of the Bar of the City of New York,<sup>867</sup> representing a comprehensive analysis on Transnistrian conflict and briefly covering some key issues of the conflict, also deserves much attention for this case study. The Report also put forward sufficient arguments clearly showing Russia's role in the creation of this conflict and the current existence of the separatist Transnistrian regime.<sup>868</sup>

In the *Ilascu* case, the ECHR clearly stated that the Russian Federation was responsible for the unlawful acts committed by the Transnistrian separatists in the view

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<sup>860</sup> Benko (n 795).

<sup>861</sup> *Ilascu* (n 100) 308-309.

<sup>862</sup> *Ilascu* (n 100).

<sup>863</sup> *Catan* (n 695).

<sup>864</sup> *Ilascu* (n 100) 302.

<sup>865</sup> *Cyprus v Turkey* (App No 25781/94) ECHR, April 2001.

<sup>866</sup> *Ilascu* (n 100).

<sup>867</sup> New York Bar Report (n 103).

<sup>868</sup> *ibid.*

of its political, military and economic support to the separatist regime.<sup>869</sup> In this case, the Government of Moldova produced a sufficient number of facts and evidences clearly showing Russia's direct military, economic and political support of the separatist Transnistrian regime.<sup>870</sup> As it was aptly emphasised in the Report on Transnistrian Conflict produced by the Association of the Bar of the City of New York, Russia's negative role in this conflict is huge and is concentrated on three main aspects: (i) military support, (ii) economic support of the separatist regime and economic pressure on Moldova and (iii) overall political support to the breakaway region.<sup>871</sup>

Despite the Treaty on the Principles of the Inter-state Relations of the RSFSR and the Moldovan SSR of 23 September 1990 stipulating 'to suppress on their territories the activity of organisations and groups that aim at destruction of the sovereign statehood and territorial integrity of other Contracting Party',<sup>872</sup> in the Transnistrian conflict Russia always provided political support to the separatist regime. It is notable that the provisions of this Treaty, which was concluded before the official breakup of the USSR, were acknowledged and reiterated by the Parties in the Protocol to this Treaty of 10 February 2005.<sup>873</sup> However, with respect to this issue Russia never complied with its obligations under international law nor under the above-referred bilateral instruments. Today, the leaders of the separatist regime hold Russian passports and citizenship and its army comprises ethnic Russians trained in Russian military schools. The available facts and evidence argue that the separatist puppet regime in Transnistria is controlled by Moscow and the first President of the MTR, Igor Smirnov

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<sup>869</sup> *Ilascu* (n 100) 382.

<sup>870</sup> *ibid.*

<sup>871</sup> New York Bar Report (n 103).

<sup>872</sup> Full Text in Russian, AI Doronchenkov, *To Union of Sovereign Peoples* (n 592) 498.

<sup>873</sup> On file with the author.



(a former military plant administrator in Tiraspol) and the current President Shevchuk much enjoyed Kremlin's support.

The political support of Russia provided to the separatist regime can be observed in many acts of the Russian authorities, in the official statements of high-ranking Russian government officials and in bilateral agreements between the Russian Federation and the separatist regime. Even the former Russian President Boris Yeltsin in his official speech stated that Russia always provided and would provide economic and political support to Transnistria.<sup>874</sup> Another example is the Declaration of the Presidium of the Supreme Soviet of the Russian Federation enacted on 20 March 1992 calling Moldova to resolve the Transnistrian conflict by observing the right of 'Transnistrian people' to self-determination.<sup>875</sup> Even Russia's position on supporting Transnistrian separatists can be expressly seen in the Agreement (never ratified by Russia) signed with Moldova on 21 October 1994 concerning the legal status of the military units of the Russian Federation temporarily stationed in the territory of the Republic of Moldova which, as a prerequisite for withdrawal of the Russian troops, provided for the establishment of a special status for the 'Transnistrian region of the Republic of Moldova'.<sup>876</sup> In its Resolution of 17 November 1995 the State Duma of the Russian Federation declared Transnistria as a special zone of high strategic interest for Russia.<sup>877</sup>

It is also evidenced that the senior officers of the 14th Army located in Transnistria are actively participating in public life in the self-proclaimed republic through their election to the supreme organs of the separatist unit and attend the official

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<sup>874</sup> *Ilascu* (n 100) 138.

<sup>875</sup> *ibid* 68.

<sup>876</sup> On file with the author.

<sup>877</sup> *Ilascu* (n 100) 143.

military parades in Tiraspol.<sup>878</sup> For example, the Chief Commander of the 14th Russian Army, General Lebed, was elected as MP of the ‘Moldovan Transnistrian Republic’.<sup>879</sup> The former chief of security service of the MTR, Vladimir Antufeyev, was a former Soviet General of special punitive militia unit (OMON) in Latvia and a Russian citizen.<sup>880</sup>

Along with its obligations under the fundamental norms and principles of international law such as respect of the territorial integrity and state boundaries and non-interference in the internal affairs of sovereign states, Russia also did not comply with its obligations under the Agreement of 21 July 1991 signed between Moldova and the Russian Federation concerning principles for a friendly resolution of the armed conflict in the Transnistrian region of the Republic of Moldova.<sup>881</sup> The referred Agreement expressly stipulates that the Parties shall act and resolve the conflict under the UN Charter and CSCE instruments. The 3 July 1992 Agreement between Moldova and the Russian Federation signed by the two presidents provided that the 14th Russian Army stationed in the territory of the Republic of Moldova should observe neutrality and not be engaged in any actions against Moldova,<sup>882</sup> which in fact was never observed by Russia.

It is obvious that at the time of commencement of the conflict, the separatist forces could not alone afford to defeat the regular troops of Moldova and its security services. Such a glorious military campaign could take place only with strong external support which, as already proven,<sup>883</sup> was provided by Russia. One of the main actors in the Transnistrian conflict is the 14th Russian Army composed of several thousand

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<sup>878</sup> *Ilascu* (n 100) 139.

<sup>879</sup> *ibid.*

<sup>880</sup> Herd (n 98) 2.

<sup>881</sup> *Ilascu* (n 101) 292.

<sup>882</sup> *ibid* 293-294.

<sup>883</sup> *ibid.*

soldiers, infantry units, artillery and heavy armed machines.<sup>884</sup> Although the facts of direct participation of the 14th Russian Army during the 1991–1992 clashes was proven and documentarily evidenced, the Russian side always denied this fact by stating that the 14th Army's role is limited to peacekeeping action.<sup>885</sup> The ECHR found that the 14th Russian Army and the Russian Cossacks intervened heavily in the conflict and actively supported the separatists to gain possession of certain major cities and settlements of Transnistria.<sup>886</sup> Another military factor was participation of the Russian Cossacks in the military phase against Moldovan troops. Being a military unit approved by the central Russian authorities,<sup>887</sup> this unit officially participated in military operations for the separatist Transnistrian regime. This fact was not even denied by the Russian Government which stated that Cossacks have a right of free movement.<sup>888</sup> There is no doubt that the heavily armed Russian Cossacks enjoying all benefits of military men in Russia are recognised as combatants under international law fighting against Moldova. As of the date Russia has still not complied with its obligations undertaken at the Istanbul Summit of the OSCE to withdraw its troops from Moldova and Georgia.<sup>889</sup> Moreover, most of the military units of the 14th Russian Army have unified with the Transnistrian military forces, removing any thin lines that might have existed in the beginning of the conflict.<sup>890</sup>

Most of the Russian arms producers including Rosvoorujenie, the major Russian arms manufacturer, actively run their special factories and enterprises in the territory of the MTR.<sup>891</sup> It is notable that on 20 March 1998 the Russian Prime Minister,

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<sup>884</sup> *ibid.*

<sup>885</sup> *ibid.*

<sup>886</sup> *Ilascu* (n 100); *Catan* (n 695).

<sup>887</sup> EP Savelyev, *Ancient History of Cossacks* (Moscow, Veche 2007) (In Russian).

<sup>888</sup> *Ilascu* (n 100) 60.

<sup>889</sup> Istanbul Summit Declaration (January 1999) OSCE PCOEW389, 50.

<sup>890</sup> *Ilascu* (n 100) 59.

<sup>891</sup> *Catan* (n 695) 86-87.

Chernomyrdin, and the MTR President, Smirnov, signed the Odessa Agreement on issues related to Russian military property in Transnistria, which provided that the proceeds of sale of weapons and ammunitions should be allocated between the parties on a 50/50 ratio,<sup>892</sup> which was contrary to the agreements entered into between the Russian Federation and Moldova after the dissolution of the Soviet Union. The follow-up Agreement was signed between Russia and the MTR on 15 June 2001 and provided the use of the proceeds from the arms trading for repaying the debts of Transnistria to Gazprom for the supply of natural gas.<sup>893</sup>

The economic support of the separatist regime by Russia is also clear and was stressed by the ECHR in the *Ilascu*<sup>894</sup> and *Catan*<sup>895</sup> cases. Moreover, Russia's application of the decreased rates for electric energy, supply of natural gas and oil products which differ from those applied to Moldova is strong evidence of Russia's economic support of Transnistria.<sup>896</sup> It has been also proven that most of the products, including the heavy industry goods produced in Transnistria, are marked as 'Made in Russia' and exported to third countries, and such exports still take place despite Moldova's consistent objections.<sup>897</sup> Russia is using economic pressure against Moldova through using unacceptable tariff barriers and prohibiting the export of certain key products (such as Moldovan wine) into Russia.<sup>898</sup> Another fact is the opening of bank accounts by the Russian Central Bank for the Transnistrian Central Bank, which enables the separatist regime to send and receive funds globally.<sup>899</sup> Russia is also heavily assisting Transnistria in the social sphere through contributions into its pension funds,

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<sup>892</sup> *Ilascu* (n 100) 299.

<sup>893</sup> On file with the author.

<sup>894</sup> *Ilascu* (n 100).

<sup>895</sup> *Catan* (n 695).

<sup>896</sup> *Ilascu* (n 100) 146.

<sup>897</sup> *Ilascu* (n 100); *Catan* (n 695).

<sup>898</sup> New York Bar Report (n 103) 74.

<sup>899</sup> *Ilascu* (n 100) 142.

which was contrary to Moldovan law.<sup>900</sup> In general, Moldova asserts that during the period 2007–2010) Russia allocated a gratis financial assistance to Transnistria in the amount of USD 55 million.<sup>901</sup>

Despite the denial of Russia on its direct involvement in the Transnistrian conflict in the *Ilascu* case, the ECHR overruled all these political (and in most cases, groundless) declarations and declared that Moldova does not control the territory of Transnistria.<sup>902</sup> The ECHR, on the principle of extraterritorial jurisdiction, found Russia responsible since it exercises effective control over the territory of Transnistria.<sup>903</sup> The active participation of the 14th Russian Army, the close ties between the Transnistrian leadership and the Russian Government and economic pressure on Moldova in this conflict are solid evidences to argue the existence of strong Russian interference in the Transnistrian conflict.<sup>904</sup> Clearly in the current case it can be argued that Russia, by its military, political and economic support of the separatist regime, did not comply with its obligations under the above-referred Agreement to act under the UN Charter and respect the principles of territorial integrity and non-interference in the internal affairs of the member states.

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<sup>900</sup> *Catan* (n 695) 87.

<sup>901</sup> *ibid.*

<sup>902</sup> *Ilascu* (n 100).

<sup>903</sup> *ibid.*

<sup>904</sup> *ibid.*

#### **4.5 Concluding Remarks**

From the foregoing it may be concluded that upon the collision between the right to external self-determination and the principle of *uti possidetis juris* in the four conflict cases of the Post-Soviet area, the former should be limited in favour of the latter. Based on the above researches, it can be concluded that upon the disintegration of the Soviet Union, peoples of the fifteen former republics were lawful holders of the right to external self-determination which exercise resulted in a consensual disintegration of the USSR. The exercise of this right was accompanied by the application of the principle of *uti possidetis juris* under which the transformation of former administrative borders of the Soviet republics into the international boundaries took place. Therefore, from the foregoing it may be concluded that the principles of *uti possidetis juris* and self-determination were mutually supportive upon the obtaining of independence by the former republics of the USSR. It is agreed with Professor Shaw who argues that upon the obtaining of independence by the non-self-governing territory, the principle of self-determination in co-operation with the principle of *uti possidetis* would serve for the protection of the territorial unity of the new state.<sup>905</sup> It is also worthy to refer to Crawford who aptly argues that the principle of self-determination has arisen in the colonial context, harmonising with the doctrine of stability,<sup>906</sup> which is a key element of the principle of *uti possidetis juris*.

However, despite the consensual disintegration of the USSR and the agreed application of *uti possidetis juris* by the former Union republics, the dissolution of the Soviet Union was accompanied with numerous secessionist movements in the territories of the newly independent states. In this case, the conflict between *uti possidetis juris*

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<sup>905</sup> M Shaw 'Territory in International Law' (1982) 13 Netherlands YBIL 71.

<sup>906</sup> Crawford, *The Creation of States* (n 108) 335-338.

and external self-determination can be clearly seen, since the unrecognised separatist units declared their independence and claimed the exercise of the right to secession. In this context there are strong grounds to argue that the principle of *uti possidetis juris* should have a primary force over the right to external self-determination aimed at the impairment of the internationally recognised territorial integrity and the political, economic and cultural unity of Georgia, Azerbaijan and Moldova.

Thus, it may be argued that, in the case of the Post-Soviet area, the principle of self-determination upon the process of obtaining independence, together with the principle of *uti possidetis juris*, served to protect the territorial integrity of newly independent states, the former USSR republics. In addition, at the next stage these principles collide due to the intention of ethnic or other groups to exercise the right to external self-determination and *eo ipso* impair the territorial integrity and unity of these newly independent states. It is obvious that in this case the principle *uti possidetis juris* is called to protect the territorial integrity of a state against the groundless claims to external self-determination.

Therefore, from the foregoing it may be concluded that no grounds for secession of the separatist units in the territories of the former USSR republics exist under international law. Moreover, based on the above facts, it can be concluded that the actions of Russia in Abkhazia, South Ossetia and Transnistria, and of Armenia in Nagorno-Karabakh on the creation of puppet separatist regimes therein, should be qualified as serious violations of the fundamental norms and principles of international law.<sup>907</sup> Under the ‘Nicaragua test’<sup>908</sup> such actions can also be considered as interference in the internal affairs in and the use of force against Georgia, Moldova and Azerbaijan.

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<sup>907</sup> *Nicaragua case* (n 518).

<sup>908</sup> *ibid.*

It is vivid that there is an attempt to justify such violations of international law by the referred states by the self-determination of the breakaway regions. Based on the above analysis of the principle of *uti possidetis juris*, it can be argued that since the proclaiming of independence by Georgia, Azerbaijan and Moldova the former administrative borders of the Georgian SSR, the Azerbaijan SSR and the Moldavian SSR (which also included Abkhazia and South Ossetia in the case of Georgia, Nagorno-Karabakh in case of Azerbaijan, and Transnistria in the case of Moldova) have been transformed into the internationally recognised boundaries of sovereign Georgia, Azerbaijan and Moldova.

Moreover, being members of the CIS and joining various legal instruments, both Russia and Armenia undertook obligations to recognise and respect the territorial integrity and inviolability of boundaries of all member states which emerged as a result of the USSR collapse. Practically it meant that the former USSR republics consensually applied the principle of *uti possidetis juris* towards determination of their international boundaries. Various CIS instruments declared that each member state should respect the sovereignty and inviolability of the state borders of other member states and recognise the existing boundaries and the territorial integrity of the member states.<sup>909</sup> All parent states, Georgia, Azerbaijan and Moldova, consistently appealed to the international community, the UNSC and the UNGA with the existence of negative ‘third state’ factors in all four conflicts in the Post-Soviet area, and this can be observed in dozens of official statements, petitions and submissions of the aforementioned states which were always accompanied with sufficient supporting legal arguments.<sup>910</sup>

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<sup>909</sup> Minsk Agreement (n 279); Alma-Ata Declaration (n 284); CIS Declaration (n 719).

<sup>910</sup> *Ilascu* (n 100); *Catan* (n 695); *Chiragov* (n 502).



## CHAPTER 5: IN QUEST FOR PEACE SETTLEMENT

### 5.1 Peace Settlement Initiatives in Georgia

Although since the beginning of both the Abkhazian and South Ossetian conflicts Russia took a leading role in negotiating the settlement, there were a few attempts by the international community to achieve a resolution of these conflicts. While PACE considers the two conflicts together,<sup>911</sup> the international community puts a separation line between them.<sup>912</sup> Unfortunately, the Five-Day War caused both conflicts in Georgia to be ‘frozen’, with no hope of soonest effective settlement.

After signing the Sochi Ceasefire Agreement bringing the end to the clashes between South Ossetians and Georgians two years later, Georgia and Abkhazia signed the Moscow Agreement ceasing the active military clashes between Georgia and Abkhazia. After the ceasefire between Georgia and Abkhazia, the active phase of negotiations started between the parties in 1993. In 1993 a UN Special Envoy established a UN Observation Mission in Georgia (UNOMIG) to monitor the ceasefire and to facilitate the peace talks and placement of the CIS peacekeeping forces, which were never put into the region due to the sole monopoly of the Russian troops.<sup>913</sup> In 1997 the Envoy’s position was transformed into the Special Representative of the Secretary-General who took a role of negotiations facilitator.<sup>914</sup> The UN-led negotiations later became known as the Geneva Process. All negotiations on Abkhazia took place under the direct supervision of the UN, the OSCE and Russia, with the latter taking the lead role. The Declaration on Measures for a Political Settlement of

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<sup>911</sup> PACE Resolution No 1633 (2 October 2008) CE Doc 11724.

<sup>912</sup> UNSC Res 1808 (2008) (15 April 2008), UN Doc S/RES/1808; UNSC Res 1839 (2008) (9 October 2008), UN Doc S/RES/1839; UNSC Res 1866 (2009) (13 February 2009), UN Doc S/RES/1866.

<sup>913</sup> United Nations Observer Mission in Georgia, UNOMIG – Background <<http://www.un.org/en/peacekeeping/missions/past/unomig/background.html>> accessed 4 February 2013.

<sup>914</sup> *ibid.*

Georgian–Abkhaz conflict was signed on 4 April 1994 between the Parties, and was followed by the Proposals relating to political and legal elements of the comprehensive settlement of Georgian–Abkhaz conflict adopted as Annex II of the UN Secretary-General’s Report of 3 May 1994.<sup>915</sup> By supporting Georgia’s territorial integrity, the international community proposed in 2000 a special resolution plan where Abkhazia was proposed a status of federal subject within Georgia with competencies between distributed between the federal centre and the unit; however, Abkhazia (supported by Russia) rejected this plan as unacceptable to its interests.<sup>916</sup>

One of the most comprehensive settlement plans was the ‘Boden Proposal’ providing for the reunification of Abkhazia and Georgia under the common roof of the Republic of Georgia.<sup>917</sup> The offer specified competencies and their allocation between Georgia and Abkhazia. The offer received serious support by the UN, but was rejected by Abkhazia as unacceptable.<sup>918</sup> Dieter Boden was in active consultations with the Group of Friends of the UN Secretary-General on Georgia, a special group of countries supporting the UN mediation. It was rather a forum between Russia and the lead Western countries to find a common language in settlement of this conflict. Boden’s plan included basic principles of the conflict settlement and was nothing but a political

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<sup>915</sup> ‘Report of the Secretary-General on the situation in Abkhazia, Georgia: Proposals for political and legal elements for a comprehensive settlement of Georgian/Abkhaz conflict’ S/1994/529 (3 May 1994) 11.

<sup>916</sup> V Socor ‘Moscow Kills Boden Paper, Threatens to Terminate UNOMIG in Georgia’ (7 February 2006) 3(26) Eurasia Daily Monitor  
<[http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=31362](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=31362)> accessed 17 June 2012.

<sup>917</sup> ICG ‘Abkhazia: Ways Forward:’ Europe Report No 179 (18 January 2007) 11  
<[http://www.crisisgroup.org/~media/Files/europe/179\\_abkhazia\\_\\_\\_ways\\_forward.ashx](http://www.crisisgroup.org/~media/Files/europe/179_abkhazia___ways_forward.ashx)> accessed 3 September 2012.

<sup>918</sup> Interview with Abkhazian Minister of Foreign Affairs S Shamba to ‘Echo Abkhazii’ Newspaper, cited by REGNUM Information Agency on 25 July 2008 (In Russian) <[www.regnum.ru/news/1032262.html](http://www.regnum.ru/news/1032262.html)> accessed 17 May 2009; A Babitsky ‘Abkhazia and Georgia: Impossibility of Coexistence in a Common State’ (31 Jul 2008) (In Russian) <<http://www.svoboda.org/content/article/458693.html>> accessed 6 March 2013.

compromise between Russia and the Western powers.<sup>919</sup> According to Abkhazia and Russia, as a result, the paper prepared by Boden was vague and contradictory and did not address the key issues.<sup>920</sup> Although the paper provided for an accommodation between the principle of territorial integrity and self-determination, the proposal made by Boden explicitly offered Abkhazia some kind of sovereign political status within Georgia. The Proposal called the Parties to enter into a federal agreement providing for the distribution of powers which would be binding on the Parties. The document itself did not offer Abkhazia the status of a fully sovereign state. Under the Boden Proposal the distribution of powers should have been based on the ‘horizontal’ division of the legislative, executive and judiciary powers, whereas a ‘vertical’ one had to be used between the federal institutions.

The Boden Proposal also referred to the 4 April 1994 Declaration on Measures for a Political Settlement of the Georgian–Abkhaz Conflict as a ground for arrangement in various fields of co-operation. However, the Boden Proposal left open key issues on allocation of responsibilities between the Parties in the fields of defence and security, and most importantly the document did not address the issue of guarantee. The word ‘sovereign’ within the context of the Boden Proposal meant only a specific status for Abkhazia as a constitutional unit within the Georgian state. Most likely, such structure is similar to the one used within the Russian Federation between the centre and Tatarstan.<sup>921</sup> In reality it meant that Abkhazia had to enjoy extensive autonomy within Georgia. It is obvious that despite Russia’s approval of the Boden Proposal, it took a

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<sup>919</sup> B Coppieters, ‘Georgian-Abkhaz Conflict’ In B Coppieters and others, *Europeanization and Conflict Resolution Case Studies from the European Periphery* (Ghent, Academia Press 2004) 191-232.

<sup>920</sup> I Tekushev, S Markedonov and K Shevchenko, *Abkhazia: Between the Past and the Future* (Prague, Medium Orient 2013) 42-45.

<sup>921</sup> J Hughes, ‘Managing Secession Potential in Russian Federation’, in J Hughes and G Sasse (ed), *Ethnicity and Territory in the Former Soviet Union: Regions in Conflict* (London, Frank Cass 2002) 42-49.

passive role and argued that it would not use its influence on the separatist authorities to accept the plan, since at that time political tension had already taken place between Russia and Georgia. It was a main reason for the Boden Proposal becoming a useless document. The commentators argue that the Boden Proposal was undeveloped in comparison with the other international conflict settlement plans due to the lack of various key issues of the Abkhaz conflict resolution.<sup>922</sup>

Nevertheless, the main reason for the failure of the Boden Proposal was a competition between Russia and the Western world in mediating on the Abkhaz conflict, which made the settlement impossible. If in case of the Balkans the Western countries led by the US demonstrated a strong intention to take over the settlement and Russia accepted it, in the South Caucasus the situation was completely different. Undoubtedly, Russia still considers this zone as a sphere of its geopolitical interests, but at the same time continues supporting the separatist units and blocking any settlement attempts. Officially Abkhazia claimed that the Boden Proposal cannot be acceptable since it provides for the reincorporation of Abkhazia into the Georgian federal state.<sup>923</sup> A number of other settlement attempts were undertaken by the Georgian authorities after the Boden Proposal, but none of them were accepted by the separatist authorities supported by Russia.

A couple of years later the draft Protocol on the Georgian–Abkhaz settlement was submitted by Russia and which was based on a proposal to establish a common state where the Parties would enjoy equal rights. In practice it meant that Abkhazia and Georgia should establish a confederation. Georgia rejected this Proposal and refused to

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<sup>922</sup> Coppieters (n 919) 191-232.

<sup>923</sup> *ibid.*

sign the Protocol. At the time of submission of the Proposal, Georgia enjoyed huge support from the US and various international organisations.<sup>924</sup>

In 2006 the international community was hoping to achieve progress in the resolution of the Abkhaz conflict within the UN-led Coordinating Council. Both Parties produced its own vision on settlement of the conflict. Abkhazia submitted a document referred to as the 'Key to the Future' document,<sup>925</sup> whereas Georgia produced the 'Road Map'.<sup>926</sup> The optimism of the Parties and the international community resulted in a special operation against the armed groups in the Kodori valley undertaken by the Georgian military forces. It was followed by Abkhazia's refusal from all further negotiations and Russia's tough position against Georgia. Instead Georgia started the anti-Russian campaign in various forums. The UN position on the Abkhaz issue remains unchanged since the beginning of the conflict, expressed in the non-admissibility of the change of Georgia's internationally recognised boundaries though the use of force.<sup>927</sup>

In the Abkhaz conflict the peace process was heavily prevented by certain military clashes between the Georgian and Abkhaz militaries. In the course of the Chechen war in Russia in 1998–2001 the Ghali and Kodori regions were the primary clash centres undermining a core idea of the peace talks on settlement of this complicated conflict. The primary forum for the peace talks between Georgia and Abkhazia was the Coordinating Council which suspended its activities from 2001 until

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<sup>924</sup> 'Declaration by the Presidency on behalf of the EU on Georgia 24 Permanent Council No 710' (2008) <<http://www.osce.org/pc/31712>> accessed 17 August 2010; J Nichol, 'Russia-Georgia Conflict in South Ossetia: Context and Implications for US Interests' CRS Report to Congress of the United States of America (24 Oct 2008) <<http://fpc.state.gov/documents/organization/112446.pdf>> accessed 19 January 2013.

<sup>925</sup> ICG, Abkhazia: Ways Forward (n 935).

<sup>926</sup> *ibid*, 25.

<sup>927</sup> UNSC Res 849 (1993) (9 July 1993), UN Doc S/1993/849; UNSC Res 854 (1993) (6 August 1993), UN Doc S/1993/854; UNSC Res 858 (1993) (24 August 1993), UN Doc S/1993/858; UNSC Res 876 (1993) (19 October 1993), UN Doc S/RES/876, UNSC Res 881 (1993) (November 1993), UN Doc S/RES/881; UNSC Res 892 (1993) (22 December 1993), UN Doc S/RES/892.

2006, resuming its activities two years before the Five-Day War in South Ossetia. After this war, whereas Abkhazia provided military support to the former and started an offensive against the Georgian troops like other conflicts considered herein, the Abkhaz conflict entered a passive frozen phase.

In the case of South Ossetia, like in the Abkhaz conflict, the lead role in the mediation was taken by Russia, and its full control of the negotiation format produced no positive results.<sup>928</sup> Any attempts of Georgia to produce an acceptable proposal for solution of the conflict and to reincorporate South Ossetia within the Georgian constitutional frameworks were opposed and rejected by the separatist unit.

The 1992 Sochi Agreement ‘On the Principles of the Settlement of Georgian–South Ossetian Conflict’ brokered by Russia achieved a ceasefire between Georgia and South Ossetia and set the Joint Control Commission, which included Georgians, South and North Ossetians and Russians.<sup>929</sup> The OSCE was also called to actively participate in this process and lead the peace process.<sup>930</sup> The OSCE Mission to Georgia pursuing a goal to support peace achievements since 1994 was closed after the Five-Day War.<sup>931</sup>

In 2005 a new peace plan for South Ossetia was declared by the Georgian President, Saakashvili, which proclaimed three phases of settlement process implying demilitarisation of the region, economic co-operation between Georgia and the breakaway region and political settlement of the conflict and determination of South Ossetia’s status.<sup>932</sup> However, the plan was rejected by South Ossetia which, through its President Eduard Kokoiti, declared that being citizens of the Russian Federation the people of the breakaway region were not willing to live under a common state roof with

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<sup>928</sup> ICG, Georgia: Avoiding War in South (n 34) 4.

<sup>929</sup> Sochi Agreement (n 45).

<sup>930</sup> OSCE Mission to Georgia, Overview <<http://www.osce.org/georgia-closed/43383>> accessed 3 February 2013.

<sup>931</sup> *ibid.*

<sup>932</sup> Central Eurasia: Daily Report Doc No CEP-15001 (7 October 2005).

Georgia.<sup>933</sup> The proposed plan was supported by the OSCE and, for the avoidance of further escalation, South Ossetia (with the support of Russia) brought a counter-offer which expressly provided for independence of South Ossetia from Georgia. A follow-up referendum in South Ossetia at which 99% of voters voted in favour of South Ossetia's independence served as a justification for the separatist entity to reject the 2005 plan.

After years of ineffective peace talks, in 2007 Georgia offered to terminate the OSCE-led Joint Control Commission and to replace it with another format, but that was rejected by South Ossetia and Russia.<sup>934</sup> Such situation gradually escalated and resulted in the Five-Day War in 2008.<sup>935</sup> It can be argued that the Georgian President Saakashvili's attempts to reintegrate South Ossetia within the constitutional frameworks of Georgia took place basically as a result of continuous deadlock in negotiations lasting decades. Another serious reason for such actions was Saakashvili's belief in repeating his success achieved in another non-loyal Ajara region. He believed that the settlement of the South Ossetia conflict would be achieved in a similar way to the Ajara scenario.<sup>936</sup> It can be argued that Saakashvili made a serious mistake in thinking that he would receive strong support from the Western world, which would be ready to enter into confrontation with Russia on the South Ossetian issue. Russia actively used the Georgian military attack factor to justify its own military actions and further recognition of the separatist units.

It can also be argued that the main reason for failing to achieve peace in both Georgian conflicts was the passive role of the players like the UN, the OSCE and the

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<sup>933</sup> Central Eurasia: Daily Report, Doc No CEP-27204 (12 December 2005).

<sup>934</sup> M Frichova 'Transitional justice and Georgia's conflicts: Breaking the silence, ICTJ' <<http://ictj.org/sites/default/files/ICTJ-Georgia-Breaking-Silence-2009-English.pdf>> accessed 19 September 2012.

<sup>935</sup> Central Eurasia: Daily Report, Doc No CEP-950449 (1 November 2007).

<sup>936</sup> ICG, Georgia: Avoiding War in South (n 34) 9; ICG, Saakashvili's Ajara Success: Repeatable Elsewhere in Georgia? Europe Briefing ICR, Tbilisi/Brussels (18 Aug 2004) <<http://unpan1.un.org/intradoc/groups/public/documents/untc/unpan018787.pdf>> accessed 7 June 2010.

US. Their passive role was clear even in 2008 when none of these players took any actions to prevent the hostilities in South Ossetia, save for the EU and France which played a special role in achieving the ceasefire between Russia and Georgia.<sup>937</sup>

In April 2008 the UN reaffirmed ‘the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders’ and called the parties to eliminate all hostilities and return all displaced persons.<sup>938</sup> In fact, the UNSC’s position on the affirmation of Georgia’s sovereignty, independence, territorial integrity and internationally recognised boundaries in April 2008 has not changed so far. The EU also condemned Russia’s interference in the South Ossetian and the Abkhaz conflicts and blamed Russia for losing its credibility as a neutral peacekeeper.<sup>939</sup> The PACE also condemned the recognition of South Ossetia and Abkhazia by Russia. It was specifically stressed by the PACE that Russia’s recognition of the breakaway units was a violation of international law and ‘European statutory principles’.<sup>940</sup> Furthermore the main European political forum confirmed again the need for the respect of Georgia’s territorial integrity, sovereignty and boundaries.<sup>941</sup> It is fairly observed by some commentators that such Resolution uses quite strong and categorical language which is not usual for the PACE.<sup>942</sup> The US did not admit South Ossetia’s independence and urged it to reintegrate into Georgia, and promises huge financial assistance for this plan; however, it did not go beyond any soft language declarations.<sup>943</sup> In general, it can be

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<sup>937</sup> Nichol (n 924) 6-18.

<sup>938</sup> UNSC Res 1808 (15 April 2008) 5866<sup>th</sup> Meeting UN Doc SC/9299.

<sup>939</sup> ‘EU Condemns Russian Recognition of South Ossetia, Abkhazia: Presidency’ Agence France Presse (26 August 2008).

<sup>940</sup> PACE Resolution No 1647 (28 January 2009) CE Docs 11800/11806/11805.

<sup>941</sup> *ibid.*

<sup>942</sup> Nußberger (n 527) 343.

<sup>943</sup> The White House Office of the Press Secretary *President Bush Condemns Actions Taken by Russian President in Regards to Georgia* (16 August 2008) <<http://georgewbush-whitehouse.archives.gov/news/releases/2008/08/20080826-2.html>> accessed 6 February 2013; J Helprin, ‘Russia Says it Is Ready to Negotiate with Georgia,’ (10 August 2008) *Associated Press*; UNSC Security Council Briefed by Political Affairs, *Peacekeeping on Georgia Developments, Including 26 August*



concluded that Russia's recognition of South Ossetia was strongly criticised as a violation of Georgia's territorial integrity and sovereignty that was previously confirmed by Russia in numerous UNSC resolutions.<sup>944</sup>

Despite the claims of Abkhazians and South Ossetians that secession of these breakaway regions is an exercise of the right to external self-determination,<sup>945</sup> there is a clear political and geopolitical factor where the primary role of Russia is obvious. The outcome of the Five-Day War did not contribute much in settlement of these conflicts, but in contrast significantly changed the picture in the region, decreasing optimism for an effective resolution. Moreover, Russia's veto on the UN and the OSCE observer missions deprived these conflicts of any serious international peace mediation.<sup>946</sup> Today, based on a review of Russia's role in both Georgian conflicts, it can be argued that without the former's constructive participation, the amicable resolution of these conflicts under the norms and principles of international law seems very difficult.<sup>947</sup> Currently there are no active peace talks for the resolution of the Abkhaz and South Ossetian conflicts due to the conservative stance of Russia which in turn prevents any possible peace initiatives by the international community.

The effective solution of the Georgian conflicts can be seen only by preserving the territorial integrity of the Republic of Georgia and granting the highest autonomous status to Abkhazia and South Ossetia. Taking into account the current status of both

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*Recognition Decrees on Abkhazia, South Ossetia*, Press Release SC/9438, August 28, 2008; 'Obama Condemns Russia's Recognition of Abkhazia and South Ossetia' (26 August 2008) PoliticusUSA <<http://www.politicususa.com/Obama-Russia-Recognition.html>> accessed 19 March 2013.

<sup>944</sup> OSCE, Press-Release OSCE Chairman Condemns Russia's recognition of South Ossetia, Abkhazia Independence (26 August 2008) <<http://www.osce.org/cio/50011>> accessed 1 July 2010.

<sup>945</sup> ICG, 'Abkhazia Today, Europe Report' (No 176) <[http://www.crisisgroup.org/~media/Files/europe/176\\_abkhazia\\_today.ashx](http://www.crisisgroup.org/~media/Files/europe/176_abkhazia_today.ashx)> accessed 10 November 2012.

<sup>946</sup> C Boian, 'Russia Moves Toward Recognition of Georgian Rebel Zones,' Agence France Presse, 20 August 2008.

<sup>947</sup> D Boden 'Conflict Settlement 20 Years after the War in Abkhazia' Democracy & Freedom Watch (8 August 2012) <<http://dfwatch.net/conflict-settlement-20-years-after-the-war-in-abkhazia-34184>> accessed 27 December 2012.

conflicts and Georgia's unfavourable position, one can argue in favour of the federative state of Georgia with asymmetric federal subjects including Abkhazia and South Ossetia. However, even if the legal grounds give Georgia a strong basis to claim that under international law both Abkhazia and South Ossetia constitute the territory of the Republic of Georgia, the respect of human rights and the grant of the highest self-governance status to both regions should be an absolute must in order to provide an additional comfort to these entities. Any effective wide autonomy model adapted to the Georgian realities can be an effective settlement scenario for both conflicts. Nevertheless, with the current state of affairs with Russia's non-constructive position<sup>948</sup> on both conflicts, the task of resolving these conflicts peacefully under international law with respect of the principles of territorial integrity and the state boundaries determined under the principle of *uti possidetis juris* as well as internal self-determination seems extremely difficult and challenging.

The above overview of the Abkhaz and South Ossetian conflicts give strong grounds to argue that these two conflicts are not the 'real' cases of collision between certain principles of international law such as territorial integrity, *uti possidetis* on the one hand and external self-determination on the other. Rather, the two conflicts appear to be geopolitical tensions between Russia and the West, where the separatist units supported by Russia attempt to hide their actions in these conflicts under the umbrella of self-determination. Therefore, all other reasons are only aggravating circumstances and not key for these conflicts. However, since the political analysis of the Abkhaz and South Ossetian conflicts are beyond the scope of these researches, the main emphasis is made on legal issues arising out of the secession attempts of these two units and their recent recognition by Russia and other states. From a legal point of view, it is argued

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<sup>948</sup> *ibid.*

that there is an obvious violation of the fundamental principles of international law, such as the principles of territorial integrity, inviolability of international boundaries, non-interference in internal affairs, use of force and gross violation of human rights. All these violations were committed by the separatist units with the direct involvement and support of the Russian Federation. In this regard it is disappointing that a permanent member of the UNSC violates and ignores the fundamental principles of international law and uses force against other UN member in the twenty-first century.

After the recognition of Abkhazia and South Ossetia, Russia insisted on the termination of the UN and the OSCE mandates, arguing that there is no need for such format in the light of post-war circumstances.<sup>949</sup> Although the EU has been trying to be actively involved in the peace settlement process in Georgia since August 2008, no serious progressive outcome has been achieved so far. Based on the above review, it is concluded that both conflicts in Georgia should be resolved under the norms and principles of international law which imply respect of the territorial integrity of Georgia and the inviolability of its internationally recognised boundaries.

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<sup>949</sup> S Lavrov, 'Russian Foreign Politics and New Quality of the Geopolitical Situation' *Russian Diplomatic Yearbook* (2008) <[http://www.mid.ru/brp\\_4.nsf/sps/80f92fa1b96d767ec3257520002dd4ae](http://www.mid.ru/brp_4.nsf/sps/80f92fa1b96d767ec3257520002dd4ae)> accessed 17 November 2008.

## **5.2 Nagorno-Karabakh: Long-Lasting International Settlement Attempts**

The UNSC condemned the secessionist movements in Nagorno-Karabakh of Azerbaijan and the respect of the territorial integrity and inviolability of Azerbaijan's state boundaries were affirmed in numerous UNSC resolutions.<sup>950</sup> Since the beginning of the Nagorno-Karabakh conflict, the territorial integrity and inviolability of Azerbaijan's boundaries, as well as the occupation of Azerbaijan's territory by Armenian forces and illegal separatist activity in the Nagorno-Karabakh region, have been confirmed at the Lisbon Summit,<sup>951</sup> in the Resolution of Council of Europe,<sup>952</sup> the Organisation of the Islamic Conference<sup>953</sup> and by other organisations.<sup>954</sup> Besides the non-recognition of the separatist region, the international community consistently condemns any political actions of Nagorno-Karabakh intended to show its false independence. In 2006 the OSCE Chairman, Co-chairmen of the Minsk Group and the EU rejected and condemned the referendum on the adoption of the Constitution of 'the Nagorno-Karabakh Republic' and considered it as a threat to a negotiated settlement process on the Nagorno-Karabakh conflict.<sup>955</sup>

It should be noted that to date Armenia has not been successful in convincing the international community of the legality of its territorial claims to Nagorno-Karabakh and other territories of the Republic of Azerbaijan. There is nothing in modern

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<sup>950</sup> UNSC Resolutions (n 730).

<sup>951</sup> Lisbon Summit Final Declaration (n 558) Annex I.

<sup>952</sup> PACE Resolution No 1416 (n 727).

<sup>953</sup> OIC Resolutions (n 728).

<sup>954</sup> International Organization for Migration (n 747) 40; HRW, *Seven Years of Conflict* (n 729); US Committee for Refugees, Country Report (n 729).

<sup>955</sup> OSCE, 'OSCE Chairman Concerned over Constitutional Referendum in Nagorno-Karabakh' Press-Release of the Office of the OSCE Chairman-in-Office, Belgian Foreign Minister Karel De Gucht (11 December 2006) <<http://www.osce.org/cio/48045>> accessed 17 March 2013; OSCE, 'Statement by the OSCE Minsk Group Co-Chairs on the 10 December 2006 Referendum in Nagorno-Karabakh', Press-Release <<http://www.osce.org/mg/48044>> accessed 19 February 2013; Council Declaration (EU) 'Declaration by the Presidency on behalf of the EU on the "constitutional referendum" in Nagorno-Karabakh on 10 December 2006' [11 December 2006] P/06/145 (Brussels 11 December 2006) 16553/06/359.

international law that can provide support to the Armenian claims that Nagorno-Karabakh is entitled to exercise the right to external self-determination leading to its secession from Azerbaijan. In justification of Nagorno-Karabakh's right to external self-determination, Armenia often relies on other precedents such as Kosovo, Abkhazia and South Ossetia.<sup>956</sup> However, there is no place for optimism for Armenia in this question from both legal and political perspectives. Immediately after the recognition of Abkhazia and South Ossetia, Russia explicitly stated that such scenario cannot be applied to the Nagorno-Karabakh and the Transnistrian conflicts.<sup>957</sup>

It can be argued that the Nagorno-Karabakh conflict is one of the most dangerous conflicts in the Post-Soviet area. The historical and geopolitical tensions between the key regional powers may transform this small local conflict into a large-scale regional, and even international, conflict. Thomas de Waal warns the international community not to ignore the Nagorno-Karabakh conflict and not to continue accepting it as a frozen conflict, since it is 'the tiny knot at the centre of a big international security tangle'.<sup>958</sup>

Before the gaining of independence by Azerbaijan and Armenia, the central authorities of the USSR acted as the main arbitrator of the conflict. For instance, the Supreme Soviet of the USSR and its Presidium, the supreme state organ of the Soviet Union, was trying to settle the Nagorno-Karabakh conflict and made the relevant decisions confirming the territorial integrity of Azerbaijan. There were no mediators during the military phase of the conflict in 1992–1994. However, with the mediation of

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<sup>956</sup> T Torosyan, 'Baku is not Brave to Accept the Realities', Interview with the Speaker of the Parliament of the Republic of Armenia by Regnum Information Agency (Yerevan, 2 February 2006) (In Russian). <[http://www.parliament.am/news.php?do=view&ID=1975&cat\\_id=5&day=02&month=08&year=2006&lang=rus](http://www.parliament.am/news.php?do=view&ID=1975&cat_id=5&day=02&month=08&year=2006&lang=rus)> accessed 27 October 2008.

<sup>957</sup> Lavrov (n 949).

<sup>958</sup> De Waal (n 79) 9.

Russia in May 1994 the conflicting sides signed the Bishkek Protocol on Ceasefire<sup>959</sup> that put the end to violence and military clashes, but the dispute has become ‘frozen’ and still remains unresolved. Under pressure from the leading powers the Nagorno-Karabakh conflict has been submitted to the CSCE (OSCE) for further peaceful settlement. For these purposes, the OSCE established the Minsk Group on 24 March 1992 in the course of the meeting of the ministers of foreign affairs in Helsinki. Italy was the first Chair of the Minsk Group and undertook several attempts to settle the conflict in 1993. However, the aggressive military campaign of Armenia diminished the attempts of the peace mediation by the Minsk Group in early 1993. Another subsequent chair of the Minsk Group was Sweden, and during the Budapest Summit on 5–6 December 1994 Russia became a permanent co-chair. On 21 April 1995 Sweden was replaced by Finland, but after the Lisbon Summit on 2–3 December 1996 the number of permanent co-chairs became three. Starting from the Lisbon Summit, Russia, France and the US became permanent co-chairs of the Minsk Group.<sup>960</sup> Other regional players like Turkey and Iran proposed their mediation services, but due to certain problems between Armenia and Turkey and between Azerbaijan and Iran such mediation was never capable of positive input into the settlement of this conflict.<sup>961</sup>

As of the date the OSCE Minsk Group has not been able to resolve the Nagorno-Karabakh conflict. One of the controversial proposals of the Minsk Group was the ‘Common State’ proposal put forward by the co-chairs in 1998. Under this proposal Nagorno-Karabakh de jure had to be an independent state forming a confederation with

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<sup>959</sup> Full Text in Russian in Barsegov, *Nagorno-Karabakh* (n 614).

<sup>960</sup> OSCE Mission Survey, ‘Minsk Process’ <<http://www.osce.org/mg/66926>> accessed 8 March 2013.

<sup>961</sup> A Mekhtiyev, ‘The Karabakh Problem has Finally Been Internationalised’ (15 May 1994) 14(45) Current Digest of the Post-Soviet Press 23; E Fuller, ‘Ozal Raises Possibility of Turkish-Azerbaijani Military Alliance’ (13-16 April 1993) 2(17) RFE/RL News Briefs 8; Cited in M Croissant, *The Armenia-Azerbaijan Conflict Causes and Implications* (Praeger, Westport Connecticut 1998) 88; J de Courcy, ‘It Looks as if Iran is Coming off the Fence on the Question of Nagorno-Karabakh Intelligence Digest’ (6-27 August 1993) Intelligence Digest 8.

Azerbaijan.<sup>962</sup> The proposal was rejected by Azerbaijan as contradicting the norms and principles of international law and the settlement principles put forward by Azerbaijan at the Lisbon Summit. Since the first days of the conflict, Azerbaijan is pursuing the strict policy of denial of the right of Nagorno-Karabakh Armenians to the right to external self-determination. Azerbaijan continuously states that the issue of its territorial integrity cannot be a subject for any discussions and bargains during the peace talks.<sup>963</sup> The Western commentators also support the idea that Nagorno-Karabakh should constitute a part of Azerbaijan in the light of political, economic and cultural aspects.<sup>964</sup>

Even if the region is currently controlled by Armenia, a constitutional restoration of the autonomy of the region by Azerbaijan should serve as a sign for the restoration of trust between the parties and Azerbaijan's readiness to solve this conflict under the norms and principles of international law, which should mean a guarantee to the Armenian population of Nagorno-Karabakh to internal self-determination. In December 1996 at the OSCE Lisbon Summit, Azerbaijan strengthened its position and three basic principles of the conflict resolution were established by the OSCE: (i) territorial integrity of the Republic of Armenia and the Republic of Azerbaijan; (ii) legal status of Nagorno-Karabakh defined in an agreement based on self-determination which would confer on Nagorno-Karabakh the highest degree of self-governance within Azerbaijan; and (iii) guaranteed security for Nagorno-Karabakh and its entire population, including mutual obligations to ensure compliance by all the Parties with the provisions of the

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<sup>962</sup> 'Common State' Resolution Plan by OSCE Minsk Group, *Bakinsky Rabochy* (Baku 21 February 2001) (In Russian).

<sup>963</sup> Speech of the President of Azerbaijan Ilham Aliyev at the opening of Autumn 2006 Session of Milli Majlis <[http://president.az/articles.php?item\\_id=20070813052144550&sec\\_id=11](http://president.az/articles.php?item_id=20070813052144550&sec_id=11)> accessed 8 February 2008; Speech of the President of Azerbaijan Ilham Aliyev at the Meeting with a Group of Members of US Representatives House Energy and International Relations Committees <[http://president.az/articles.php?item\\_id=20070813061531899&sec\\_id=11](http://president.az/articles.php?item_id=20070813061531899&sec_id=11)> accessed 8 February 2008.

<sup>964</sup> Rau (n 798) 30.

settlement.<sup>965</sup> The publicly undisclosed ‘Key West Talks’ which took place at the later stage were declared as the most successful peace talks.<sup>966</sup> Pursuant to the statements of the high officials of both sides and the mediating foreign diplomats, it became publicly known that the ‘Key West Talks’ implied the withdrawal of the Armenian troops from the six surrounding occupied territories of Azerbaijan and the granting of a special status to Nagorno-Karabakh within Azerbaijan and the keeping of the Lachin corridor in the latter’s control, and that this plan had to be guaranteed by international peacekeeping forces.<sup>967</sup> However, the ‘Key West Talks’ became another lost opportunity due to the non-constructive position of Armenia, which stepped out from all ‘Key West’ agreements.

Only once did Armenia and Azerbaijan come close to the settlement of the conflict in 1997, when the former Armenian President Levon Ter-Petrosian expressed consent with the OSCE Minsk Group’s proposal on the stepwise plan implying: liberation of the six occupied Azerbaijani regions; returning of IDPs; determination of the status of the strategic towns Shusha and Lachin; and determining the legal status of Nagorno-Karabakh.<sup>968</sup> However, the radical Armenian opposition comprised of the ethnic Armenians from Nagorno-Karabakh and led by Robert Kocharian forced President Levon Ter-Petrosian to resign. Armenia officially recalled all consents to the arrangements of President Levon Ter-Petrosian previously expressed on behalf of Armenia during the Minsk Group peace process. Thus, from that time the Karabakhi

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<sup>965</sup> Lisbon Summit Final Declaration (n 558) Annex 1.

<sup>966</sup> K Cavano ‘Both Presidents Were Sincere in Their Desire to Move Ahead’. Interview of the Former US Ambassador Kerry Cavano to the OSCE Minsk Group to Gihser.Ru News Agency (5 April 2011) (In Russian) <<http://www.gisher.ru/oba-prezidenta-bili-iskrenni-v-svoem-zhelanii-dvigatsya-vper-t24252.html>> accessed 7 February 2013.

<sup>967</sup> ICG, ‘Nagorno-Karabakh: Risking War’ Europe Report No 187 (14 November 2007) 2-3 <[http://www.crisisgroup.org/~media/Files/europe/187\\_nagorno\\_karabakh\\_risking\\_war](http://www.crisisgroup.org/~media/Files/europe/187_nagorno_karabakh_risking_war)> accessed 12 March 2013; US Department of State ‘Armenia and Azerbaijan: Key West Peace Talks’, Briefing by Three Co-Chairs on Key West Peace Talks (Florida, 6 April 2001) <<http://2001-2009.state.gov/p/eur/rls/rm/2001/2098.htm>> accessed 7 March 2010.

<sup>968</sup> De Waal (n 79) 258-261.



Armenian's reign period commenced in Armenia which still lasts in the light of the re-election of Serzh Sargsyan as the President of Armenia.

Another evidence of the international community's negative stance with respect to the occupation of Azerbaijan's territories and the Nagorno-Karabakh conflict followed in the GA Resolution 62/243 condemning the violation of Azerbaijan's territorial integrity and internationally recognised boundaries.<sup>969</sup> Despite strong opposition by the three OSCE's Minsk Group Co-Chairs, the UNGA adopted the Resolution confirming the territorial integrity and inviolability of the internationally recognised boundaries of Azerbaijan, and demanding immediate, complete and unconditional withdrawal of the Armenian forces from the occupied territories of Azerbaijan. Resolution 62/243 cross-referenced to the four UNSC resolutions and referred to the relevant documents adopted within the Council of Europe recognising the territorial integrity and inviolability of boundaries of the Republic of Azerbaijan. The Resolution also confirmed 'the inalienable right of the population expelled from the occupied territories of the Republic of Azerbaijan to return to their homes'.<sup>970</sup> The UNGA reaffirmed the necessity of providing normal, secure and equal living conditions for the Armenian and Azerbaijani communities in the Nagorno-Karabakh region of the Republic of Azerbaijan, which will allow an effective democratic system of self-governance to be built up in this region within the Republic of Azerbaijan, which would mean an effective exercise of the internal self-determination permitted under international law. One of the most important issues contained in Resolution 62/243 is the requirement to all member states to recognise as unlawful the current situation

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<sup>969</sup> UNGA Res 62/243 (14 March 2008) 86th Plenary Meeting, UN Doc A/Res/62/243.

<sup>970</sup> *ibid.*

which has resulted in the occupation of the Azerbaijani territories, and not to provide any assistance in maintaining this situation.<sup>971</sup>

However, the main characteristics of the conflict's nature have been reflected in the reports submitted by Terry Davies and David Atkinson,<sup>972</sup> special rapporteurs on the Nagorno-Karabakh conflict based on which the PACE adopted Resolution No. 1416(2005).<sup>973</sup> The PACE explicitly stated its position recognising the occupation of the Azerbaijani territories:

the conflict over the Nagorno-Karabakh region remains unsolved. Hundreds of thousands of people are still displaced and live in miserable conditions. Considerable parts of the territory of Azerbaijan are still occupied by Armenian forces, and separatist forces are still in control of the Nagorno-Karabakh region.<sup>974</sup>

In fact, that was a progressive and balanced document fairly evaluating the Nagorno-Karabakh conflict and criticising Armenia on its violation of international law. For the first time since the beginning of the conflict, Armenia and its forces were recognised as key actors in the ethnic cleansing against the Azerbaijani population of Nagorno-Karabakh and the surrounding territories.<sup>975</sup> The interesting recommendation was made by the PACE in its Resolution No. 1426(2005) wherein it was recommended to use the ICJ as a forum for the resolution of the Nagorno-Karabakh conflict.<sup>976</sup> However, whereas Azerbaijan is confident and eager to proceed with the ICJ, Armenia is reluctant to put the resolution of the Nagorno-Karabakh conflict within the legal frameworks, fearing its weak position given its track record of international legal breaches. One of the evidences of such fear is Armenia's strong resistance against

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<sup>971</sup> *ibid.*

<sup>972</sup> HRW, *Seven Years of Conflict* (n 729); Report of Rapporteur Atkinson (n 543).

<sup>973</sup> PACE Resolution No 1416 (n 727).

<sup>974</sup> *ibid.*

<sup>975</sup> *ibid.*

<sup>976</sup> *ibid.*

bringing the conflict to the UN or any other format expressly shown during adoption of the UNGA 62/243 Resolution.

The recent attempts to achieve some progress in the peace talks between Azerbaijan and Armenia were initiated by Russia by its former President Medvedev. At that time Turkey also intensified its involvement in the process through signing the Zurich Protocols.<sup>977</sup> The initiation of the Moscow Declaration signed on 2 November 2008 signed between Armenia, Azerbaijan and Russia was undertaken by Russia in the light of its recent actions with respect to South Ossetia and Abkhazia, and mass criticism came from the international community.<sup>978</sup> It can be argued such sudden activity by Russia was simply an attempt not to completely lose its credibility with other South Caucasian republics and redeem its 'Georgian fault' in the eyes of the international community.

The Declaration was signed under huge pressure from Russia and even watching the broadcasting of the official signing ceremony gave the impression that both the Armenian and Azerbaijani presidents were not happy with their uncomfortable positions under Russian pressure. The Declaration contains five paragraphs stating that the Parties will: (i) endeavour for the improvement of the situation in the South Caucasian region and establishment of peace and stability in the region through the settlement of the Nagorno-Karabakh conflict under the norms and principles of international law and pursuant to the decisions and resolutions made in this regard, which will result in economic and thorough co-operation in the region; (ii) confirm the importance of the mediation by the co-chairs of the Minsk Group based on the principles discussed in the

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<sup>977</sup> 'Statement on Turkish President Gul's Visit to Armenia', United States Mission to the OSCE by Deputy Chief of Mission Kyle Scott<<http://www.america.gov/st/texttrans-english/2008/September>> accessed 11 November 2008.

<sup>978</sup> Full Text in Russian at the Official Website of Russian President <<http://www.kremlin.ru/text/docs/2008/11/208670.shtml>> accessed 19 November 2012.

course of the meeting in Madrid on 29 November 2007 and further meetings targeting the finding of a political solution for the conflict; (iii) agree that the achievement of a peace agreement signing should be secured by legally binding international warranties; (iv) confirm that meetings between the presidents of the two states will be continued, and at the same time the ministers of foreign affairs should intensify their negotiation activities on the conflict; and (v) undertake all possible steps to strengthen a trust between the two countries serving for a settlement of the conflict.<sup>979</sup>

The Moscow Declaration was expected to be a new positive legal instrument for settlement of the conflict. In fact, the first paragraph of the Moscow Declaration states that the conflict should be resolved under the norms and principles of international law and pursuant to the decisions and resolutions made with respect to the Nagorno-Karabakh conflict. The analysis of the prevailing force of the principle of territorial integrity over the right to external self-determination, based on various universal and regional legal instruments made herein, gives a strong ground to argue that in case of the Moscow Declaration the Parties signed under the document which in fact affirms the territorial integrity of Azerbaijan and the impossibility of the impairing of its territory through the secession of Nagorno-Karabakh. Even if the first part of this paragraph regarding the norms and principles of international law is controversial and debatable, the second part referring to the decisions and resolutions made with respect to the Nagorno-Karabakh conflict make the picture much clearer. Absolutely all decisions and resolutions made in respect of the Nagorno-Karabakh conflict by most universal and regional organisations, considered hereinabove, have confirmed and reaffirmed the territorial integrity of Azerbaijan and emphasised the lack of grounds for Nagorno-Karabakh's secession. Such instruments also clearly call the Armenian side to

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<sup>979</sup> *ibid.*

immediate liberate the occupied Azerbaijani territories. As it has been mentioned above the most recent and important decisions are the UNGA Resolution 62/243<sup>980</sup> and the PACE Resolution 1614,<sup>981</sup> which reaffirmed the requirement of respect of Azerbaijan's territorial integrity and inviolability of its internationally recognised boundaries.

In the meantime, it is agreed with the position criticising Azerbaijan for the absence of specification on what type of autonomous status Azerbaijan is eager to grant to Nagorno-Karabakh.<sup>982</sup> Mass criticism addressed to Azerbaijan authorities is fair and objective; since the beginning of the peace talks following the ceasefire, Azerbaijan has never clearly defined its position on the choice of preference on certain types of legal autonomous statuses for the separatist Nagorno-Karabakh region. It can be argued that the abolition of the NKAO by the decision of the Supreme Soviet of Azerbaijan of 26 November 1991 should be considered as a legally and politically wrong step taken by the Azerbaijan Government. Even the new 1995 Azerbaijan Constitution makes no provisions about the seceded region.<sup>983</sup> The official position of Azerbaijan is expressed in a formula that such specific section can be supplemented to the Azerbaijani Constitution only after the achievement of the political solution of the conflict.<sup>984</sup> In fact, from the practicality perspective, such position of Baku can be deemed reasonable. However, it can also be argued that at least the amending of the current Azerbaijan Constitution with the relevant section confirming the highest autonomous status of Nagorno-Karabakh region can serve as a solid evidence of Azerbaijan's strong intention and willingness to grant such right to the breakaway region expressed in a legal argument which ranks at the top of the hierarchy of legal instruments in Azerbaijan. It is

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<sup>980</sup> UNGA Res 62/243 (n 969).

<sup>981</sup> PACE Resolution No 1416 (n 727).

<sup>982</sup> Potier (n 57) 87.

<sup>983</sup> Constitution of the Republic of Azerbaijan (12 November 1995) (Baku, Minimax 2008).

<sup>984</sup> Interview with Azerbaijan Minister of Foreign Affairs H Hasanov, 39 Zerkalo (Baku, 21 October 1995) (In Russian) 5.

believed that even under the circumstances of hostility, Azerbaijan had not to abolish the autonomy without the expression of will by the people of Azerbaijan. Such decision simply gave additional grounds for Armenia to justify its aggressive plans. It is obvious that the Azerbaijani side was driven by emotions when undertaking such step due to the potential loss of the NKAO. It can be argued that in the case of Nagorno-Karabakh the principle of *uti possidetis juris* in the context of territorial integrity should prevail over the right to external self-determination, but with the necessary condition of the respect and protection of the Armenian population of the Nagorno-Karabakh region through granting them the right to internal self-determination. In fact, granting the highest level of autonomy to Nagorno-Karabakh will guarantee respect and protection of human rights as well as create the necessary conditions ‘to free, fair and open participation’ in the democratic process of governance.<sup>985</sup> In the meantime, it should be emphasised that a triumph of democracy and compliance with international human rights in both Azerbaijan and Armenia can bring optimism for finding a way out of the existing deadlock.

In fact, Azerbaijan is a country with a mosaic of various nations, and support for the process of the complete capitulation of the old Soviet inheritance in favour of the European values and the establishment of a democratic state with the priority of law and human rights is a necessary task and duty for this state. Only strict compliance with these requirements will be an effective response to the current problems preventing the progressive development of Azerbaijan and its integration into the Euro–Atlantic community. However, under no circumstances can the rights of the Armenian minority residing in Nagorno-Karabakh, including the right to internal self-determination, be subject to violation or oppression. As previously declared by Azerbaijan, the Armenians

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<sup>985</sup> T Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 58-59.

of Nagorno-Karabakh are entitled to the right of internal self-determination in the form of the highest level of autonomy within the Republic of Azerbaijan.<sup>986</sup> Undoubtedly, Azerbaijan will reject any models that put in doubt its territorial integrity or international boundaries. For example, the ‘Bosnian’ model implying the creation of two independent states is absolutely unacceptable for Azerbaijan, because no mechanisms for saving the territorial integrity of Azerbaijan would exist in this case. ‘Lichtenstein’, ‘Andorra’ and the ‘common state’ models actively supported by the separatist regime of Nagorno-Karabakh and Armenia are also unacceptable for Azerbaijan since these models imply independence of the region from Azerbaijan.<sup>987</sup> It can be argued that granting autonomous status to the Nagorno-Karabakh region similar to the ‘Tatarstan Model’ within Russia or the ‘Aaland Model’ in Finland could be an effective solution to this long-standing and sanguinary conflict. The proposals on the ‘Aaland Model’ of autonomy have even been recently sounded out by the OSCE’s high-level officials.<sup>988</sup> Such ideas on the peaceful solution of the Nagorno-Karabakh conflict have been also proposed by John J Maresca, a former US ambassador to the CSCE and former special US negotiator for Nagorno-Karabakh.<sup>989</sup>

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<sup>986</sup> Lisbon Summit Final Declaration (n 558).

<sup>987</sup> A Abbasov and H Khachatrian, *The Karabakh Conflict Variants of Settlement: Concepts and Reality* (3rd edn) (Baku-Yerevan, Friedrich-Ebert-Stiftung South-Caucasus Co-ordination Office 2006) 50-51.

<sup>988</sup> ‘OSCE Special Rapporteur Mr Goran Lenmarker considers the granting of independence to the Nagorno-Karabakh region, because it will result in the fragmentation of the Caucasus Region into a large number of small states and will lead to the destabilization of the Region, which is not acceptable for the International Community’ (In Russian) <<http://www.kavkaz-uzel.ru/articles/80251/>> accessed 12 January 2013.

<sup>989</sup> J Maresca, ‘War in the Caucasus a Proposal for Settlement of the Conflict over Nagorno-Karabakh’ <<http://www.usip.org/pubs/specialreports/early/caucasus>> accessed 27 May 2006.

### **5.3 Transnistrian Peace Initiatives**

Since the Transnistrian conflict was among the less violent ones in the Post-Soviet area, there is much hope that an amicable solution of this conflict is achievable in the near future. Since the beginning, a primary peacekeeping role was taken by Russia.<sup>990</sup> The active military clashes phase was ended through the direct involvement and mediation of Russia resulted in signing of the 1992 ceasefire agreement.<sup>991</sup> The agreement also stipulated the setting up of a trilateral peacekeeping mission by the conflicting sides and Russia.<sup>992</sup> It is quite strange that upon a decrease of nationalistic attitudes to the separatist regime in Moldova, Transnistria started continuously contending that secession is the best way to eliminate any possible ethnic conflicts. It is obvious that such game of 'stepping back' that is used by almost all separatist regimes in the Post-Soviet area has wide-reaching political implication that is directed at the achievement of a no-solution result of these 'frozen conflicts'. The lack of intention of the Transnistrian regime to settle the conflict was expressly shown by the periodic threats of the separatist leaders to cut off the gas and electricity supply to the rest of Moldova.<sup>993</sup> It can be argued that today the non-resolution of the Transnistrian conflict is a favourable environment for the third states interfering in the internal affairs of Moldova. The ICG aptly reported that the illegal trade and traffic encourages some powerful actors in the conflict to keep it frozen.<sup>994</sup>

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<sup>990</sup> J Mackinlay and P Cross, *Regional Peacekeepers: The Paradox of Russian Peacekeeping* (New York, United Nations University Press 2003) 135.

<sup>991</sup> 'Agreement on Principles of Settlement of Conflict in Transnistrian Region of the Republic of Moldova' (21 July 1992). Full Text in Russian  
<<http://www.peacekeeper.ru/ru/?module=pages&action=view&id=89>> accessed 4 February 2013.

<sup>992</sup> *ibid.*

<sup>993</sup> King (n 93) 191.

<sup>994</sup> ICG, 'Moldova: Regional Tensions over Transdniestria' (2004) Europe Report No 157  
<[http://www.crisisgroup.org/~media/Files/europe/157\\_moldova\\_regional\\_tensions\\_over\\_transdniestria.pdf](http://www.crisisgroup.org/~media/Files/europe/157_moldova_regional_tensions_over_transdniestria.pdf)> accessed 4 February 2013.



Since the start of the peace talks, Moldova always expressed its intention and readiness to settle the conflict amicably and not to prevent the internal self-determination of Transnistria within Moldova. A clear example is the resolution of the Gagauz problem with the further granting of autonomy to this Christian Turkic-speaking region which was even criticised by the Council of Europe as a grant of wide authorities to the autonomous region.<sup>995</sup> In other words, Moldova has shown a willingness to co-exist within a state with other ethnic minority groups.

In the initial stages the Transnistrian conflict was negotiated by the CSCE and resulted in Report No. 13 of the CSCE Mission to Moldova, produced in 1993.<sup>996</sup> In 1997 with extensive mediation of Russia the Memorandum on the Bases for Normalisation of Relations between the Republic of Moldova and Transnistria was signed, but was never ratified by Moldova.<sup>997</sup>

Moldova and the Transnistrian separatist regime signed the Kiev Joint Statement which established the general principles for the common states expressed in common borders and economic, legal, defence and social policies.<sup>998</sup> The analysis of this document testifies that it is an agreement, but in no way can it be treated as an international treaty or indirect recognition of Transnistria. In this accord the separatist regime undertook to establish a common state with the Republic of Moldova, but without the clear definition of such common state. The separatist regime and its supporters argue that by signing of such agreements Moldova entered into an

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<sup>995</sup> Benko (n 795).

<sup>996</sup> CSCE Mission to Moldova Report No 13 (13 November 1993) <<http://www.osce.org/moldova/42307>> accessed 5 February 2013.

<sup>997</sup> OSCE 'Memorandum for the Bases of Normalisation between the Republic of Moldova and Transnistria' (8 May 1997) <[http://osce.org/documents/mm/1997/05/456\\_en.pdf](http://osce.org/documents/mm/1997/05/456_en.pdf)> accessed 7 July 2010.

<sup>998</sup> Full Text in Russian at <<http://old.niss.gov.ua/book/Perep/pril.htm>> accessed 6 February 2013; Bruno (n 576) 68-69.

international treaty with Transnistria and recognised the breakaway region.<sup>999</sup> Nevertheless, it is noted that none of such vague agreements signed between Moldova and Transnistria was ever ratified by the Moldovan Parliament.

A new hope for the prompt and effective settlement of the conflict arose upon the victory of the Moldovan Communist Party in 2001 and Voronin's taking over the presidency. Close ties of Voronin's team with the Kremlin brought some optimism to the Moldovan side. With such optimism, in 2003 Russia produced a new settlement plan referred to as the 'Kozak Plan' which took its name from the name of the Russian politician who drafted it.<sup>1000</sup> Dmitry Kozak's plan, officially the 'Memorandum on the Basic Principles of the State Structure of the United State', proposed a new confederative type structure for Moldova, whereas Transnistria should have an equal political status with Moldova and substantial representation in the Moldovan Parliament.<sup>1001</sup> The plan also stipulated a right of the Transnistrian autonomy to benefit from the veto right on any vital national issues including the issue of Moldova's reunification with any third states.<sup>1002</sup> Although Voronin was ready to sign the Kozak Memorandum under huge pressure from the local political powers, he withdrew from this settlement plan. In fact, this proposal was aimed to give the Transnistrian side a de facto veto right on any constitutional changes in Moldova and to keep Russian military presence for a long time.<sup>1003</sup> The Kozak Plan, which was proposing a confederative 'common state' for Moldova and Transnistria, also stipulated the maintenance of 2,000

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<sup>999</sup> 'Report of Western Experts on Sovereignty of Transnistria' (2006). Full Text in Russian from the Conference held in Tiraspol, Transnistria Reprinted in Russian <<http://www.olvia.idknet.com/ol31-06-06.htm>> accessed 5 February 2013.

<sup>1000</sup> 'Memorandum of Kozak', full text in Russian, 'Russian Plan on Unification of Moldova' IA Regnum (23 May 2005) (*In Russian*) <<http://www.regnum.ru/news/458547.html>> accessed 6 February 2013.

<sup>1001</sup> *Catan* (n 695) 10.

<sup>1002</sup> 'Memorandum of Kozak' (n 1000).

<sup>1003</sup> M Emerson and M Vahl, 'Moldova and the Transnistrian Conflict' in B Coppieters and others (ed), *Europeanization and Conflict Resolution - Case Studies from the European Periphery* (Ghent, Academia Press and the Journal of Ethnopolitics and Minorities in Europe 2004) 170-174.

troops by Russians in the territory of Moldova until 2020. Due to the huge pressure by EU and the US, Moldova refused to sign the Kozak Plan and, thus, such refusal gave Russia justification to block any further initiatives to resolve the Transnistrian conflict. Due to its pro-Russian nature, the Transnistrian regime stated its readiness to accept the Kozak Plan immediately.<sup>1004</sup>

In 2005 due to considerable resistance from Russia, Ukraine led by Yushchenko also failed to effectively negotiate the settlement.<sup>1005</sup> Yushchenko's plan was basically to provide a grant of the highest self-governance status to Transnistria within Moldova.<sup>1006</sup> The plan also stipulated a right of the breakaway region to use a veto on any substantial international agreements of Moldova including any territorial issues.<sup>1007</sup> However, the plan did not receive much support by Moldovans who considered this plan as an easy way for Transnistria's secession.

During the final few months of 2012, the EU tried to take the initiative in the Transnistrian conflict settlement.<sup>1008</sup> The EU is trying to act independently and resume the process failed by the OSCE. However, the EU faces certain obstacles in the settlement due to Russia's exclusive role in this conflict. The EU's intention to settle this conflict (which is close to its borders) is the part of the 'Wider Europe' plan.<sup>1009</sup> The EU's settlement plan is based on an offer produced by the Institute for Security Studies of the EU (ISS), which suggests joint efforts of the EU and Russia in resolving

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<sup>1004</sup> J Maksymiuk, 'Analysis: Transdnistr Wants Talks on 'Federal System' with Moldova' <<http://www.rferl.org/featuresarticle/2004/09/53bc0d6b-d61b-49bb-8f7a-e563715de8b9.html>> accessed 11 August 2011.

<sup>1005</sup> T Lynch, 'Yuschenko Undercutting Moldova in Transnistria?' (26 Jul 2005) 10(8) The NIS Observed: An Analytical Review <<http://www.bu.edu/iscip/digest/vol10/ed1008.html>> accessed 6 March 2008.

<sup>1006</sup> *ibid.*

<sup>1007</sup> New York Bar Report (n 103) 95.

<sup>1008</sup> N Popescu and L Litra, 'Transnistria: A Bottom-Up Solution (September 2012) 63 European Council on Foreign Relations 2-8.

<sup>1009</sup> Communication from the Commission to the Council and the European Parliament 'Wider Europe-Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbours' (Brussels, 11 March 2003) COM (2003) 104; N Popescu 'Moldova's European Policy Options' (3 February 2004) EuroJournal <[http://eurojournal.org/comments.php?id=P125\\_0\\_1\\_0\\_C](http://eurojournal.org/comments.php?id=P125_0_1_0_C)> accessed 27 January 2013.

this long-standing conflict with further guaranteeing a security and maintenance of the peace in the region.<sup>1010</sup> Such settlement plan also covers the economic recovery of the reunited Moldova with the huge economic support of the EU, while it is expected then that peacekeeping forces will be jointly maintained by the EU and Russia.<sup>1011</sup> Taking into account the special role of Russia in this conflict, it is naïve to expect Russia's wide collaboration with the EU on the soonest and effective settlement of the conflict.

Even the five-sided format with the involvement of Russia, Ukraine and the OSCE did not contribute much to the resolution of this conflict. Despite the follow-up transformation of the five-sided format into five + two format, whereas the US and the EU joined the peace process in 2005, numerous peace proposals did not lead to substantial progress in achieving the peace settlement during the next five years. Nevertheless, the five + two format resumed peace talks with the EU taking an active leading role and referred to as the Meseberg Process, and gave some optimism as to the possibility of the conflict settlement. A German–Russian initiative followed with the signing of the Meseberg Memorandum in June 2010, which gave its name to the process. Within this format in 2010 the conflicting parties achieved certain progress in the removal of each other's transport blockades which also allowed the free movement of goods between the parties.<sup>1012</sup> The arrangements also established restoration of the telecommunications including the telephone landlines between Moldova and the breakaway region. Only in September 2011 did the five + two format make progress to

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<sup>1010</sup> Popescu and Litra (n 1008) 9-10.

<sup>1011</sup> A Huff, 'The Role of EU Defence Policy in the Eastern Neighbourhood' (May 2011) 91 Occasional Paper, EU Institute for Security Studies <[http://www.iss.europa.eu/uploads/media/op91-The\\_role\\_of\\_EU\\_defence\\_policy\\_in\\_the\\_Eastern\\_neighbourhood.pdf](http://www.iss.europa.eu/uploads/media/op91-The_role_of_EU_defence_policy_in_the_Eastern_neighbourhood.pdf)> accessed 5 February 2013.

<sup>1012</sup> V Socor, 'Meseberg Process: Germany Testing EU-Russia Security Cooperation Potential' (22 October 2010) 7(191) Eurasia Daily Monitor. Reprinted by the Jamestown Foundation <[http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=37065](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=37065)> accessed 5 February 2013.

resume the full-scope peace talks after the five-year break, which started in November in Vilnius.<sup>1013</sup>

The current negotiations format with a lead initiative from the EU relies on experience available in the settlement of conflicts in the Balkans. It is argued that the EU's plan based on the one effectively used in the Balkans cannot be applied in its pure form in Transnistria.<sup>1014</sup> Despite the lack of detailed settlement mechanisms, the current asymmetric federalisation proposal produced by the five + two format with a lead role of the EU is probably the only currently available effective settlement plan for the Transnistrian conflict.<sup>1015</sup>

The main problem of all proposed peace plans has been the lack of clear mechanism on the distribution of powers between the conflicting sides, any firm guarantees on preservation of the territorial integrity of Moldova and the irrevocable grant of the right to internal self-determination to the breakaway region. In fact, one of the primary issues (like in all other conflicts) is the demilitarisation of the region and in this case the presence of the Russian peacekeeping forces can still be a negative factor giving additional comfort and confidence to the separatist unit.

Based on the current circumstances, it can be argued that Transnistria should be granted the highest autonomous status within Moldova. Taking into account the settlement practice with Gagauzia, Moldova might consider the application of asymmetric relations with Transnistria upon the settlement and reincorporation of the

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<sup>1013</sup> V Socor, 'A Failed Re-Start to 5+2 Negotiations on Transnistria' (8 March 2012) 9(48) Eurasia Daily Monitor Re-printed by the Jamestown Foundation  
<[http://www.jamestown.org/programs/edm/single/?tx\\_ttnews%5Btt\\_news%5D=39113&cHash=1820a355aad6791589e35a3e0c9758d4](http://www.jamestown.org/programs/edm/single/?tx_ttnews%5Btt_news%5D=39113&cHash=1820a355aad6791589e35a3e0c9758d4)> accessed 6 February 2013.

<sup>1014</sup> Popescu and Litra (n 1008) 9-10.

<sup>1015</sup> S Wolff, 'The Prospects of a Sustainable Conflict Settlement for Transnistria' (9 February 2011)  
<<http://www.stefanwolff.com/files/The%20Prospects%20of%20a%20Sustainable%20Conflict%20Settlement%20for%20Transnistria.pdf>> accessed 5 February 2013.

breakaway region under the Moldovan state roof. Again the model of the Aaland Islands, Crimea in Ukraine could be adapted to Moldovan realities.

## CONCLUSION

Events taking place in the modern world still show that problems related to territorial and boundary changes are not vestiges of the historical past, but are still one of the most controversial and complex matters in international law. In fact, finding a solution to this problem is among the most important tasks for the maintenance of international peace and security. The reviewed state practice, decisions of international tribunals and arbitrations, resolutions of international organisations and scholarly views provide grounds to argue that the principles of territorial integrity and inviolability of state boundaries still have strong positions in international law. This thesis covers an analysis of the principle of *uti possidetis* and its correlation with the self-determination of peoples, another principle of international law.

The thesis argues about the role of the principle *uti possidetis juris* in Eastern Europe and the Post-Soviet area based on the relevant state practice which led to its wide recognition as a general principle of international law.<sup>1016</sup> The review given in Chapter 2 concludes that the principle of *uti possidetis* is borrowed from Roman law in which its primary designation was as a concept of temporary possession preserving the status quo of transaction participants.<sup>1017</sup> It is argued that *uti possidetis*' transformation into a principle of international law started from the Latin American continent in the 19th century.<sup>1018</sup> Collapse of the Spanish colonial system in Latin America led to the birth of many independent states, and for the prevention of sanguinary conflicts the concerned parties agreed to employ the principle of *uti possidetis juris* as a tool for the amicable settlement of existing disagreements on territorial and boundary problems.

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<sup>1016</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>1017</sup> Moore (n 111) 328.

<sup>1018</sup> Alvarez (n 128) 342.

Since the inherited de facto boundaries were unclear and disputable,<sup>1019</sup> newly independent states of Latin America made their choice in favour of preserving the existing boundaries and protection of their territorial integrity.<sup>1020</sup> The Latin American experience of *uti possidetis* was also effectively used in Africa, the Middle East, Asia and Europe, and by the end of the twentieth century the role of *uti possidetis* dramatically increased in the light of the disintegration of the communist federations of the SFRY, the USSR and Czechoslovakia.<sup>1021</sup> It is also argued that in the latter cases the principle was employed in a non-colonial context.<sup>1022</sup>

The thesis concludes that the principle of *uti possidetis juris* is a specific mechanism and process of international law which serves the purposes of transferring sovereignty over a territory from the preceding sovereign to the new one. Based on this, it is argued that the principle itself is part of a wider principle which refers to the stability of state territories.<sup>1023</sup> However, it is clearly stressed that the principle of *uti possidetis* cannot be opposed to the principle of territorial integrity of states. If the latter serves for the protection of territorial integrity, the former principle precedes it and provides a transformation of former internal administrative borders between units of the same parent state into international boundaries. The thesis emphasises that the principle of *uti possidetis juris* is clearly recognised as a principle of international law which is applied even beyond the decolonisation to all cases related to the achievement of independence regardless of the circumstances.<sup>1024</sup>

The thesis concludes that if the designation and role of the principle of *uti possidetis* is clear and well-grounded based on the state practice and doctrine, the

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<sup>1019</sup> Shaw, 'Peoples, Territorialism and Boundaries' (n 1) 478-492.

<sup>1020</sup> Lalonde (n 4) 28.

<sup>1021</sup> Ratner, 'Drawing Better Line' (n 5) 592-593.

<sup>1022</sup> Pellet, 'Note sur la Commission d'Arbitrage' (n 273) 329-339; Yakemtchouk (n 273) 393-401.

<sup>1023</sup> Shaw, 'The Heritage of States' (n 142) 88; Bardonnnet (n 109) 9.

<sup>1024</sup> Torres Bernardez (n 166) 420.



controversial nature of the external self-determination creates considerable problems in its correlation with other principles of international law, including the principles of territorial integrity and *uti possidetis juris*. It is also argued that the unlimited use of and wrong perception of the right to external self-determination could create a threat to international peace and security.

In Chapter 3 it is argued that there is subordination of the problems of minority groups to the internal jurisdiction of these states, which means a serious limitation of self-determination in international law. In the meantime, it is emphasised that a lawful secession should be distinguished from a separatism targeting the territorial integrity and state boundaries of sovereign states. It is made clear in the conclusions in the thesis that under modern international law ethnic, religious, racial and other groups which constitute minorities and who inhabit specific territories of a sovereign state have a right to internal self-determination without the right to secession and creating their own independent states leading to impairment of existing sovereign states. Thus, the right to self-determination is not an absolute right which has no limitations, although it is recognised in numerous international instruments as a principle which has been developed into a principle of international law.<sup>1025</sup> Based on the state practice,<sup>1026</sup> it is further stated that self-determination should be limited for the purposes of eliminating any threats to the territorial integrity of sovereign states. The thesis' core argument with respect to the right to external self-determination refers to a statement that self-determination is a universal principle of international law if it is in the form of internal self-determination and it should be exercised within territorial frameworks of the existing sovereign states with no threats to the territorial integrity and boundaries of such states. It is obvious that limitations imposed by international law on external self-

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<sup>1025</sup> *ibid* 171-172.

<sup>1026</sup> *Reference re Secession of Quebec* (n 471) 282.

determination<sup>1027</sup> serve the purposes of protecting sovereign states, their territories and boundaries as well as maintaining international peace and security which can be endangered by the multiple defragmentation of sovereign states.<sup>1028</sup>

The basic aspects of the principles of *uti possidetis* and self-determination and their correlation have been considered through the window of international law referring to the doctrinal views as well as state practice in this thesis. The correlation of the principle of *uti possidetis* and the right to self-determination in the case of the Post-Soviet area has been assessed referring to theory and practice.

Chapter 4 examines the correlation of the two principles in the case of the Post-Soviet area in the cases of Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria. Upon review and analysis of the key aspects and legal nature of both principles, it can be argued that *uti possidetis* and self-determination are general principles of international law. Although there is a strong belief that these two principles are in permanent conflict, it should be noted that in the case of the former USSR there was a situation when they were not in conflict. The review of the four conflict cases in the Post-Soviet area gives sufficient grounds to argue in the thesis that these two principles were in co-operation upon dissolution of the USSR and the obtaining of independence by the former fifteen Soviet republics, and entered into a conflict at the later stage when the separatist units in Georgia, Azerbaijan and Moldova declared the exercise of external self-determination. The thesis argues that upon disintegration of the Soviet Union, the former Union republics exercised their right to external self-determination declaring their independence, which in fact was prescribed under the Soviet Constitution. In this case the right to self-determination was

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<sup>1027</sup> Rich (n 478); DW Bowett, 'Self-determination and political Rights in developing Countries' (1966) 60 Proceedings of Amer Soc of Int'l L 131.

<sup>1028</sup> B Boutros-Ghali, 'Agenda for Peace' (n 475).

accompanied by the application of the principle of *uti possidetis juris* under which the former administrative borders of the Soviet republics have been transformed into the international boundaries of newly independent states of the Post-Soviet area. It is further argued that the principle of self-determination upon the process of obtaining independence together with the principle of *uti possidetis* served the protection of the territorial integrity of the newly independent states, ie they were mutually supportive upon obtaining of the independence by the former USSR republics. Nevertheless, the collapse of the Soviet Union resulted in numerous secessionist movements in the territories of the newly independent states. However, as it is argued in the thesis, a lawful self-determination should be distinguished from secession in the form of aggressive separatism. In such case there is a clear conflict between the principle of *uti possidetis* and external self-determination. If the former constitutional units of the USSR were referring to the principles of *uti possidetis juris* and territorial integrity, the separatist entities were claiming a right to external self-determination. Based on the review and analysis of the legal nature of the principle of *uti possidetis*, it can be argued that at the moment of obtaining independence, the former administrative borders of the Georgian SSR, the Azerbaijan SSR and the Moldavian SSR (which also included Abkhazia and South Ossetia in the case of Georgia, Nagorno-Karabakh in the case of Azerbaijan, and Transnistria in the case of Moldova) have been transformed into the internationally recognised boundaries of sovereign Georgia, Azerbaijan and Moldova.

Threats of massive-scale territorial and boundary disputes in the Post-Soviet area convinced the member states of the CIS to initiate and sign various legal instruments which could guarantee the preservation of the old internal administrative borders among the fifteen constitutional units of the USSR. The key forces were interested in the avoidance of instability in the region and elimination of any threats to

regional and international peace and security. Adoption of numerous legal instruments within the CIS affirmed the parties' intention to apply the principle of *uti possidetis juris* for determination of their international boundaries based on the old internal administrative borders of the USSR.<sup>1029</sup> However, not all of them in practice adhered to the consented-to CIS legal instruments. The Russian role in all four conflict cases and Armenia's direct involvement in the Nagorno-Karabakh conflict are emphasised for the purposes of showing the underlying violations of the fundamental principles of international law by these states. The thesis expressly and evidentially indicates the negative 'third state' factor in the four conflict case studies referring to specific applicable ECHR precedents.<sup>1030</sup>

It is argued in the thesis under international law that the principle of *uti possidetis* is called upon to protect the territorial integrity of sovereign states and therefore should prevail over external self-determination in the four conflict cases considered herein. The thesis finally proclaims that, based on the conducted researches, it is argued that the correlation of the two principles in the Post-Soviet area should be resolved in favour of the principle of *uti possidetis juris* which, having been considered in the framework of the principle of stability of boundaries, should prevail over the right to external self-determination. However, it is also emphasised that such primacy of the *uti possidetis juris* over external self-determination should be exercised with the necessary condition of the respect and protection of the right of all peoples, including minority groups, through granting them the right to internal self-determination. None of the considered arguments in favour of the principles of *uti possidetis* or territorial integrity may serve as an excuse for the respective governments to escape responsibility for the non-compliance with international human rights standards. It is also concluded

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<sup>1029</sup> Minsk Agreement (n 279); Alma-Ata Declaration (n 284); CIS Declaration (n 719).

<sup>1030</sup> *Ilascu* (n 100); *Catan* (n 695); *Chiragov* (n 502).

in the thesis that, based on the researches undertaken, it can be argued that no grounds for secession of the separatist units of the former USSR republics exist under international law. The thesis specifically emphasises that, based on the conducted researches, the reviewed conflicts also possess a political and geopolitical nature with the involvement of third powerful states, rather than being a pure legal conflict between the two principles of international law.

Finally in Chapter 5 the thesis examines the peace settlement attempts of the four conflict cases. It is argued herein that the solution of the Abkhaz, South Ossetian, Nagorno-Karabakh and Transnistrian conflicts should be based on the preservation of the territorial integrity and recognised international boundaries of Georgia, Azerbaijan and Moldova, but with a necessary exercise of the right to internal self-determination by the peoples of these breakaway regions in the form of granting the highest legal status of self-governance to Abkhazia, South Ossetia, Nagorno-Karabakh and Transnistria.

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