Chapter 3

Related Legal Issues

3.1. The Legal Status of South Ossetia and Abkhazia

The status of Abkhazia and South Ossetia under international law is decisive for determining the international rights and obligations of those regions. This question is analysed here for the period from the end of the armed conflicts in South Ossetia (1992) and Abkhazia (1994) up to the outbreak of the armed conflict of August 2008.

I. Determination of Statehood on the Basis of International Law

The question of whether a certain territorial entity is a "state" can be approached in two different ways. First, it is possible to argue that statehood can be determined on the basis of certain objective criteria. In this case, the recognition by other states would be of only declaratory value (declaratory theory of recognition). Second, the reaction of the other international legal subjects can be seen as decisive. What counts then, is the recognition of a territorial entity as "state" by other states (constitutive theory of recognition).[1] State practice[2] and international legal scholarship[3] espouse predominantly the first approach, assuming that recognition is *not* constitutive of a state.[4]

Therefore, the international legal status of a territorial entity has to be assessed with a view to the presence or absence of certain factual elements. There is no authoritative definition of the relevant criteria. Yet there is a basic consensus that minimal preconditions for statehood are (1) a defined territory, (2) a permanent population, and (3) an effective government.[5]

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[1] See the historical debate by James Crawford, *The Creation of States in International Law* (2nd ed. Oxford: Clarendon Oxford UP 2006), at 19 *et seq*.

[2] See e.g. *The Charter of the Organisation of American States* of 30 April 1948, which came into effect on 13 December 1951 (Art. 13): "The political existence of a State is independent of recognition by other States. Even before being recognised, the State has the right to defend its integrity and independence …". For an overview of state practice see Ian Brownlie, *Principles of International Law* (7th ed. Oxford OUP 2008), at 95 *et seq.*

[3] See only, among many others, Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/1 (Berlin: De Gruyter 1988), at 188-191; Antonio Cassese, *Public International Law* (2nd ed. Oxford OUP 2001), at 48-49; Patrick Daillier/Allain Pellet, *Droit international public* (7th ed. Paris: LGDJ 2002), at 557-58.

[4] The reason is that there is no central recognition authority, and that recognition is accorded in a decentralised fashion by the other states on the basis of their own assessment as to whether the criteria for statehood are present. If these acts of recognition were constitutive of statehood and would "create" states, the result would be that an entity could be a "relative" state: A state *vis-à-vis* one state, but not a state *vis-à-vis* another. This relativity would cause legal confusion and would be impracticable. Moreover and most importantly, if statehood depended on recognition, an unrecognised political entity, although it possesses all features of a state (defined territory, permanent population, effective government, and independence) would not be protected by international law and would itself not be bound by international law. It would exist in an international legal vacuum. Such a state of affairs would in policy terms be undesirable.

[5] Karl Doehring, "State" in Rudolf Bernhard (ed), *Enyclopedia of Public International Law*, vol. 4 (North-Holland: Elsevier 2000) 600-604, at 601; Dahm/Delbrück/Wolfrum 1988 (above note 3), at 131; Brownlie (above note 2, at 71-72; Cassese, *Public International Law* (above note 3), at 48. Cf. also Opinion No. 1 of the European Conference on Yugoslavia : "the state is commonly defined as a community which consists of a

These objective criteria for determining statehood are very general and flexible, and their application to concrete cases always remains a question of appreciation. Especially the "effectiveness" of government is a question of degree. The emergence of a new state, especially as a result of secession from an existing state, is usually a process extended through time. Throughout this process, independence can decrease or increase, depending on a number of factors.

In current international law, the observation of legal principles which are themselves enshrined in international law (notably the principles of self-determination and the prohibition of the use of force), are accepted as an additional standard for the qualification of an entity as a state.[6] The "guidelines" elaborated by the EU foreign ministers for the recognition of new states in Eastern Europe and in the Soviet Union have taken into account the respect for basic international obligations, especially in the field of human and minority rights.[7] It is however not clear whether these criteria of legitimacy were applied as legal conditions or as a matter of political discretion. In either case, these normative considerations can work in the same direction as the principle of effectiveness and underscore an entity's claim to statehood.

Crucially, assessment of statehood in international law and in international politics overlaps, but differs. The political practice of recognition of states, as a rule, starts out from the objective criteria identified in international law, but may be guided by additional considerations. It is very possible that an entity short of statehood is recognised as a state by another state or states for particular political motives.

That means that territorial entities can fall into three different categories: (1) (full) states fulfilling the relevant criteria for statehood and universally recognised; (2) state-like entities fulfilling the relevant criteria, but which are not, or not universally, recognised;[8] and entities

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territory and a population subject to an organized political authority" (repr. in ILM 31(1992), at 1494-1497; EJIL 3 (1992), at 182), para. 1 b).

6 Crawford (above note 1) at 128-131; Malcolm N. Shaw, *International Law* (6th ed. Cambridge University Press 2008), at 206.

7 Guidelines repr. in Europa-Archiv 47 (1992), D 120; ILM 31 (1992), at 1486-87.

8 A term used in this context is the term "*de facto* regime". That term was coined in scholarship to describe "entities … claiming to be states …, which controlled more or less clearly defined territories without being recognized – at least by many states". Jochen A. Frowein, "*De facto* regime" in Rudolf Bernhardt (ed), *Encyclopedia of International Law*, vol. 1 (Amsterdam: Elsevier 1992) 966-968; at 966. Jochen A. Frowein, *Das de facto-Regime im Völkerrecht* (Köln: Carl Heymanns 1968). In that terminology, entities such as the German Democratic Republic before its broad recognition in 1972 or North Vietnam before the unification of Vietnam were *de facto* regimes. However, the term *de facto* regime is probably even more ambiguous than the others. If we follow the prevailing scholarly line that international recognition has only a declaratory effect and is not constitutive of statehood, such entities need not be called *de facto* regimes, but simply state-like entities. "*De facto* regime" is also a term of international humanitarian law, where it denotes a prolongation and

short of statehood (not fulfilling the relevant criteria, or only some of them, or only in a weak form, but eventually recognised by one or more states).

Even if recognition has only a declaratory value, the recognition of an entity as a state by other states can give a certain evidence of its legal status as a state, although this presumption can be refuted on the basis of facts.

Such a type of *prima facie* evidence did not exist for South Ossetia before August 2008. No state had recognised it before the outbreak of the war, not even for opportunistic reasons.[9] Moreover, South Ossetia itself had not unambiguously and consistently claimed to be a state: on the one hand the South Ossetian authorities have sought to be recognised as a sovereign and independent state, but on the other hand they have also advocated unification with North Ossetia through integration into Russia.[10] Integration into the Russian Federation would go against the attainment of independent statehood.

Nevertheless, despite these uncertainties and lack of recognition, South Ossetia could have been a "state", if it had fulfilled the relevant criteria mentioned above.

With regard to the territorial status under international law, Abkhazia was similar, but not identical to that of South Ossetia before the outbreak of violence. Abkhazia was not recognised by any state before August 2008. But integration within Russia has been far less appealing to Abkhazia than to South Ossetia. Abkhazia always stressed the fact of being a sovereign state.[11]

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stabilization of insurgency. In that IHL-tradition, it was assumed that an entity must be recognized as a *de facto* regime and only through recognition acquires limited legal personality. The difference from the recognition of a state is that the recognition of a *de facto* regime is constitutive and by definition has a somewhat provisional character. See Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/2 (Berlin: De Gruyter 2002), at 303-304.

[9] This finding is also confirmed by the official Russian answers to the IIFFMCG questionnaire related to legal issues: "Prior to the conflict Russia recognised Abkhazia and South Ossetia as constituent entities of Georgia."

[10] In continuation of the process of separation from Georgia, initiated in September 1990, the Ossetians participated in a "referendum" on the independence of South Ossetia from Georgia on 19 January 1992 in which the vast majority declared itself in favour of independence and unification with Russia.
On 29 May 1992, the South Ossetian Supreme Council issued the "Declaration of Independence of the Republic of South Ossetia" in which it proclaimed: "Implementing the Declaration on State Sovereignty of the Republic of South Ossetia, the Supreme council solemnly declares the independence of South Ossetia and establishment of the independent state of South Ossetia." In the "Constitution (Organic Law) of the Republic of South Ossetia", adopted on 8 April 2001, Article 1(1) states: "The Republic of South Ossetia is a sovereign democratic state based on law, which has been established by the right of nation to self-determination."

[11] Before 1999, Abkhazia was not opposed to a "Union of States" according to the model of a confederation, and to proposals to constitute a freely associated state either with Georgia or with Russia. All these proposals were, however, based on the sovereignty, the right to secession and the statehood of Abkhazia.

1. Defined territory

As government necessarily has to be related to a territory, the first condition of statehood is a certain coherent territory or a "particular territorial base upon which to operate."[12] A final settlement on the delimitation of the territory is not a prerequisite for the existence of a state; boundary disputes generally do not affect statehood.[13] Neither is there any rule requiring contiguity of the territory of a state.[14]

Therefore, despite the lack of agreement between the Georgian Government and the authorities of South Ossetia concerning the delimitation and status of its boundaries – both sides were controlling a part of the territory of the Former Autonomous Republic of South Ossetia[15] – and notwithstanding the fragmented character of the territory controlled by the authorities of South Ossetia – including even a number of enclaves - the minimum requirement of the existence of a "core" territory[16] was met in the case of South Ossetia.

In the case of Abkhazia, there are even fewer doubts concerning the criterion of an identifiable core territory, although the Georgian Government controlled a part of the territory, i.e. the upper Kodori Gorge that geographically belongs to Abkhazia.

2. Permanent population

The exact meaning of the second criterion, a "permanent population", is disputed in international legal doctrine. "Population" can be understood as an "aggregate of individuals" independent of these persons' nationality.[17] More narrowly, population can be understood in the sense of a people with a common nationality.[18]

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[12] This definition is used by Malcolm N. Shaw, *International Law* (6th ed. Cambridge University Press 2008), at 199. See also German-Polish Arbitration Court (1 August 1929), *Deutsche Continental-Gas-Gesellschaft v Etat polonais*, repr. in ZaöRV 2 (1931), 14-40, at 23: "il suffit que ce territoire ait une consistance suffisamment certaine … et que, sur ce territoire, il exerce en réalité la puissance publique nationale de façon indépendante."

[13] Crawford (above note 1), at 49.

[14] Crawford (above note 1), at 47.

[15] Before the outbreak of large-scale hostilities, the South Ossetian Government reportedly controlled about three fifths of the territory of the former administrative entity of South Ossetia, while the Georgian Government controlled about two fifths, several enclaves within South Ossetia and the entire district of Akhalgori in the Southeast of South Ossetia.

[16] According to Rosalyn Higgins, statehood might be questionable when there are "doubts of a serious nature" on the future frontiers (Rosalyn Higgins, *The Development of International Law through the Political Organs of the UN* (London: OUP 1963), at 20).

[17] Crawford (above note 1), at 52 states that the criterion "is not a rule relating to the nationality of that population." For Brownlie (above note 2), at 70-71 a "stable community" is sufficient.

[18] Alfred Verdross/ Bruno Simma, *Völkerrecht* (3d ed. Berlin: Duncker & Humblot 1984), at 225 speak of a "dauerhafter Personenverbund, der in der Geschlechterfolge fortlebt." Georg Jellinek, *Allgemeine Staatslehre*

For South Ossetia and Abkhazia, this aspect is important, because the overwhelming majority of the people living in these territories have voluntarily acquired Russian nationality (even after acquiring the "nationality" of South Ossetia and Abkhazia respectively).[19] Furthermore, there was a constant flux of the population due to internally displaced persons and migratory movements.[20] The changes within the demographic composition of the population were even greater in Abkhazia than in South Ossetia. Therefore, the existence of a stable group with a common nationality is doubtful for both regions.

However, the criterion of nationality is not very helpful, at least in the context of secession processes, because here nationality is, as a rule, defined only after having created a new state. As a rule, nationality seems to depend on statehood and not vice versa.[21] Therefore, the status of a (new) state cannot in legal terms be linked to the existence of a group of persons possessing a common nationality.

An "aggregate of individuals" that lived in both South Ossetia and Abkhazia can be broadly considered as constituting a population.

3. Effective government

The element of effective government is mostly viewed as one complex criterion.[22] Some authors subdivide it into "effective government" and "independence".[23] Despite this terminological difference, it is consented that the criterion of "effective government" has an "inward" and an "outward" aspect. These two aspects refer to the exercise of authority with respect to persons and property within the territory of the state, and to the exercise of authority with respect to other states.[24] In both relations independence is decisive: according to Ian Brownlie, it must be ascertained that there is no "foreign control overbearing the

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(3rd ed. Berlin: Julius von Springer 1920), at 183, demands that there is a "Volk" as a precondition of statehood in the legal sense. See in this sense also Doehring (above note 5), at 601, Dahm/Delbrück/Wolfrum 1988 (above note 3), at 127, Theodor Schweisfurth, *Völkerrecht* (Tübingen: UTB Mohr Siebeck 2006), at 10 and 296; Daillier/Pellet (above note 3), at 409.

19 The validity of Russian nationality on the international plane below Chapter 2.3.

20 See Chapter 2 "The conflicts in Abkhazia and South Ossetia: Peace Efforts up to 2008".

21 Crawford (above note 1), at 52.

22 That was the classical approach developed in the 19th century as enounced by Georg Jellinek. See in contemporary scholarship Karl Doehring, *Völkerrecht* (2nd ed. Heidelberg: CF Müller 2004), MN 49; Volker Epping in Knut Ipsen, *Völkerrecht* (5th ed. Munich: Beck 2004), at 59-67; Pierre-Marie Dupuy, *Droit international public* (9th ed. Paris: Dalloz 2008), at 95.

23 Notably Crawford (above note 1), at 55 *et seq*.

24 *Ibid*, at 55, fn 85.

decision-making of the entity concerned on a wide range of matters of high policy and doing so systematically and on a permanent basis."[25]

a) South Ossetia

South Ossetia had already established a new constitutional order in 1993, and in a revised form in 2001 with executive, legislative and judicial branches. Nevertheless, there are many doubts as to the effectiveness and independence of the system.

First, as the majority of people living in South Ossetia have acquired Russian citizenship, Russia can claim personal jurisdiction over them.[26] Russian legislation, for instance on health insurance or pensions, can therefore directly impact on their lives. On the basis of the Russian Constitution, Russian citizens have many rights and obligations, among them the right to vote (Article 32 para. 2 Russian Constitution) and the right to actively participate in the management of the state (Article 32 para. 1 Russian Constitution), as well as the obligation to pay taxes (Article 57 Russian Constitution) and the obligation to perform military service (Article 59 Russian Constitution). From the point of view of Russian constitutional law, the legal position of Russian citizens living in South Ossetia is basically the same as the legal position of Russian citizens living in Russia.[27] Russian passport holders in South Ossetia participate in Russian elections, e.g. in the Russian presidential elections of March 2008,[28] because Russian politics directly matters to them.

Second – and still more importantly – Russian officials already had *de facto* control over South Ossetia's institutions before the outbreak of the armed conflict, and especially over the security institutions and security forces. The *de facto* Government and the "Ministries of Defence", "Internal Affairs" and "Civil Defence and Emergency Situations", the "State Security Committee", the "State Border Protection Services", the "Presidential Administration" – among others – have been largely staffed by Russian representatives or South Ossetians with Russian citizenship that have worked previously in equivalent positions in Central Russia or in North Ossetia.[29] According to the South Ossetian Constitution, these

[25] Brownlie (above note 2), at 72.

[26] The effects of the conferral of Russian nationality on Georgian citizens and stateless persons are dealt with below in Chapter 2.3.

[27] Cf. Article 62(2) of the Russian Constitution: "Possession of the citizenship of a foreign state by the citizen of the Russian Federation shall not belittle his or her ranks and liberties or exempt him or her from the duties stemming from Russian citizenship unless otherwise stipulated by the federal law or international treaty of the Russian Federation."

[28] Civil Georgia, 3 March 2008.

[29] See official Georgian answers to IIFFMCG questionnaires.

officials are directly responsible to the *de facto* President of South Ossetia as "head of state" and of the executive branch (Art. 47 para. 1 of the Constitution). Still, despite this constitutional accountability, the fact that the decisive positions within the security structures of South Ossetia were occupied by Russian representatives, or by South Ossetians who had built their careers in Russia, meant that South Ossetia would hardly have implemented policies contrary to Russia's interests.

De facto control of South Ossetia was gradually built up by Moscow. Russian representatives were not as present within the South Ossetian leadership before summer 2004. Thus the process of state-building was not gradually stabilised after South Ossetia's declaration of independence in 1992, but suffered setbacks after 2004. Even if South Ossetia was not formally dependent on any other state, Russian foreign influence on decision-making in the sensitive area of security issues was so decisive that South Ossetia's claim to independence could be called into question.

To sum up, Russia's influence on and control of the decision-making process in South Ossetia concerned a wide range of matters with regard to the internal and external relations of the entity. The influence was systematic, and exercised on a permanent basis. Therefore the *de facto* Government of South Ossetia was not "effective" on its own.

b) Abkhazia

The effective control of the Abkhaz authorities over the relevant territory and its residents is problematic, because many inhabitants had acquired Russian citizenship and were – from the Russian perspective – under the personal jurisdiction of the Russian Federation. According to the information given by the Abkhaz authorities "practically all the inhabitants of Abkhazia are at the same time citizens of the Russian Federation."[30] Russian passport-holders participated massively in presidential and parliamentary elections in Russia.[31]

Russia's control over Abkhazia's security institutions seems to be less extensive than in South Ossetia. Contrary to the situation in South Ossetia, the will to remain independent from Russia has traditionally remained strong among the elites and Abkhaz public opinion. In the "presidential elections" of 2004/05, for instance, Moscow had to acknowledge the defeat of the candidate whom it had openly supported (Raul Khadjimba) and had to accept the victory

[30] See official Abkhaz answers to the IIFFMCG questionnaire related to legal issues, including international humanitarian law and human rights issues.

[31] Civil Georgia, 3 March 2008.

of Sergei Bagapsh. This means that the Abkhaz institutions were – at least at that particular moment – not completely under control of the Russian Government.

II. Conclusion

From the perspective of international law, South Ossetia was, at the time of the military conflict in 2008, an entity that had a territory, a population and a government acting on a newly established constitutional basis. But all usual criteria for statehood (in legal and in political terms) are gradual ones. Especially the third criterion, effectiveness was not sufficiently present in the case of South Ossetia, as domestic policy was largely influenced by Russian representatives from "within".

Thus, South Ossetia came close to statehood without quite reaching the threshold of effectiveness. It was – from the perspective of international law – thus not a state-like entity, but only an entity short of statehood.[32]

The status of Abkhazia is slightly different. Contrary to South Ossetia, the Abkhaz "government" has expressed its clear will to remain independent from Russia, even if its policies and structures, particularly its security and defence institutions, remain to a large extent under control of Moscow. Abkhazia is more advanced than South Ossetia in the process of state-building and might be seen to have reached the threshold of effectiveness. It may therefore be qualified as a state-like entity. However, it needs to be stressed that the Abkhaz and South Ossetian claims to legitimacy are undermined by the fact that a major ethnic group (i.e. the Georgians) were expelled from these territories and are still not allowed to return, in accordance with international standards.

[32] In political science, the concepts of "statehood" and "*de facto* state" are indeed defined for different purposes than for international law. The following definition of Scott Pegg for instance serves descriptive and explanatory objectives that are particular to political science. Pegg stresses a number of characteristics of a *de facto* state – such as the degree of domestic legitimacy and capacity to deliver public goods – which are not directly relevant for a legal definition of statehood: "A *de facto* state exists where there is an organized political leadership which has risen to power through some degree of indigenous capability; receives popular support; and has achieved sufficient capacity to provide governmental services to a given population in a specific territorial area, over which effective control is maintained for a significant period of time. The *de facto* state views itself as capable of entering into relations with other states and it seeks full constitutional independence and widespread international recognition as a sovereign state. It is, however, unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society." (Scott Pegg, *International Society and the De Facto State* (Aldershot i.a. 1998), at 26 *et seq*.).

III. Comment

South Ossetia should not be recognised because the preconditions for statehood are not met. Neither should Abkhazia be recognised. Although it shows the characteristics of statehood, the process of state-building as such is not legitimate, as Abkhazia never had a right to secession. Furthermore, Abkhazia does not meet basic requirements regarding human and minority rights, especially because it does not guarantee a right of safe return to IDPs/refugees.

3.2. Self-Determination and Secession

Both South Ossetia and Abkhazia consider the right to self-determination as the legal basis for their request for sovereignty and independence. Since the end of the 1980s, the two political entities have based successive declarations and constitutional steps on this principle.[33] Therefore it is necessary to discuss whether South Ossetia and Abkhazia could rely on self-determination, and whether they were allowed to secede from Georgia.

I. Self-Determination and Secession in International Law

Both the principle of self-determination of peoples and the principle of territorial integrity are fundamental principles of international law. They are explicitly acknowledged in the UN Charter. The promotion of self-determination is one of the purposes of the United Nations (Article 1 (2) UN Charter[34]), and is also endorsed in common Article 1 of both universal Human Rights Covenants of 1966. Self-determination is understood as "the right of cohesive national groups ('peoples') to choose for themselves a form of political organisation and their relation to other groups."[35] Generally speaking, the choice may be "independence as a state,

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[33] The preamble of Abkhazia's *de facto* Constitution of 26 Nov. 1994 (adopted by "referendum" on 3 October 1999) reads as follows: "We, the people of Abkhazia, exercising our right of self-determination … announce solemnly and decide on the constitution of the Republic of Abkhazia". Art. 1 sentence 1 states: "The Republic of Abkhazia (Apsny) is a sovereign, democratic rule-of-law-state which has been historically confirmed according to the right of the people to free self-determination." http://www.abkhaziagov.org/ru/state/sovereignty/index.php?print=Y; also http://rrc.ge/admn/url12subx.php?idcat=2&lng_3=en; Engl. transl http://www.isn.ethz.ch/isn/Digital-Library/Primary-Resources/Detail/?id=30523&lng=en. The preamble of South Ossetia's *de facto* Constitution adopted on the basis of a "referendum" on 8 April 2001, and effective in the version of December 2005, also refers to the principle of equal rights and self-determination of the people, and Art. 1 states: "The Republic of South Ossetia is a sovereign democratic rule-of-law-state which has been founded by virtue of the self-determination of South Ossetia's people." (http://www.sojcc.ru/zakoniruo/196.html).

[34] Article 1(2) UN Charter: "The purposes of the United Nations are: … To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace".

[35] Brownlie (above note 2), at 580.

association with other groups in a federal state, or autonomy or assimilation in a unitary (non-federal) state."[36] At the same time, the UN Charter upholds the principle of territorial integrity of any state (Article 2 (4) UN Charter[37]). The principle of territorial integrity is a major and foundational principle of international law and is acknowledged in numerous international documents, notably by the Friendly Relations Declaration of 1970 [38] and the Helsinki Final Act of 1975.[39] Both principles have equal value and form part of customary international law.[40]

The "internal" aspect of the right to self-determination, to be realised within the framework of a state, does not infringe on the territorial integrity of the state concerned. However, if the right to self-determination is interpreted as granting the right to secession (external right to self-determination), the two principles are incompatible.

As evidenced by state practice and United Nations resolutions, the right to secede unilaterally is uncontested for colonial peoples, and peoples subject to foreign occupation. This situation is not present in South Ossetia and Abkhazia.

Scholarship has remained divided on the question of whether international law allows secession outside the colonial context in extreme circumstances. A current of literature argues that secession is basically a fact of life not regulated by international law.[41] The doctrinal argument for this proposition is that, systematically speaking, the principle of territorial integrity does not apply within a state, and is thus not directed against groups within states.[42]

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[36] *Ibid*., at 580.

[37] Article 2(4) UN Charter: "The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles: … All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[38] UN GA Res. 2625 (XXV) of 24 Oct. 1970.

[39] Part 1 (a) "Declaration on Principles Guiding Relations between Participating States", Principle III "Inviolability of frontiers"; Principle IV "Territorial integrity of States" including the commitment that no occupation or acquisition of territory in violation of that principle will be recognized as legal.

[40] Edward Mc Whinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law. Failed States, Nation-building and the Alternative, Federal Option* (Leiden, Boston: Martinus Nijhoff 2007), at 2 *et seq.*

[41] See Mc Whinney (above note 40), at 5; Karl Josef Partsch, "Self-Determination" in Rüdiger Wolfrum/Christiane Philipp (eds), *United Nations: Law. Practice, and Policy*, vol. 2 (Munich: Beck 1995), 1171-1179, para. 27; Dietrich Murswiek, "The Issue of a Right of Secession – Reconsidered" in Christian Tomuschat (ed.), *Modern Law of Self-Determination* Dordrecht/Boston/London: Martinus Nijhoff 1993) 21-39, at 37 *et seq.*

[42] See in this connection, e.g., Georges Abi–Saab, "Conclusions", in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 470-76, at 474. "[T]here is no international norm prohibiting secession and therefore it is difficult to see an actual need for such a norm [authorising secession]. … still it would not make much sense to speak about a 'right to secession'" (Peter Hilpold, "Self-

However, this argument is not fully persuasive, especially as international law increasingly addresses situations within the territory of states. International law is not silent in that regard.

The potential tension between self-determination and territorial integrity is addressed in the General Assembly's "Friendly Relations Declaration"[43] which explains the right to self-determination and then adds in the so-called savings clause:

> *"Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour."*

This paragraph endorses the principle of territorial integrity, but at the same time makes it conditional on a representative and non-discriminatory government. Some authors argue that it follows *e contrario* from this clause that territorial integrity need not be respected if the government does not represent the whole people, but discriminates against one group. The proposition is that if internal self-determination is persistently denied to a people, and when all peaceful and diplomatic means to establish a regime of internal self-determination have been exhausted, that people may be entitled to secession as the *ultima ratio* ("remedial secession").[44]

Determination in the 21st Century – Modern Perspectives on for an old Concept", *Israel Yearbook of Humanitarian Law* 36 (2006), 247-288, at 267-270, at 269). Hilpold continues: "but here we are already outside a legal framework … and it cannot be stated whether the normative framework will ever develop in this direction."

[43] UN GA Res. 2625 (XXV) of 24 Oct. 1970; cf also the similar wording of the Vienna Declaration and Programme of Action of 12 July 1993, A/CONF.157/23, part I.2., of the World Conference on Human Rights.

[44] Diagnosing and supporting remedial secession (as a rule of positive interational law derived from the savings clause of the Friendly Relations Declaration) Christian Tomuschat in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 23-45, at 42: "[R]emedial secession should be acknowledged as part and parcel of positive law, notwithstanding the fact that its empirical basis is fairly thin, but not totally lacking ...". See also Schweisfurth (above note 18), at 382; and Markku Suksi, "Keeping the Lid on the Secession Kettle – a Review of Legal interpretations concerning Claims of Self-Determination by Minority Populations", *International Journal on Minority and Group Rights* 12 (2005), 189 *et seq*., at 225: "Unilateral secession from an existing State is not supported by public international law *except in some very special circumstances* that, against the background of the solutions in situations like Kosovo and Chechnya, are almost unlikely to materialise." South Ossetia and Abkhazia argue that they do constitute such an "extreme" case. See in state practice the Supreme Court of Canada, *Reference Secession of Quebec*, judgement of 20 August 1998, reprinted in ILM 37 (1998), 1340 *et seq*.. paras 134-5, 138, 122, which did not unequivocally endorse this position, but clearly leant towards it: Para 122. "… [I]nternational law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise. …". Para 134. A number of commentators have further asserted that the right to self-determination may establish a right to unilateral

However, this savings clause as such, figuring only in a non-binding General Assembly resolution, is not in itself hard law. It has so far not become customary law.[45] It rather constitutes a deviation from general state practice which might be explained by its drafting history and the desire to formulate a political compromise.[46] As Antonio Cassese writes: "Whatever the intentions of the draftsmen and the result of their negotiations, and whatever the proper interpretation of the clause under discussion, it cannot be denied that state practice and the overwhelming view of states remain opposed to secession."[47] The international community can react to extreme forms of oppression in other forms than by granting a right to secession, e.g. by adopting sanctions without questioning the territorial integrity of the oppressive state.[48] State practice outside the colonial context has been "extremely reluctant" to accept unilateral secession of parts of independent states, and since 1945 no state created by unilateral secession has been admitted to the United Nations against the explicit wish of the state from which it had separated.[49]

With a view to that state practice, the prevailing scholarly opinion shares the view that – as a matter of international law as it stands – the savings clause does not imply that whenever the principles of non-discrimination and adequate representation are violated a "people" can lawfully claim a right to secession.[50]

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secession under specific circumstances. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The *Vienna Declaration* [CSCE Vienna meeting of 1989] requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession. Para 135. Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination." 138: "In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination."

45 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: CUP 1995), at 121.

46 *Ibid*., at 123.

47 *Ibid*.

48 See the situation of the Kurds in northern Iraq, where the international community stressed the territorial integrity of Iraq despite continued Iraqi repression of the Kurds, but adopted a sanctions regime (Crawford (above note 1) at 404).

49 Crawford (above note 1), at 390 and 415; cf. also the detailed analysis of State practice in *ibid*. at 391 *et seq*.

50 Jean Combacau/Serge Sur, *Droit international public* (8th ed., Paris: 2008), at 273; Wolfgang Heintze, Völker im Völkerrecht, in: Knut Ipsen, *Völkerrecht* 5th ed. 2004, at 423; Donald Clark/Robert Williamson, *Self-Determination. International Perspectives* (Basingstoke: Macmillan Press 1996), at 30.

However, the legal status quo in this field is deplored as unfair by many authors[51] who discuss under which conditions secession should be possible.[52] Scenarios invoked in this context are violations of basic human rights, especially (attempted) genocide, the exclusion of a minority from the political process, or the outbreak of armed conflicts or despotic governments suppressing the rights of minorities.[53] It is also highlighted that any extraordinary permission to secede would have to be realised following the appropriate procedures, notably having recourse to a free and fair referendum on independence, ideally under international supervision.[54]

The uncertainty about the existence of an external right to self-determination "has itself contributed to many human tragedies the world has witnessed in the post-Word War II period by giving false hope to minority groups that they have rights to autonomy or independence against the states in which they are found, even absent a colonial history."[55] Since the unilateral declaration of independence of Kosovo in 2008, the discussion has gained momentum. However, most commentators remain sceptical.[56] Only a few international legal scholars have diagnosed a change of international law.[57]

In any case, it is more than doubtful that a new rule of customary international law has been created on the basis of the Kosovo case. The preamble to Kosovo's declaration of

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[51] See for an explicit critique: Allan Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations of International Law* (Oxford OUP 2007), at 339 *et seq*.

[52] See Shaw 2008 (above note 6), at 257: "Self-determination as a concept is capable of developing further so as to include the right to secession from existing states, but that has not as yet convincingly happened. "

[53] Cf. Cassese, *Self-Determination* (above note 45), at 359. Cassese reflects on a multinational intervention in extreme cases.

[54] See e.g. the Opinion No. 4 of the Badinter Commission on Bosnia-Herzegovina which required a referendum as a pre-condition for recognition by the EC (repr. in ILM 31 (1992), at 1501-3). In scholarship Anne Peters, *Das Gebietsreferendum im Völkerrecht* (Nomos: Baden-Baden 1995); Antonelli Tancredi, "A normative 'due process' in the creation of States through secession" in Marcelo Kohen (ed.) *Secession – International Law Perspectives* (Cambridge: CUP 2006), 171-207, at 190-91.

[55] Jonathan I. Charney, "Commentary: Self-Determination: Chechnya, Kosovo, and East Timor", *Vanderbilt Journal of Transnational Law* 34 (2001), 455 *et seq*., at 456.

[56] See, e.g., Per Sevastik, "Secession, Self-determination of 'Peoples' and Recognition – The Case of Kosovo's Declaration of Independence and International Law", in G. Engdahl (ed.), *Law at War: Liber Amicorum Ove Bring* (Leiden 2008), 231 et seq, at 237.

[57] Marc Weller, *Escaping the Self-determination Trap* (Leiden: Martinus Nijhof 2008), at 65: "While the question of repression or exclusion being constitutive of a new, remedial self-determination status in the sense of secession is therefore not clearly settled, it is at least this legitimising effect that can be clearly observed." See also *ibid*. at 146: "The hesitancy concerning a move towards what is sometimes called 'remedial self-determination' may have been reinforced by Russia's armed actions relating to Georgia. On the other hand, over time, the situation in Kosovo, Abkhazia, and South Ossetia may well stabilize, leading to a retroactive re-interpretation of these episodes as instances of state practice in favour of remedial secession." See in favour of a right to secession by Kosovo Katharina Parameswaran, "Der Rechtsstatus des Kosovo im Lichte der aktuellen Entwicklungen", *Archiv des Völkerrechts* 46 (2008), 172-204 at 178-182.

independence underlines that "Kosovo is a special case arising from Yugoslavia's non-consensual break-up and is not a precedent for any other situation."[58] The Council of the European Union[59] and the UN Secretary General[60] clearly stated that Kosovo is a *sui generis* case which does not constitute a precedent for other territorial conflicts.

In contrast, Russia, although opposing a right to secession generally, considers Kosovo as a precedent.[61] Precedents as such are not a source of international law; they can only give indications for the emergence of a new rule of customary law. Such a new rule requires a general practice over a certain period of time, accompanied by the opinion that this practice reflects law (*opinio iuris*).[62] Even if these requirements for the creation of new rules of customary law have been watered down in the past decades,[63] a single case leading to a major dispute within the international community does not satisfy even lenient standards, because it does not constitute a "general" practice and does not manifest the conviction of a number of states that this practice reflects an international legal rule.

Moreover, even if the declaration of independence and the ensuing recognition of Kosovo as an independent state by many other states were interpreted as triggering the creation of a new

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[58] http://www.assembly-kosova.org/?krye=news&newsid=1635&lang=en.

[59] Cf. Council of the European Union, Council conclusions on Kosovo (18 February 2008): "The Council reiterates the EU's adherence to the principles of the UN-Charter and the Helsinki Final Act, *inter alia* the principles of sovereignty and territorial integrity and all UN Security Council resolutions. It underlines its conviction that in view of the 1990 and the extended period of international administration under SCR 1244, Kosovo constitutes a *sui generis* case which does not call into question these principles and resolutions." Cf. on the *sui generis* thesis.

[60] Cf. the Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council (UN-Doc. S/2007/168 para. 15): "Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved conflicts. In unanimously adopting resolution 1244 (1999), the Security Council responded to Milosevic's actions in Kosovo by denying Serbia a role in its governance, placing Kosovo under temporary United Nations administration and envisaging a political process designed to determine Kosovo's future. The combination of these factors makes Kosovo's circumstances extraordinary."

[61] See among others the statement of the President of the Duma Boris Gryslov on 1 April 2008, Ria Novosti, http://de.rian.ru/world/20080515/107471636.html (accessed on 22 August 2008). According to the Russian President Dmitri Medvedev it would be impossible "to tell the Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them. In international relations, you cannot have one rule for some and another rule for others." Dmitry Medvedev, 'Why I had to Recognize Georgia's Breakaway Regions', *Financial Times*, 27 August 2008; an analysis of the differences and similarities between Kosovo on the one hand and the break-away regions in Georgia on the other hand is provided by Aleksandr Aksenenok, Self-determination between the law and realpolitik (Russian), Rossija v global'noj politike Nr. 5, 2006; http://www.globalaffairs.ru/articles/6214,html (accessed on 27 July 2008).

[62] See Article 38 lit b) of the Statute of the ICJ: "international custom, as evidence of a general practice accepted as law".

[63] Cf. on the discussion on "instant custom": Jörg Kammerhofer, "Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems", *EJIL* 15 (2004), 523 – 553; Robert Kolb, "Selected Problems in the Theory of Customary International Law", *Netherlands International Law Review* 50 (2003), 119-150.

rule, the states denying Kosovo's right to secede would have to be considered as persistent objectors. Therefore those states would be excluded from relying on such a new rule themselves. The law does not permit arguing that other states have violated international law and then taking the rule created by the alleged violation as a new rule and to apply it (selectively) to other cases.

To sum up, outside the colonial context, self-determination is basically limited to internal self-determination. A right to external self-determination in form of a secession is not accepted in state practice. A limited, conditional extraordinary allowance to secede as a last resort in extreme cases is debated in international legal scholarship. However, most authors opine that such a remedial "right" or allowance does not form part of international law as it stands. The case of Kosovo has not changed the rules.

II. Self-Determination and Secession in Soviet Constitutional Law

Although all members of the United Nations are bound to observe the principle of self-determination, they have a wide discretion in implementing this principle in national law. The Soviet law was – at least on paper – especially permissive in this respect. *De iure* the Soviet Union was a federal state[64] composed of three different levels of governance: Union republics, Autonomous republics and Autonomous regions. According to the Soviet Constitution of 1977, only the Union republics were accorded the right to secession without any preconditions (Article 72). Moreover, their territories could only be changed with their consent (Article 78).

These rights were virtual only as long as all levels of authority in the Soviet state remained under firm control of the Communist Party. Yet, at the end of the 1980s, when such central control was weakening, the Soviet Union witnessed a "parade of sovereignties". Not only Union republics, but also territorial sub-units of the republics such as Autonomous republics and Autonomous regions adopted declarations of sovereignty[65] and/or independence.[66] The

[64] Cf. Article 70 of the Soviet Constitution (1977): (1) The Union of Soviet Socialist Republics is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics. (2) The USSR embodies the state unity of the Soviet people and draws all its nations and nationalities together for the purpose of jointly building communism.

[65] North Ossetia 20.7.1990, Kareliya 9.8.1990, Khakassiya 15.8.1990, Komi 29.8.1990, Tatarstan 30.8.1990, Udmurtiya 20.9.1990, Sakha 27.9.1990, Buryatiya 8.10.1990, Bashkortostan 11.10.1990, Kalmykiya 18.10.1990, Marii El 22.10.1990, Chuvashiya 24.10.1990, Gorno-Altay 25.10.1990, Tuva 1.11.1990, Karachay-Cherkessiya 17.11.1990, Checheno-Ingushetiya 27.11.1990, Mordova 8.12.1990, Karakalpak Republic (Uzbekistan) 14.12.1990, Kabardino-Balkariya 31.1.1991, Dagestan 15.5.1991, Adygeya 2.7.1991 and others.

law of the USSR from 4 April 1990 "On the procedure on the decision of questions connected with the secession of a union republic from the USSR"[67] tried to slow down the process of dissolution by building up certain barriers such as the organisation of certain types of referenda. Thus, the law opened the door to a so-called 'recursive secession': The populations living on territories of Union republics that wished to become independent would have in their turn the right to secede from those republics and to remain in the Soviet Union.[68] This law contradicted the Soviet Constitution – which prohibited the secession of territories from Union republics without the consent of those republics (Art. 78). In any case, it was not taken into consideration in the process of dismemberment of the Soviet Union, neither by the Soviet Republics nor by the international community. Importantly, all former Soviet Republics accepted the inviolability of their borders in all relevant subsequent treaties.[69]

III. Statehood and International Recognition of Georgia

The Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, decided on 16 December 1991 by the Council of the Foreign Ministers of the European Community, defined recognition criteria for the entities that emerged from the dissolution of the Soviet Union.[70] Although the principle of self-determination was particularly emphasised at the beginning of that text,[71] the recognition policy of the EU focused only on the constituent states or component states of the dissolving federations.[72] Applying these principles, Georgia could be recognised as an independent state, but not Abkhazia or South Ossetia.

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66 E.g., on 6 September 1991 the newly elected Parliament of Chechnya declared the independence of the former Chechen-Ingush Autonomous Socialist Soviet Republic, whereas a part of the former autonomous Republic, Ingushetia, insisted on remaining part of the Russian Federation.

67 Vedomosti S'ezda narodnyh deputatov SSSR i Verhovnogo Soveta SSSR 1990, Nr. 15, at p. 252.

68 According to Article 3 of the Law, autonomous republics and autonomous entities had the right to decide independently whether to remain in the USSR or within the seceding republic and to raise the issue on their legal status.

69 The Protocol to the Agreement on the Establishment of the Commonwealth of Independent States of December 21, 1991 contains a guarantee of the existing borders of all CIS countries (Documents of Alma Ata of December 21, 1991, Diplomaticheskiy Vestnik 1992, No. 1, p. 6 *et seq*, English translation in ILM 31 (1992), at 147-154). The inviolability of existing borders is also confirmed in the Preamble to the 1994 CIS "Declaration on the Observance of Sovereignty, Territorial Integrity and Inviolability of Borders of States – Members of the Commonwealth of Independent States" of 8 Dec. 1991.

70 Reprinted in International Legal Materials (ILM) 31 (1992), at 1485 *et seq*.

71 "The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination…".

72 For Yugoslavia this was spelled out clearly in the Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991): "The Community and its Member States agree to recognize the independence of all the Yugoslav *Republics"* fulfilling the conditions (repr. in ILM 31 (1992), at 1485).

This restrictive position is based on the opinions issued by the Arbitration Commission of the Conference on Yugoslavia (established by the European Communities under the chairmanship of Robert Badinter) in November 1991[73] and even more clearly in January 1992.[74] The commission based its view on the international legal principle of *uti possidetis*. This principle was first applied in the process of decolonisation of Latin America (19th century) and Africa (20th century) to prevent and solve potential border disputes. By virtue of this principle, the administrative borders drawn by the former colonial powers between the colonies are elevated to international borders at the moment the respective administrative area declares its independence.[75] Applied to the Soviet Union, the internal frontiers between the Union republics could become external frontiers of states in the sense of international law, but not those between Union and autonomous republics or between Union republics and autonomous regions.

This principle was observed by all members of the international community in recognising Georgia. It was confirmed by the founding documents of the CIS.[76] Based on the recommendation of the UN Security Council from 6 July 1992, the General Assembly admitted Georgia on 31 July 1992 as a member of the United Nations within the borders of the former Soviet Union Republic of Georgia.

This is the legal background against which South Ossetia's and Abkhazia's claims to self-determination and secession have to be assessed.

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

[74] Cf. Opinion No. 3 (11 January 1992): "Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, form the principle of *uti possidetis*. … The principle applies all the more readily to the Republics since the second and fourth paragraphs of Article 5 of the Constitution for the SFRY stipulated that the Republics' territories and boundaries could not be altered without their consent." (reprinted in EJIL 3 (1992), at 182 *et seq*.)

[75] Cf. ICJ, *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali), ICJ Reports 1986, 554, at 565; ICJ, *Case Concerning the Frontier Dispute* (Benin v. Niger), ICJ Reports 2005, at 90 *et seq*.; Malcolm Shaw, "Peoples, Territorialism and Boundaries", EJIL 3 (1997), 478 – 507, Christiane Simmler, *Das uti possidetis-Prinzip: Zur Grenzziehung zwischen neu entstandenden Staaten* (Berlin: Duncker & Humblodt 199), at 292; Joshua Castellino, *International Law and Self-Determination. The Interplay of the Politics of Territorial Possession with Formulations of Post-Colonial „National" Identity* (The Hague/Boston/London: Martinus Nijhoff 2000), at 109 *et seq*. This approach has been criticised by Steven Ratner, "Drawing a Better Line: *uti possidetis* and the Borders of New States", *American Journal of International Law* (AJIL) 90 (1996), 590-624; Peter Radan, *The Break-up of Yugoslavia and International Law* (London, New York: Routledge 2002), at 244 *et seq*.

[76] See above note 69.

IV. The Right to Self-Determination and Secession of South Ossetia

The Ossetians can be qualified as a "people" for purposes of international law.[77] This people can in principle rely on the right to self-determination.

Although the Ossetian population living in Georgia before the outbreak of the violence in August 2008 is only one part of that people, this sub-group may still claim a right to internal self-determination.

Thus, the South Ossetians could request that their interests be represented in governmental politics and that their cultural identity be preserved both in the Soviet Union and in the newly independent Republic of Georgia. This does not mean, however, that the South Ossetians could base their claim to raise the status of the South Ossetian "autonomous region" to that of an "autonomous republic" directly on international law, because the right to self-determination does not convey a specific privileged status in a given constitutional system.[78]

The demand of the South Ossetians to upgrade their status within the Soviet federal framework from an autonomous region to an autonomous republic, on par with the autonomous republic of North Ossetia within the Russian Federation, led to an open conflict with Tbilisi, which reacted on 11 December 1990 by suppressing the autonomous status of South Ossetia altogether. Under the given circumstances,[79] the result was that the cultural and political autonomy of the South Ossetian people was not guaranteed any more.

As explained above, international law does not grant an unqualified right to external self-determination in the form of secession in the event of violations of the internal right to self-

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[77] A group is a "people" in the sense of international law if it has objective common characteristics such as a common language, culture, and religion, and if the group moreover has expressed the intention to form a political community of its own. Both the objective elements and the subjective intention seem to be present in the case of the South Ossetians.

[78] South Ossetia's status of autonomy was clearly defined in the Soviet Constitution in Article 87. Soviet federalism claimed to realise the right to self-determination of the various Soviet nations, but this was done in an authoritarian fashion. This policy created strong tensions among the various nations, and – in the case of Georgians and Ossetians – gave rise to opposing views on the implementation of the principle of national self-determination. Both nations felt discriminated against. This led to the rise of nationalism in the second half of the 1980s.

[79] Law of the Republic of Georgia on the abolition of the Autonomous Oblast' of South Ossetia of 11 December 1990 (Abolition of the decree of 20 April 1922 which fixed the establishment of an "Autonomous Area of South Ossetia), in: Tamaz Diasamidze, The Collection of Political-Legal Acts, Tbilisi 2008, p. 38-39. The withdrawal of the autonomous status was based on the following argumentation: "Taking into consideration the fact that the Autonomous Oblast of South Ossetia was established in 1922 in full disrespect of the local Georgian population and contradicted the best interest of the Georgian people and bearing in mind the fact that the Ossetian people have their statehood on their historical homeland – North Ossetia – and that only an insignificant portion of ethnic Ossetians live in the Autonomous Oblast of South Ossetia, where they enjoy, and will continue enjoying wide cultural autonomy rights, pursuant to the paragraphs 3 and 11 of Article 104 of the Constitution of the Republic of Georgia, …".

determination. Even if an extraordinary allowance to secede were accepted under extreme circumstances, such an exception was not applicable to South Ossetia.[80]

The international community (including Russia) consistently emphasised the territorial integrity of Georgia, both before and after the outbreak of the armed conflict of 2008. This was expressed notably in numerous Security Council resolutions,[81] and also in resolutions of other international organisations.[82] These statements indicate the denial of any allowance to secede based on self-determination.

Thus, although internal self-determination had not been granted to the South Ossetian people in the transitory period after the dissolution of the Soviet Union, South Ossetia could not claim a right to secession.

Conclusion: The aspirations of the South Ossetian people to self-determination were not fulfilled, neither *de facto* nor *de iure*, in the transitional period when Georgia became independent, especially because the autonomous status had been abolished without being

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[80] Both Russia and South Ossetia called the violent actions against the South Ossetians in the beginning of the 1990s "genocide". "Genocide" is clearly defined in international law (Article II of the Convention and Punishment of Genocide). Specific harmful acts must be "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The documentation provided by the Russian side to the IIFFMCG reported many cases of maltreatment and killing. Nevertheless, these seem to be incidents of violence typical for civil wars rather than systematic attempts to destroy the South Ossetians as an ethnic group. Investigations by Human Rights Watch in 23 January 2009 reached the conclusion that there had been "grave human rights violations", but neither genocide nor ethnic cleansing (*Up in Flames. Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*). The situation was therefore not fundamentally different from the situation of the Chechens in the Russian Federation or the Kurds in Iraq where the international community did not support a right to secession (see Charney, above note 55).

[81] See SC Res 876 (1993), SC Res 896 (1994), SC Res 906 (1994), SC Res 937 (1994), SC Res 971 (1995), SC Res 993 (1995), SC Res 1036 (1996) SC Res 1065 (1996), SC Res 1124 (1997), SC Res 1150 (1998), SC Res 1150 (1998), SC Res 1187 (1998), SC Res 1225 (1999), SC Res 1255 (1999), SC Res 1287 (2000), SC Res 1462 (2003), SC Res 1494 (2003), SC Res 1524 (2004), SC Res 1554 (2004), SC Res 1582 (2005), SC Res 1615 (2005), SC Res 1666 (2006), SC Res 1752 (2007), SC Res 1781 (2007), SC Res 1808 (2008).

[82] For the Organization for Security and Cooperation in Europe (OSCE): Decision of the OSCE Budapest Summit, 6 December 1994; decision of the Oslo OSCE Ministerial Council on Georgia, 1 December 1998; Resolution on the conflict in Abkhazia, Georgia, adopted by the OSCE Parliamentary Assembly, Warsaw, 8 July 1997; Resolution of the OSCE Parliamentary Assembly adopted at the seventeenth Annual Session on the security environment in Georgia, Astana, 29 June to 3 July 2008; Resolution of the Parliamentary Assembly adopted at the fourteenth annual session on the situation in Abkhazia, Georgia, Washington, D.C., 1 to 5 July 2005. For the EU: Extraordinary European Council, Brussels 1 September 2008, Presidency Conclusions, 12594/2/08 REV 2; For the Council of Europe: Council of Europe Parliamentary Assembly Report Fifth sitting, 28 January 2009 Add. 2: "The humanitarian consequences of the war between Georgia and Russia" (Recommendation 1857 (2009) Parliamentary Assembly, Provisional edition). "The Humanitarian Consequences of the War between Georgia and Russia" (Parliamentary Assembly Doc. 11789 of 12 January 2009). "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" (Parliamentary Assembly Doc. 11800 of 26 January 2009). "The consequences of the war between Georgia and Russia" (Parliamentary Assembly Resolution 1633 of 30 September and 2 October 2008). "The implementation of Resolution 1633 (2008) on the consequences of the war between Georgia and Russia" (Parliamentary Assembly, Provisional edition, Resolution 1647 of 28 January 2009).

replaced by other reliable legal guarantees. Nevertheless, South Ossetia was not allowed to secede from Georgia under international law.

V. The Right to Self-Determination and Secession of Abkhazia

The Abkhaz people can also be qualified as a "people" and can therefore rely on the right to self-determination.

Under Soviet law, Abkhazia had the status of an "Autonomous Socialist Soviet Republic" (Article 85 of the Soviet Constitution). As the Soviet Constitution did not grant a right to secession to autonomous republics, Abkhazia was, from the perspective of domestic law, an integral part of the Republic of Georgia at the moment of Georgia's independence. From the perspective of international law, this legal assessment was in conformity with the *uti-possidetis principle* as explained above.

Contrary to the situation in South Ossetia, the autonomous status of Abkhazia was never withdrawn.[83] Nevertheless, *de facto* the rights of the Abkhaz people – including their rights to political representation and to preservation of their national identity - were not adequately protected in the Soviet period and in the first years of Georgia's independence. The entry of Georgian troops in Abkhazia in August 1992 – as analysed in Chapter 2 "Conflicts in Abkhazia and South Ossetia: Peace Efforts 1991 – 2008" – should be mentioned in this context.

The entry of Georgian troops into Abkhazia in August 1992 hightened the tension in the area and resulted in hostilities. A UN inquiry of October 1993 found serious human rights violations by both sides.[84] Considering the specific circumstances, it must be asked whether the situation in Abkhazia might be qualified as "exceptional", thus creating an extraordinary allowance to secede under international law. But as explained above, such a "remedial" right to secession does not form part and parcel of international law as it stands for the time being.

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[83] On 2 January 1992 the Georgian Constitution of 1978 was annulled by the Military Council of the Republic of Georgia and replaced by the Constitution of the Democratic Republic of Georgia of 21 February 1921. In this context the Military Council declared: "Without changing the current borders and State – territorial arrangement of the Republic of Georgia (with current status of Abkhazia and Ajara), it recognizes the international legal acts and supremacy of the Constitution of Democratic Republic of Georgia of February 21, 1921 and its implementation with due account of current realities." (Declaration of the Military Council of the Republic of Georgia, 21 February 1992, published on 25 February 1992 in the newspaper "Sakartvelos Respublica, No. 36), http://www.parliament.ge/files/1_5718_330138_27.pdf.

[84] See Report of the Secretary-General's Fact-Finding Mission to Investigate Human Rights Violations in Abkhazia, Republic of Georgia, S/26795, 17 November 1993. Annex.

After the ceasefire agreement in Abkhazia was reached in 1994, a CIS peacekeeping force and a UN military observer mission were to prevent the eruption of further large-scale violence. Russia and the UN also provided a format for negotiations on the legal status of Abkhazia within Georgia. This means that there was no situation which called for an "*ultima ratio*", where secession would have been the only possible solution to the conflict. This was also acknowledged by the international community which continued to confirm the territorial integrity of Georgia.[85]

Conclusion: The aspirations of the Abkhaz people to self-determination were not fulfilled in the transition period when Georgia became independent. Nevertheless, Abkhazia was not allowed to secede from Georgia under international law, because the right to self-determination does not entail a right to secession.

3.3. "Passportisation": Mass-Conferral of Russian Nationality on Residents of South Ossetia and Abkhazia

A. Statement of the Problem

I. Basic Questions

According to various sources,[86] the overwhelming majority of the residents of Abkhazia and South Ossetia have acquired Russian nationality through naturalisation. According to Georgia, "passportisation" began on a massive scale in summer 2002 and "continued more rigorously following the Russian-Georgian war in August 2008".[87] The latter period will not be treated in this Report.

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[85] See the resolutions quoted above in footnotes 81 and 82.

[86] PC.DEL/52/03 of 24 January 2003 (Georgian statement to the Permanent Council of the OSCE), quoted in Victor-Ives Ghebali, "The OSCE Mission to Georgia (1992-2004): The Failing art of Half-hearted Measures", *Helsinki monitor* 2004, no. 3, 280-292, at 285. Also Thomas Kunze, Krieg um Südossetien, Länderbericht der Konrad Adenauer Stiftung vom 12 August 2008, at 2-3 (http://www.kas.de/proj/home/pub/83/1/year-2008/dokument_id-14356/index.html); Igor Zevelev, Russia's Policy Towards Compatriots in the Former Soviet Union, Russia in Global Affairs No. 1, January-March 2008, at 4. According to the *de facto* Deputy Minister of Foreign Affairs of Abkhazia, Maksim Gvindzhia, roughly 80% of the population hold dual Abkhaz-Russian citizenship (statement of 6 Sept. 2006). See Pal Kolsto/Helge Blakkisrud, "Living with Non-recognition: State- and Nation-Building in South Caucasian Quasi-states", *Europa-Asia Studies* 60 (2008), 483-509, at 494. The authors note that if this figure is correct, it would necessarily include some ethnic Georgians as well (*ibid*., fn. 27).

[87] Official Georgian answer (question 2) to the IIFFMCG questionnaire related to legal issues; there is no special information given by Russia on that issue.

In factual terms, it is disputed whether, and in which numbers, the naturalisation of the residents of South Ossetia and Abkhazia was voluntary or the result of Russian pressure on the population.[88] It is also unclear to what extent ethnic criteria were relevant for granting Russian nationality.

In legal terms, there is dissent on the question of whether the residents of Abkhazia and South Ossetia had been stateless or citizens of Georgia before their naturalisation by Russia. Finally, the consequences of the conferral of the Abkhaz or South Ossetian nationality respectively on the persons living in the breakaway territories from the perspective of international law are disputed.

The conformity of large-scale Russian naturalisations of the residents of South Ossetia and Abkhazia with international law is a relevant issue in the conflict between Russia and Georgia. Georgia continuously protested against this policy at least since 2003.[89] It considers the policy as "a significant component of Russia's creeping annexation of the Tskhinvali Region/South Ossetia and Abkhazia, Georgia."[90] In the Georgian view, the "passportisation" policy is a violation of the "principles of territorial integrity and sovereignty of Georgia, non-interference in internal affairs of sovereign states and the principle of resolving disputes through peaceful means."[91] Russia, on the contrary, holds that there is "nothing that would warrant criticism for granting Russian citizenship to the aforementioned persons who were entitled to it in accordance with legislation of the Russian Federation."[92]

The international legality and validity of the Russian nationality of South Ossetian residents also matters for the legal assessment of the use of force by Georgia and Russia, because one argument advanced by Russia was the "protection of its citizens".

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[88] According to Russia, "Russian nationality was granted to residents of Abkhazia and South Ossetia exclusively where they wilfully chose to apply for it." Georgia speaks of "forcible passportisation of ethnic Georgians residing on the territory of the occupied Akhalgori district" after August 2008 (cf. Official Georgian and Russian answers (question 2) to the IIFFMCG questionnaire related to legal issues.

[89] See the various reports of the Secretary-General on the Situation in Abkhazia, Georgia: report of 13 January 2003 (UN Doc. S/2003/39) para. 4; report of 21 July 2003 (UN Doc. S/2003/751), para. 7; report of 17 Oct. 2003 (UN Doc. S/2003/1019), para. 12.

[90] Official Georgian answer (question 2) to the IIFFMCG questionnaire related to legal issues.

[91] *Ibid*.

[92] Official Russian answer (question 2) to the IIFFMCG questionnaire related to legal issues.

Against this background, there are three relevant legal questions:

- Have the residents of Abkhazia and South Ossetia automatically become citizens of Georgia, acquired Georgian nationality on the basis of the 1993 Georgian law on nationality or remained stateless? (Part B).

- Does Russia's "passportisation" policy violate international law and thus constitute an illegal act under international law? (Part C).

- What are the legal consequences of the conferral of Russian nationality on the residents of Abkhazia and South Ossetia, and is Russian nationality opposable to third states? (Part D).

II. Basic Concepts

In this Report, the term "nationality" is used in order to denote the international law concept of a legal bond between a state and a person. The Report avoids the term "citizenship" which is often used as a synonym for "nationality", but has also other meanings pertaining rather to the political than to the legal sphere.

Nationality, as a concept of international law, has been defined by the International Court of Justice as "a legal bond having as its basis a social fact of attachment, a genuine connection of existence and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute a juridical expression of the fact that the individual upon whom it is conferred, either directly by law or as a result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state."[93]

It is not for international law, but for the internal law of each state to determine who is, and who is not, to be considered its national. The conferral of nationality is in the reserved domain (*domaine réservé*) of states.[94] For the purposes of domestic law, the determination of a person's nationality will be made only according to domestic law. But the effects of this act as regards other states occur on the international plane and are therefore to be determined by

[93] ICJ, *Nottebohm case (second phase)* (*Liechtenstein* v. *Guatemala*), ICJ Reports 1955, 4 at 23.

[94] PCIJ, *Nationality Decrees issued in Tunis and Morocco*, Advisory Opinion, PCIJ Reports (1923) Series B No. 4, at 24: "The question whether a certain matter is or is not solely within the jurisdiction of a State is essentially a relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain." ICJ, *Nottebohm case* (above note 93), at 20: "[I]t is for every sovereign State, to settle by its own legislation the rules relating to the acquisition of its nationality, and to confer that nationality by naturalisation granted by its own organs in accordance with that legislation."

international law. Thereby the jurisdiction of a state to confer nationality may become limited by rules of international law.[95]

Naturalisation in a broad sense is the conferral of nationality upon someone who has not acquired the nationality of the state by birth, but is already a national of another state or stateless. Naturalisation in the narrower sense of the term (also called "individual naturalisation") is the conferral of nationality upon the concerned individual's request or application made by the alien for the specific purpose through a formal (administrative) act in that individual case. In contrast, "collective naturalisation" is the conferral of nationality by operation of a national law, *ipso iure* upon the fulfilment of certain prescribed conditions without individual application by the person concerned, and thus by definition applicable to a whole group.

The limits on naturalisation may differ from the limits on the regulation of the acquisition of an original nationality by birth, because naturalisation also affects the interests of the person's former state of nationality, which is not the case with regard to birth.

Broadly speaking, international law sets up limits on the naturalisation in order to protect two sets of interests: the interests of the affected persons and the interests of the former state of nationality.[96] These two sets of interests may coincide, but they may also be in conflict. Traditional international law focused more on the interests of the states, but in the contemporary era of human rights, the interests of the affected individuals are at least equally important.

B. Acquisition of Georgian Nationality by Residents of Abkhazia and South Ossetia

The question is whether the residents of Abkhazia and South Ossetia acquired Georgian nationality at the beginning of the 1990s or whether they have remained stateless.

I. Acquisition under the Georgian Law on Citizenship of 1993

This question must be first addressed on the basis of the Georgian law on citizenship. However, the conferral of Georgian nationality deploys effects in the international sphere and is opposable to other states when it observes the limits set by international law.

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[95] Robert Jennings/Arthur Watts, *Oppenheim's International Law*, vol. 1 part 1 (9th ed. Harlow: Longman House 1992), at 852.

[96] Cf. the preamble of the European Convention on Nationality of 6 Nov. 1997, ETS No. 166: "Recognizing that, in matter concerning nationality, account should be taken both of the legitimate interests of States and those of individuals."

According to the Georgian Law on Citizenship adopted on 25 March 1993 (entered into force immediately upon enactment),[97] citizens of Georgia were persons:

- having lived permanently in Georgia for not less than five years,
- living there at the time the law entered into force,
- who did not refuse the citizenship of Georgia in written form within three months and
- who received the documents confirming citizenship within four months.

This law was adopted during a period of transition after the collapse of the Soviet Union. Georgia had declared its independence on 9 April 1991, the end of the Soviet Union is dated the 25 December 1991. Soviet nationality had already lost its meaning for the residents of the territory of Georgia on 9 April 1991, and at the latest on 25 December 1991 at the moment of the dissolution of the Soviet Union, even if the Soviet passports were still used. In the transitory period before the adoption of the new law, the status of the former Soviet nationals in Georgia remained undetermined.[98] The new Georgian law was adopted only after the armed conflict between Georgia and South Ossetia (1991 - 1992) and during the armed conflict between Georgia and Abkhazia (1992 - 1994). At that time, South Ossetia had already adopted its declaration of independence (19 January 1992). Georgia had most likely already lost effective control over the two breakaway territories, and any exchange of written documents was very difficult if not impossible. That meant that the formal criterion "reception of the documents confirming citizenship within four months" could not be fulfilled.

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[97] Organic Law of Georgia "On Citizenship of Georgia" (as last amended in 2006, publication date 30 January 2006), available at: http://www.unhcr.org/refworld/docid/44ab816f4.html. See also Resolution of the Parliament of Georgia on the enforcement of the law on citizenship of Georgia, of 25 March 1993.

[98] Art. 15 of the Soviet Law on the procedure of deciding questions connected with the exit of union republics from the USSR of 3 April 1990 stated: "Citizens of the USSR on the territory of the existing republic are afforded the right of choice of citizenship, place of residence and employment. The existing republic compensates all expenses connected with the resettlement of citizens outside the confines of the republic." SND, SSR 1990, no. 15 item 252, quoted in English in George Ginsburg's, *From Soviet to Russian International Law: Studies in Continuity and Change* (The Hague: Martinus Nijhoff 1998), at 147, and in Ineta Ziemele, *State Continuity and Nationality: the Baltic States and Russia* (Leiden: Martinus Nijhoff 2005), at 178. Yet, the status and validity of this law is controversial.

The Georgian Law on Citizenship was revised on 24 June 1993.[99] The fourth criterion ("reception of the documents confirming citizenship within four months") was abolished and the time limit for the refusal of citizenship extended to six months.

Pursuant to this amendment, the acquisition of nationality no longer depended on formal criteria. Residents of the breakaway territories of Abkhazia and South Ossetia became Georgian citizens even without any documentation.

According to the wording of the Georgian statute, there was an option to refuse Georgian nationality. But consent was presumed when the person concerned did not protest within three or six months. Yet, in practice it might not have been possible to convey the refusal to the Georgian authorities, because they were no longer present within the territories of Abkhazia and South Ossetia in the aftermath of the armed conflict.

The practical difficulties that were not wilfully created by the Georgian authorities, but by the circumstances of the armed conflict, may be relevant. Most likely, a number of residents wanted to refuse Georgian nationality in 1993, but were not able to do so. The short delay for refusal of Georgian citizenship of only three and later six months (which is at the lower limit of delays granted in other states[100]), together with the administrative problems, might have rendered the right of the individual to refuse only virtual.

II. Conformity of Georgian Law with International Law

The question is whether the difficulty or even *de facto* impossibility to refuse Georgian nationality is contrary to international law. As will be explained below, international law generally requires the consent of the affected individual to the conferral of a new nationality (Part C.I.1.).

1. No international customary right of option in the event of state succession

However, the consent requirement does not apply in the event of an automatic change of nationality through a change of boundaries and of territorial sovereignty. The traditional and still valid rule on nationality in the event of territorial changes and creation of a new state is that the affected populations automatically acquire the new nationality.

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[99] http://www.coe.int/t/e/legal_affairs/legal_cooperation/foreigners_and_citizens/nationality/documents/national_legislation/Georgia%20Law%20on%20Citizenship_ENG.pdf

[100] State practice ranges from three months to six years. Yael Ronen, "Option of Nationality", Max Planck Encyclopedia of International Law online 2009, para. 22.

Such a territorial change normally occurs after the cession of territory by a peace treaty, but it also occurred in the event of the dissolutions of Yugoslavia and the Soviet Union. The general rule of international law is that in such a case, the nationality of the inhabitants of the territory follows sovereignty, and therefore changes automatically.

In state practice at least since the peace treaties after the First World War, the affected populations have often been granted a right of option.[101] The "option" is the right to decline the nationality of the new territorial state after a transfer of sovereignty, while remaining in that new state. But although this practice has been widespread, it has not been uniform. Also after the collapse of the Soviet Union, only some but not all CIS member states granted their populations a right of option by virtue of domestic statutes.[102] In the absence of general and longstanding practice, a right of option in the sense of a right to decline the nationality of the new territorial state after a transfer of sovereignty, while remaining in that new state, does not exist by virtue of customary law.[103] Accordingly, the Venice Commission in a declaration on the consequences of state succession for the nationality of natural persons, declared that in cases of state succession, "in matters of nationality, the state concerned 'shall respect, *as far as possible*, the will of the person concerned'", but did not assume a strict legal obligation in that sense.[104] International customary law does not impose on the states involved in a change of territorial sovereignty the option to grant to the inhabitants of the concerned territory the right to decline (or acquire) the nationality of those states. Although the manner in which an option is granted may be subject to international legal limitations, notably by treaty, the grant of the option as such is within the competence of the successor state and is not dictated by the rules of international law.[105]

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[101] Cf. e.g., Art. 18 of the Harvard Draft Convention on Nationality of 1929, AJIL 23, special suppl. (1929), 13 *et seq*.

[102] No right of option was granted in the laws on nationality of Azerbaijan, Georgia, Kyrgyzstan, Kazakhstan, and Tajikistan. An option was granted in the laws on nationality of Moldova (Art. 2 para. 3 sec. 2), Russia (Art. 13 para. 1), Turkmenistan (Art. 49), Uzbekistan (Art. 4 para. 1, 2) , Ukraine (Art. 2 para. 1); cf. Kommentarij zakonodatel'stva gosudarstv-učastnikov SNG o graždanstve, Moscow (1996; Russian).

[103] A right of "option" in the form of the *freedom to emigrate* is a different matter. Older authorities asserting a customary right of option often only have this freedom in mind (Paul Weis, *Nationality and Statelessness in International Law* (2nd ed. Alphen aan den Rijn: Sijthoof & Noordhoff 1979), at 156.

[104] Declaration on the consequences of State succession for the nationality of natural persons, adopted by the European Commission for Democracy through Law at its 28th Plenary Meeting, Venice, 13—14 September 1996 (CDL-NAT (1996) 007), para. 7.

[105] Yael Ronen, "Option of Nationality", Max Planck Encyclopedia of International Law online 2009, para. 11-12; Weis (above note 103), at 159; Ruth Donner, *The Regulation of Nationality in International Law* (2nd ed. Irvigton-on-Hudson: Transnational Publishers 1994), at 255-56. The International Law Commission's "Draft Articles on Nationality of Natural Persons in Relation to the Succession of States" of 1999 (GAOR 54th Sess.

2. Further international legal principles supporting automatic acquisition of Georgian nationality

The international rule of automatic acquisition of a successor state's nationality without a right of option in international law is supported by general international principles.

Although international law requires respect of the human rights of those affected by legislation on nationality, it also respects the sovereign rights of a newly independent state conferring its nationality on the residents within its territory. Further concerns are legal security and the achievement of a more coherent division of state jurisdiction.[106]

The right of Georgia to confer its nationality on those living within its borders can be derived from the recognition of the Georgian borders by the international community. The Georgian legislation on nationality is in line with the legislation in the other CIS states and cannot be regarded as excessive. Given the fact that Georgia excluded dual citizenship,[107] those persons who already possessed the nationality of another state did not acquire Georgian citizenship.

Finally, nationality has to be seen in line with the principles on state succession, notably with the *uti-possidetis* principle. Under *uti possidetis,* not only former administrative borders are transformed into state borders, but also territorial sub-units remain part of the newly independent state. If the population of the territorial sub-unit had the right to collectively refuse the new citizenship, the pacifying effect of the *uti-possidetis* principle would be undermined. This is another reason why the resident of the breakaway territories must be in principle regarded as Georgian nationals for the purposes of international law.

III. Conclusion

The residents of Abkhazia and South Ossetia who had not refused Georgian citizenship in a written form before 24 December 1993 became Georgian citizens for purposes of Georgian and international law. Their personal reservations against Georgian citizenship are irrelevant, as long as they did not exercise the right to refuse Georgian citizenship within the statutory delay. Eventual practical difficulties in exercising this right of refusal are immaterial from the

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Supp. 10, 13, suggests respect for the will of persons concerned in the event of state succession (Art. 11). But this is only a proposal *de lege ferenda* and not valid international law.

[106] Ronen (above note 105), para. 27.

[107] Cf. Art. 1 (2) of the Georgian Law on Citizenship (above note 97): "A citizen of Georgia may not simultaneously be a citizen of another state country except particular cases foreseen by the Constitution of Georgia. The President of Georgia may grant citizenship of Georgia to a foreign citizen for having special merits to Georgia or if the granting of Georgian citizenship is in the State interests of Georgia." The Constitution of Georgia (adopted on 24 August 1995) confirms this rule.

perspective of international law, because international law did not require Georgia to grant this option.

C. Conformity of the Russian "Passportisation" Policy with International Law

Neither Georgia nor Russia are bound by any international treaty regulating nationality.[108] Nevertheless, they are bound by international customary law and general rules of international law which will be briefly explained here.

I. Conditions for the International Legality of Naturalisation

1. Choice of the individual

A naturalisation in principle requires the consent of the person concerned.[109] However, there are important exceptions to this rule which will be discussed separately.

a) Legal bases of the consent requirement

The requirement of voluntariness can today be based on human rights law. Article 15 of the Universal Declaration of Human Rights of 1948 states: "(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Article 4 of the European Convention on Nationality of 1997 repeats this wording in part.[110]

But the rule of consent is even older than the Human Rights Declaration and independent of the existence of a human right to nationality (which is in itself controversial).[111] For example, already the Harvard Draft Convention on Nationality of 1929 stated in Article 15: "Except as

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[108] The most important treaties in this area are the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930 (entered into force 1 July 1937; League of Nations Treaty Series, vol. 179, p. 89, No. 4137) and the European Convention on Nationality of 6 Nov. 1997 (entered into force 1 March 2000; ETS No. 166).

[109] See for case law Holland, Judicial Chamber of the Council for the Restoration of Legal Rights, The Hague, *Weber and Weber* v. *Nederlands Beheers Instituut*, judgments of 27 May 1953 and 4 July 1955, English translation in ILR 24 (1957), 431, at 431; German-Mexican Claims Commission, *Rau claim, decision of 14 January 1930*, Annual Digest of Public International Law Cases, ed. by Hersch Lauterpacht 6 (1931-32), No. 124 (p. 251, at 251); German Court of Appeals of Cologne, *Compulsory Acquisition of Nationality case*, judgement of 14 May 1960, English translation in ILR 32 (1966), 166, at 167.

[110] Art. 4: "The rules on nationality of each State Party shall be based on the following principles: (a) everyone has a right to a nationality; (b) … (c) No one shall be arbitrarily deprived of his nationality; (d) …".

[111] See Ineta Ziemele and Gunnar G Schram, "Article 15", in Gudmundur Alöfredsson/Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement* (The Hague: Martinus Nijhoff 1999), 297-323, at 321.

otherwise provided for in this convention, a state may not naturalise a person of full age who is a national of another state without the consent of such person".[112]

The consent principle can also be derived from the international principle of self-determination. With respect to the dissolution of Yugoslavia, the Badinter Commission stated that by virtue of the right to self-determination, "every individual may choose to belong to whatever ethnic, religious or language community he or she wishes." According to the Badinter Commission, one possible implementation of that element of the principle of self-determination might be the conclusion of agreements among states in which the affected persons are recognised "as having the nationality of their choice".[113] The Badinter Commission thereby seemed to suggest that the principle of self-determination encompasses a right of option whose details must, however, be regulated by an inter-state treaty.

This rather cautious suggestion is in line with the traditional main exception to the consent requirement, namely the automatic change of nationality through a change of boundaries and of territorial sovereignty, as discussed above (Part B.II.).

b) Possible vitiation of the individual's consent

Individualised naturalisations are illegal under international law if the affected person's consent is not free. In that special case, both the interests of the former state of nationality and the interests of the individuals are disregarded, and therefore both concerns suggest the illegality of this type of naturalisation.

A lack of consent may be given in cases of clear pressure, threat, or force, because the individual's consent to acquire the new citizenship is vitiated if it is gained under threat or force. Resulting naturalisations would be illegal under international law.

A different situation is present when persons are lured into a new nationality by threat or by misrepresentations, or by promising advantages. In such a situation, it could be argued that the consent of the persons was "bought" and was not free. The "soft" means of imposing citizenship, the "selling of citizenship", e.g. by granting of social security to persons abroad already, could arguably vitiate the individual's consent. But this idea of a prohibition of even

[112] Art. 18 of the Harvard Draft Convention on Nationality of 1929, AJIL 23, special suppl. (1929), 13 *et seq*. The explanation given to that rule in 1929 was not based on the (then non-existant) idea of a human right to nationality. The comment on Art. 15 stated that an attempt to naturalise a person without his or her consent "would be a disregard of the interests of the state of which the person is a national, particularly in the view that nationality involves obligations as well as rights." (*ibid*., at 53).

[113] Opinion No. 2, repr. in *EJIL* 3 (1992), 183-4, para. 3.

"soft" imposition of citizenship does not seem to be part of international law as is stands. Moreover, fairness does not seem to require such a rule. As long as the advantages promised have some reasonable connection with the usual privileges traditionally accorded to nationals by their state, nothing prohibits a state from making active publicity for its nationality. International law allows states to grant advantages to one's nationals, such as social security or freedom of residence and movement. The promise of these advantages does not vitiate the consent of the applying persons.

c) Limits to individual choice of nationality

There is no absolute, unlimited, individual right of choice of nationality. Consent of the individual is a necessity, but not a sufficient condition for the international legality of a naturalisation. International law sets up additional limits, beyond individual consent, on naturalisations. The (controversial) human right to nationality does not prohibit setting up further conditions for the international legality and validity of naturalisations.

Article 15 of the Universal Declaration on Human Rights contains the rule: "No one shall be … denied the right to change his nationality," but the human rights declaration as such is no binding treaty. Not all of its provisions have acquired the status of a rule of customary international law. It is controversial whether there is a customary right to nationality and if yes, what are its exact scope and content.[114] The right to nationality is not contained in the International Covenant on Civil and Political Rights of 1966. Tellingly, the 1997 European Convention on Nationality does contain the principle that no one shall be arbitrarily *deprived* of his nationality, but does not contain the passage on nationality *change*. This shows that the idea of a free change of nationality is controversial.

Also the Badinter Commission did not imply that an unfettered right to chose one's nationality exists. The Commission stated only that the Yugoslav republics must afford the members of minorities all international human rights, "including, *where appropriate*, the right to choose their nationality."[115]

Even if a human right to change one's nationality existed, this right is in any case not absolute. As with most human rights, it may be limited in order to protect legitimate governmental interests.

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[114] Ziemele and Schram (above note 111), at 322-323 argue that article 15 UDHR may in certain situations or in relation to certain groups have acquired the force of customary law.

[115] Badinter Opinion No. 2, repr. in EJIL 3 (1992), 183-4, para. 4 (ii).

Ultimately, the issue is one of balancing the former home state's rights against the rights of the individual. The appropriate balance is struck by the requirement of a factual connection to the naturalising state.

2. Rights of the former state of nationality

A naturalisation does not only concern the individual, but also the home state of the person who acquires a new nationality because the former home state loses a citizen. The former state of nationality of a person has an interest in preventing its own nationals from acquiring a foreign citizenship completely at will, especially without having any connection to that other state. That interest is legitimate because the state is constituted by its citizens and would cease to exist as a state if all its citizens were naturalised elsewhere.

However, in modern international law, the individual character of a person's nationality and the human rights implications of nationality are probably in the foreground. Therefore, it is generally acknowledged that the validity of an (individual) naturalisation under international law does not, in principle, depend on the consent of the naturalised person's state of former nationality, but can be effective without that state's consent and against its opposition[116] – if, and only if, a factual connection to the naturalising state exists. So a state may not categorically prevent its citizens from acquiring a different citizenship. It may however refuse to "let go" its citizens if a factual connection to the naturalising state is missing. In that case, the former state's refusal to dismiss its citizens would not be arbitrary.[117]

It seems proportionate (and not arbitrary) to require a factual connection between the person and the naturalising state. Such an additional condition does not unduly curtail the (in itself controversial) human right to change one's nationality.

3. Factual connection to the naturalising state

In an international legal perspective, there must be a factual relationship between the person to be naturalised and the naturalising state's territory or its nationals.[118] So international law

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[116] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 45.

[117] The prohibition of arbitrariness is a pervasive principle of the international law of nationality. The arbitrary withdrawal of nationality is prohibited (see. e.g. Art. 4 of the 1997 European Convention on Nationality), and also the arbitrary conferral of nationality is prohibited by customary international law (see below note 123.

[118] Albrecht Randelzhofer, "Nationality", in Rudolf Bernhardt (ed.), *Encyclopedia of International Law* (EPIL) vol. 3 (Amsterdam: Elsevier 1997), 501, at 504. Weis (above note 103), at 100; Dahm/Delbrück/Wolfrum 2002 (above note 8), at 46-47. See for case law German Constitutional Court (BVerfG), *German Nationality (Annexation of Czecheslovakia)* case, BVerfGE 1, 322, at 328-329 (1952), Engl. translation of some extracts in in ILR 19 (1952), No. 56, p. 319, at 320.

does not allow a state to confer its nationality by naturalisation upon persons possessing the nationality of another state, and to whom the conferring state has no factual relation at all.

The first reason for asking for some factual connection is that nationality has traditionally been in principle exclusive. The bond of nationality should have "as its basis a social fact of attachment."[119]

The second underlying consideration is that the states are to some extent constituted by their nationals. A political entity without a population can not be a state. By conferring its nationality on persons who were previously nationals of another state, a state therefore to some extent "enlarges" itself. Simultaneously, by the act of naturalisation a state loosens (or may even sever) the relationship between the individual and the state of its former nationality, and thus deprive the other state of parts of one of its components, namely its people. Thereby the conferring state necessarily interferes with the other state's personal jurisdiction. Therefore, the international legal rules on the acquisition of nationality, especially through the naturalisation of persons possessing a foreign nationality already, must strike a balance between a state's right to confer its nationality, the concerned individual's interests and rights, and the other state's jurisdiction over persons, which is one element of the state's sovereignty. A fair balance seems to be established by the condition that there must be a certain factual and real connection between the state and an applicant for naturalisation.

There is agreement on this principle. The only question is how intense this factual relationship or connection must be. The stricter view is that a genuine link in the sense of the ICJ *Nottebohm* judgment is required in order to render the naturalisation valid under international law and opposable to other states.[120] However, the *Nottebohm* case directly concerned only the ability of the conferring state (in that case Liechtenstein) to exercise diplomatic protection, and the International Court of Justice itself emphasised that its judgment had this restricted scope.[121] The strict requirement of a *Nottebohm*-type genuine or effective link for all cases of naturalisation would unduly limit and curtail the conferring state's sovereign right to confer its nationality upon persons according to its own rules. Even more importantly, it would create an element of uncertainty. If courts would have to investigate the genuineness of every

[119] ICJ, *Nottebohm*, 1953 (above note 93), at 23.

[120] OSCE High Commissioner on National Minorities, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations and Explanatory Note* (June 2008), para. 11: States should refrain from granting citizenship without the existence of a genuine link, referring to *Nottebohm*. In scholarship Brownlie (above note 2), at 407.

[121] ICJ, *Nottebohm* case, 1955 (note 93), at 17.

case of naturalisation, the effect would be to erode further the clarity of the rules of international law.[122]

The better view is therefore that the genuine link requirement applies only to the question of diplomatic protection and for resolving questions of dual nationality. For all other purposes, the factual relationship need not be very tight. Naturalisations are valid under international law unless they are arbitrary or abusive.[123] The factual connection must be objective and generally recognised.

A sufficient factual relationship is created by residence in the territory, when the person to be naturalised has a biological (family) relationship to the state, and when he or she was in the governmental service of the state.[124] It is an open question how close the family ties must be, whether e.g. very distant biological kinship would be sufficient.

4. No *per se* illegality of naturalisation without residence (extra-territorial naturalisation)

The main question of our case is whether the conferral of Russian nationality on persons living outside Russia, and without having any other connection to Russia, is *per se* illegal because of the lack of a substantial factual connection.

In historical periods with a strong concern for the preservation of national sovereignty, the prevailing international doctrine opined that the necessary factual relationship was not present when the person was not a resident of the naturalising state, especially when he or she continued to reside in her (former) state of nationality.[125]

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[122] Weis (above note 103), at 180; see also Dahm/Delbrück/Wolfrum 2002 (above note 8), at 47.

[123] See, e.g., German Federal Court, Criminal Chamber (*Bundesgerichtshof in Strafsachen*), BGHSt 5, 230, at 234 (1943), order of 29 Dec. 1953: The arbitral conferral of nationality is prohibited by international law if this results in a disadvantage for another state. The conferral of nationality without a generally recognised link is arbitrary. The link can be territorial (residence or prolongated stay) but may also consist in the entry into governmental or military service. Federal Republic of Germany, Court of Appeal of Berlin, *North-Transylvania Nationality case*, judgment of 21 December 1965, engl. Translation in ILR 43 (1971), 191, at 194: "Thus the State may not validly under international law grant its nationality arbitrarily but only to persons who are in a close and actual relationship to it." In scholarship Dahm/Delbrück/Wolfrum 2002 (above note 8), at 45 and 47-48.

[124] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 48.

[125] See Art. 3(1) of the resolution of the Institut de Droit International on nationality of 1928 ; Institut de Droit International, Session de Stockholm, « la nationalité », 28 August 1928. http://www.idi-iil.org/idiF/resolutionsF/1928_stock_01_fr.pdf (accessed on 17 June 2009) ; Sec. 4 of the Model Statute adopted by the International Law Association in 1924; Harvard Draft Convention on Nationality of 1929 Article 14, AJIL 23, special suppl. (1929), 13 *et seq*. The comment on the Harvard Draft Convention on Nationality of 1929 stated: "It may be difficult to precise the limitations which exist in international law upon the power of a state to confer its nationality … If State A should attempt, for instance, to naturalise persons who have never had any connection with state A, who have never been within its territory, and who are

Under this traditional and strict view, Russia would not be allowed under international law to naturalise persons with a foreign, notably Georgian nationality, as long as they still resided in Georgia.

However, today "States are not prohibited by international law from naturalising persons not coming by residence under their territorial jurisdiction, *i.e.* persons residing outside the State territory."[126] Thus, the naturalisation of persons residing abroad is not *per se* illegal under international law. Put differently, the necessary factual connection to the naturalising state may lie in factors other than residence.

5. The illegality of selective naturalisation based on ethnic and racial criteria

The International Convention on the Elimination of All Forms of Racial Discrimination of 1965 (CERD),[127] to which Russia and Georgia are parties, prohibits discriminatory naturalisations. Article 5 lit. d) (iii) in combination with Article 1 guarantees a right to nationality without racial discrimination. Article 1(3) of the CERD states that "nothing in this Convention may be interpreted as affecting in any way the provisions of states Parties concerning nationality, citizenship, or naturalisation, *provided that such provisions do not discriminate against any particular nationality."*[128]

So from the perspective of individual rights, both the imposition (see above) and the discriminatory refusal to grant nationality are illegal under international law.

6. Collective naturalisation (without individual application)

A collective naturalisation is the conferral of nationality by operation of a national law without individual application by the person concerned. At times, states have thus imposed their nationality in a collective way, by law (*ex lege*), on persons residing for a specified time in their territory, for persons owning land, or on persons marrying a native or having native children.

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nationals of other states, it would seem that State A would clearly have gone beyond the limits set by international law. Thus, if State A should attempt to naturalise all persons living outside its territory but within 500 miles of its frontier, it would clearly have passed those limits." AJIL 23 (1929), spec. suppl., at 26. "In general, it may be said that a proper regard for other states makes it unreasonable for any state to attempt to extend the operation of its naturalisation laws so as to change the nationality of persons at the time resident in other states." *Ibid*., at 51.

126 Weis (above note 103), at 101.

127 CERD of 7 March 1966, UN Doc. A/6014 (1966), 660 UNTS 195.

128 In the same vein, Article 5 of the 197 European Convention on Nationality prohibits discrimination in nationality questions: Article 5 (1): "The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin" Russia and Georgia are not parties to that Convention.

a) The requirement of a right of refusal

Collective naturalisations are in conformity with international law only if there is "an element of voluntariness on the part of the individual acquiring" the new nationality, which "must not be conferred against the will of the individual."[129] So the concerned person must somehow, if only implicitly, have consented, e.g. by subsequent approval of the naturalisation.[130] The legislation foreseeing naturalisation only functions as an offer to the affected persons to accept the nationality.[131]

One reason for the reluctance of international law to recognise the validity of collective naturalisation is that it risks depriving the affected persons of the nationality they have acquired by birth. Collective naturalisations thus violate the liberty and dignity of the affected persons,[132] eventually the human right to privacy and family life, and last but not least the (controversial) human right to nationality. With a new nationality, persons acquire obligations towards the state, they owe the state allegiance and loyalty, and in an extreme case have to go to war for the state. For these reasons, they must have a say on their naturalisation.

In that perspective, any collective naturalisation can only take (international) effect if it encompasses a right for the concerned persons to refuse the proposed nationality.[133] However, this rule does not apply to situations of territorial changes such as the emergence of new states after the collapse of the Soviet Union. In that situation, no international customary rule of option exists,[134] and the interests of the successor state are deemed to prevail over the rights of the individual.

b) The requirement of residence for collective naturalisation

Collective naturalisation must furthermore satisfy the requirement of a factual connection to the state. Because collective naturalisations by definition affect groups of persons they

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[129] Weis (above note 103), at 110. A collective naturalisation, "provided that it reflects a sufficient connection with the naturalising state" "*may not* be contrary to international law – and certainly not if the person concerned has in some way consented" (Jennings/Watts (above note 95), at 874). This scholarly statement can be read as implying that individual consent might remedy the connection otherwise lacking, but might also mean that both (connection and consent) must be present in a cumulative way.

[130] This principle has long been acknowledged in the case law, even before the era of human rights. The traditional reason for asking for the individual's voluntary acceptance of the new nationality was not so much a concern for the individual's liberty and freedom of choice, but rather the concern for the former state of nationality which was divested of its citizens by collective naturalisations by another state.

[131] Weis (above note 103), at 110: "Legislation providing for the *ipso facto* acquisition must not be regarded as compulsory conferment, but as a permissive rule offering naturalisation subject to acceptance."

[132] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 49.

[133] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 42.

[134] See above Part B.II.

interfere more strongly with the interest and with the personal jurisdiction of the states whose nationals are, so to speak, "taken away." Therefore it seems that for collective naturalisations the factual connection between those groups of persons and the naturalising state would have to be more intense than in the case of individual naturalisations. The mere temporary dwelling in a state, possession of real estate, or professional activities would not be sufficient. A law on collective naturalisation which would rely on such weak factors only would therefore be illegal under international law.

These reasons have given rise to a basic rule of international law: The collective (i.e. *ex lege*) naturalisation of persons living outside the territory of the state seems to be contrary to international law.[135]

Paul Weis has qualified the example of a law "naturalising 'all persons living outside the territory but within 500 miles of its frontier'" as "inconsistent with international law […]: it purports to deprive other states of a number of their nationals, of the right of protection over a number of their subjects. It constitutes an encroachment upon the personal jurisdiction of these states and must be regarded, if it affects a considerable number of nationals, as an unfriendly or even hostile act against the state of nationality comparable to the violation of a state's territorial jurisdiction: it constitutes a threat to peaceful relations and is as such illegal."[136]

II. Application of the Principles to the Facts

1. The conferral of Abkhaz and South Ossetian "nationality" on residents of the breakaway territories

Both Abkhazia and South Ossetia have passed laws on nationality and conferred their own "nationality" on the residents of the territory.[137] According to various sources, the residents living in South Ossetia and Abkhazia were forced in many instances to assume South Ossetian or Abkhaz "nationality."[138]

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[135] Moreover, collective naturalisations forced upon populations in an occupied territory violate the international legal prohibition on annexation (Dahm/Delbrück/Wolfrum 2002 (above note 8), at 52).

[136] Weis (above note 103), at 112, referring also to p. 102.

[137] Art. 16 of the South Ossetian *de facto* Constitution of 8 April 2001 (above note 33) stipulates: "(1) The Republic of South Ossetia shall have its own citizenship. (2) Double-citizenship is admissible in the Republic of South Ossetia." The Abkhaz Constitution of 26 Nov. 1994 does not contain any provision on citizenship. Article 6 of the law on citizenship of the Republic of Abkhazia of 24 Oct. 2005 stipulates that a citizen of the Republic of Abkhazia is also entitled to obtain the citizenship of the Russian Federation.

[138] See Chapter 7 "International Humanitarian Law and Human Rights Law".

From an international law perspective, the nationality conferred by unrecognised states, state-like entities and entities short of statehood can be ignored by those states that do not recognise those entities as states.[139]

At the time of the writing of this Report, this means that South Ossetian and Abkhaz "nationality" can be disregarded by all states with the exception of Russia and Nicaragua.

2. Naturalisation of Georgian citizens living in Abkhazia and South Ossetia by Russia

a) Naturalisation on the basis of the Russian Law on Citizenship

The conferral of Russian nationality to residents of Abkhazia and South Ossetia must first be assessed on the basis of Russian law.

From 6 Feb. 1992 until 1st July 2002, Russian citizenship was acquired according to the 1991 Law on Citizenship (entered into force on 6 Feb 1992), as amended in 1993 and 1995.[140] Article 13 of the 1991 Law foresaw a right of option of nationality for persons permanently residing in the territory of the Russian Federation as of 6 Feb 1992 (the date of entry into force of the 1991 Law).[141] Art. 18 of the 1991 Law foresaw the acquisition of Russian citizenship by way of registration. The registration procedure was open to various groups of persons.[142] The only group of persons not resident in the territory of the Russian Federation that could acquire Russian nationality by way of registration were stateless persons permanently resident on the territory of other republics within the former USSR. They had to register by 6 Feb 1993. That means that the residents of Abkhazia and South Ossetia who remained there on a permanent basis and did not resettle in the Russian Federation could acquire Russian nationality only if they were of Russian ascendancy or if they were stateless. Even if they were regarded as stateless before the entry into force of the Georgian law on nationality on 25 March 1993, they would have had to register as Russians before February 1993. The Mission has no data on the number of residents of Abkhazia and South Ossetia who

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[139] Jennings/Watts (above note 95), at 854 fn. 14: "A nationality which is that of an unrecognised 'state' is not a true nationality in the international sense, and need not be recognised in other countries." In state practice New Zealand Court of Appeal, *Walter James Hunt* v *The Hon. Sir Arthur Hamilton Gordon*, judgment of 6 March 1884, New Zealand Law Reports vol. 2 (1884), 160, at 198-204.

[140] The Law of the Russian Federation on the Citizenship of the Russian Federation, No. 1948-I, of 28 Nov. 1991 (as amended on 17 June 1993, and 6 Feb 1995); first version in Ved. RSFSR 1992 No. 6 item 243, English transl. in Review of Central and East European Law 19 (1993), 293-318.

[141] See Ziemele (above note 98), at 178-79.

[142] It was open to persons with Russian ascendancy, second to nationals of the former USSR who resided in the territory of one of the former Republics and entered the territory of the Russian Federation after 6 February 1992 (here registration was possible until until 31 Dec. 2000). The last groups were stateless persons permanently resident on the territory of other republics within the former USSR; they could register up to 6 Feb 1993.

were registered in the Russian Federation. It can be assumed that the above-mentioned criteria were fulfilled only by a marginal group of residents.

The active "passportisation" policy of the Russian Federation started only at the beginning of the new century. Since July 2002, the new Russian Law on Citizenship of 2002 applies.[143] The derivative acquisition of Russian citizenship (other than by birth) for foreign citizens and stateless persons is regulated in Article 13 and 14 of that Law. Under the normal procedure of admission to Russian citizenship, a five year residence on Russian territory is required (Art. 13(1) (a)). The duration of stay in Russian territory may be reduced to one year in special cases, e.g. for professionally highly qualified persons.[144]

The admittance to Russian citizenship in a simplified procedure is regulated in Article 14. This simplified procedure applies to numerous, quite large groups of persons.[145] It contains a clause 4 under which foreigners and stateless persons who were former citizens of the USSR receive Russian nationality under a simplified procedure. That means that they do not have to have lived five years on the territory of the Russian Federation, they do not need to have sufficient means for subsistence as fixed by law, and they do not need to master the Russian language.[146] Some other procedural requirements remain, such as the necessity to turn to the authorities of the former state of nationality and to ask for the withdrawal of the former nationality (заявлениие об отказе). This is not necessary if this withdrawal is impossible due to reasons for which the person concerned is not responsible (если отказ от иного гражданства невозможен в силу не зависящих от лица причин).

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[143] Federal Law No. 62-FZ of 31 May 2002, adopted by the State Duma on 19 April 2002, approved by the Council of the Federation on 15 May 2002, amended and supplemented on 11 Nov. 2003 and 2 Nov. 2004 (Statutes of the Russian Federation (Sobranie Zakonodatel'stva Rossijskoj Federacij)) 2002, No. 22, p. 2031; 2003, No. 46, p. 4447). Third amendment signed into law by the President in Jan. 2006, official publication on 3 Jan 2006 (and 11 Jan 2007), available at Immigration and Refugee Board of Canada, Russia: Russian Citizenship Law signed into law by the President in January 2006, 1 March 2007. RUS102357.E. Online. UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/46fa5381c.html [accessed 8 May 2009].

[144] Art. 13(2) of the Act of 31 May 2002 (above note 143).

[145] It applies for instance to persons having at least one Russian parent residing in Russia (cl. 1 lit. a)), to former USSR citizens residing in one of the former Soviet republics and who are now stateless (cl. 1 lit b); also to persons who received a higher education in Russia after 1st July 2002 (cl. 1 lit. c)).; persons born in the territory of the RSFR and who were former citizens of the USSR (cl. 2 lit. a)); persons married to a Russian citizen (cl. 2 lit b)); disabled persons with a Russian child (cl. 2 lit. c)). They all can ask for being conferred Russian citizenship.

[146] These conditions are laid down in Article 13 of the law and can be disposed of in the case of a simplified procedure.

The wish to become Russian has to be explicitly expressed. The time-frame for this option has continuously been extended. According to the last amendment, the wish has to be expressed before 1 July 2009.[147]

The preconditions for applying this simplified procedure are enshrined in the following ambiguous provision:

"Foreign citizens and stateless persons who were citizens of the USSR, who have come to the Russian Federation from states that were part of the USSR, who were registered at their place of residence in the Russian Federation as of 1 July 2002, or have received permission to stay in the Russian Federation on a temporary basis or a permit for residence in the Russian Federation, shall be granted Russian Federation citizenship under a simplified procedure without regard to the provisions of Items 'a', 'c' and 'e' of Part 1 of Article 13 of this Federal Law if, prior to 1 July 2009, they declare their wish to become citizens of the Russian Federation."[148]

The phrase "who have come to the Russian Federation from states that were part of the USSR" (прибывшие в Российскую Федерацию из государств, входивших в состав СССР) can be read as a condition for every naturalisation. In this case extraterritorial naturalisations would be excluded; at least it would not be possible to become a Russian citizen without having entered the Russian Federation (even if leaving again afterwards). A different reading would be to understand the second alternative "or have received permission to stay in the Russian Federation on a temporary basis or a permit for residence in the Russian Federation" (либо получившие разрешение на временное проживание в Российской Федерации или вид на жительство) as an independent and *per se* sufficient condition for acquiring Russian nationality.

[147] The last version of the law dates from 28 June 2009.

[148] In Russian original: "Иностранные граждане и лица без гражданства, имевшие гражданство СССР, прибывшие в Российскую Федерацию из государств, входивших в состав СССР, и зарегистрированные по месту жительства в Российской Федерации по состоянию на 1 июля 2002 года либо получившие разрешение на временное проживание в Российской Федерации или вид на жительство, принимаются в гражданство Российской Федерации в упрощенном порядке без соблюдения условий, предусмотренных пунктами "а", "в" и "д" части первой статьи 13 настоящего Федерального закона, если они до 1 января 2008 года заявят о своем желании приобрести гражданство Российской Федерации."

All other alternatives of conferring Russian nationality[149] raise no international legal concerns. But exactly this particular option seems to be the one used for the naturalisation of the majority of the residents of Abkhazia and South Ossetia.

b) Conformity of naturalisation with international law

Under a broad reading of the statute, extraterritorial naturalisations are valid under Russian law. Accordingly, there is a presumption that other states have to accept them as valid. However, this presumption can be reversed if the conferral of nationality is not in line with the minimum requirements of international law and thus "excessive".

i) Voluntariness

The first question is whether the acceptance of Russian nationality was voluntary or imposed by threat or use of force. It might be argued that many residents of Abkhazia and South Ossetia were in a no-choice situation after the armed conflicts at the beginning of the 1990s and in the process of secession of the breakaway territories. In this context, it matters that the Russian Federation had introduced a visa regime for Georgian citizens, which took effect on 5 December 2000 against the will of Georgia.[150] It did so by denouncing the Agreement on the free movement of the citizens of the CIS countries on the territory of the Member states without visa (concluded on 9 October 1992) on 30 August 2000. The Russian plan to exempt the residents of Abkhazia and South Ossetia from these regulations has been implemented. The Parliament of the European Union has expressed strong objections to this policy.[151]

From a political point of view, Russia's policy was very welcome to Abkhazia and South Ossetia, because it distanced them from Georgia. The residents of the breakaway territories had economic and administrative reasons to accept the offer of a Russian passport in order to avoid applying for visas. Yet, this did not necessarily create a no-choice situation in which economic pressure would have the same effects as threats or the use of force. Georgia asserts that in some cases, individuals were pressured into Russian nationality, for instance by threats with "punitive taxes" or expulsions.

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[149] E.g. if the persons concerned were born in the Russian Federation or are married to a Russian citizen for at least three years (Article 14 para. 3).

[150] Cf. Statement of the Parliament of Georgia on introduction of visa regime between Russia and Georgia of 24 Nov. 2000, Archive of the Parliament of Georgia, http://www.rrc.ge/law/Statem_2000_11_24_e.htm?lawid=626&lng_3=en

[151] European Parliament resolution on the visa regime imposed by the Russian Federation on Georgia, 18 January 2001, http://www.europarl.europa.eu/intcoop/euro/pcc/aag/pcc_meeting/resolutions/2001_01_18.pdf.

Other motives for inhabitants of South Ossetia and Abkhazia to apply for Russian nationality were apparently the desire to receive a Russian pension,[152] and to be able to travel abroad.[153] Further advantages relate to medical care and education, and the ability to benefit from the EU Visa facilitation programme with Russia. Such incentives do not contradict international law, as explained above (Part B.I.1.).

It can therefore be assumed that the conferral of Russian nationality before August 2008 generally occurred on a voluntary basis.

ii) Factual connection

The second condition for the international validity of individual naturalisations is a factual connection between the person granted the new nationality, and the state conferring its nationality.

When Article 14 para. 4 of the Russian Law on Citizenship is interpreted in such a way as not to require residence in Russia, then the only legal preconditions for acquiring Russian nationality would be the former Soviet nationality and a temporary residence permit.

Former Soviet citizenship cannot be accepted as sufficient factual connection. Regardless of the qualification of the dissolution of the Soviet Union as a process of dismemberment or as a series of secessions, Russia is not identical with the Soviet Union as a state and as a subject of international law. Therefore the bond created by the Soviet citizenship between the citizens of the different Soviet Republics was irrevocably severed in 1991. On the basis of new laws on nationality, all former Soviet citizens redefined their status and determined to which of the CIS-States they wanted to belong. And even if the Russian nationality were considered to be the "former nationality", it would only be accepted as a sufficient factual connection if the person again took residence in Russia.[154]

The fact that the persons concerned must have received a temporary residence permit does not create a real link either, because such a permit can be granted in an arbitrary manner without any further preconditions.

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[152] According to the Human Rights Assistance Mission of the OSCE, "elderly Abkhaz with Russian passports are now reportedly eligible to receive a pension of 1 600 rubles, compared with that of 100 rubles offered by the Abkhaz government". (Human Rights Assessment Mission of the Office for Democratic Institutions and Human Rights, OSCE, *Human Rights In The War-Affected Areas Following The Conflict In Georgia*, 27 November 2008, at 67).

[153] Source: NATO PA, 2005 Annual Session, http://www.nato-pa.int/default.asp?SHORTCUT=683).

[154] Dahm/Delbrück/Wolfrum 2002 (above note 8), at 51.

The Russian law on Citizenship does not define any additional criteria. Common ethnicity might be relevant for the South Ossetian population in relation to the North Ossetian population, but not for the Abkhaz population. However, ethnicity is a very problematic criterion, as the protection of minorities is seen as the task of the state in which they live. Even unilateral measures of protection of kin-minorities are acceptable only under narrow conditions.[155]

That means that the conferral of Russian nationality to persons living outside the territory of the Russian Federation only because they had been citizens of the Soviet Union and have acquired a temporary residence permit does not fulfil the minimum requirement of a factual connection between the person and Russia.

III. The Illegality of Large-Scale Extraterritorial Naturalisation of Georgian Citizens by Russia

A "passportisation" policy aiming at the conferral of nationality on the citizens of another state without sufficient factual links, especially if it is implemented on a large scale, violates first the specific prohibition of extraterritorial collective naturalisations, and also several general principles of international law. The policy is thus not in conformity with international law.

1. Infringement of the prohibition of extraterritorial collective naturalisation

As stated above, the collective naturalisation of citizens of another state residing outside the naturalising state's territory is clearly prohibited by a special rule of international law.

The naturalisations of the residents of South Ossetia and Abkhazia are not collective naturalisations in a formal sense. They operate upon individual application and not *ex lege* (by law). However, the procedures are simplified. In practical terms, the naturalisations constitute a mass phenomenon. The question is whether they can be qualified as equalling prohibited extraterritorial collective naturalisations. In that case they might be qualified as *de facto* collective naturalisations of persons residing outside Russia which should fall under the international legal prohibition stated above.

The assessment of whether large-scale, simplified extraterritorial naturalisations amount to a *de facto* collective naturalisation must take into account the two sets of interests or values as

[155] European Commission for Democracy through Law (Venice Commision), Report on the preferential treatment of national minorities by their kin-state, adopted by the Venice Commission at its 4th plenary meeting (Venice, 19-20 October 2001), Doc. CDL-INF (2001) E.

explained above: The interests of Georgia (statehood, territorial and personal sovereignty) and the interests of the affected individuals (human rights to privacy and nationality, and human dignity).

The criterion of quantity: With regard to the interests of Georgia, what matters is the quantity of the persons affected. Looking at quantity, the naturalisations have the same effect as collective naturalisations, because the overwhelming majority of the populations in the territories have become Russians.

The criterion of consent: In the perspective of the affected persons, what matters are their rights and interests. Collective (*ex lege*) naturalisations are characterised by the absence of consent. Focusing on individual consent as the decisive criterion would mean that naturalisations upon individual application can not be placed on an equal footing with collective naturalisations. From that perspective, the naturalisations of South Ossetians and Abkhaz residents is legal, as long as their consent is free and informed.

In that situation, the interests of the individuals living in the territories and the interests of Georgia are in conflict. The question is now which criterion is decisive. Is the individual's free decision to change his or her nationality more important than the detrimental effects for Georgia? Put differently: Can their consent override the countervailing values of state sovereignty and jurisdiction?

The answer depends on the priorities assigned to these conflicting goods in international law. As already explained above, international law does not unequivocally acknowledge a human right to change one's nationality. Even assuming such a right, it is subject to limitations.

As a whole, the international legal rules on nationality still seem to accord a high value to the interests of states, because these are constituted by their nationals. Therefore, it seems fair to argue that the crucial element constituting the illegality of large-scale naturalisations is the quantity of persons affected and the resulting significant shrinking of the population.

Along this line, the leading treatise on nationality stated in 1979: "It is not the freedom of the individual whose nationality is at issue, but the rights of the state of which he is a national, that are the primary considerations in international law."[156] Arguably the normative foundations of international law have in the meanwhile shifted towards more consideration for the individual. Still, nationality crucially concerns his or her state as well. International

[156] Weis (above note 103), at 112.

law does not acknowledge an unfettered individualism concerning the choice of nationality. The interests of the affected state, notably if it is virtually divested of large parts of its constitutive element, its people, seem to outweigh that of the individual.

Along that line, the above quoted author wrote: "In view of the overriding importance of the right of the state to independence, even a possible tacit acceptance by the persons concerned would be irrelevant."[157] Arguably, even an explicit acceptance by the persons concerned would be irrelevant. Therefore the naturalisations of residents of South Ossetia and Abkhazia, if they are a massive phenomenon, can be equated to such formally collective (*ex lege*) naturalisations of residents of foreign states which operate without individual applications.

Conclusion: The large-scale naturalisations of residents of South Ossetia and Abkhazia with no other factual connection to Russia must be equated to so-called collective (*ex lege*) naturalisations of foreign residents. For this reason they are already prohibited by the specific international legal prohibition of extraterritorial collective naturalisations.

Additionally, general principles seem to be infringed by large-scale naturalisations, as will be discussed now.

2. Violation of Georgia's jurisdiction over persons

One component of sovereignty is the sovereign state's jurisdiction over persons. Large-scale naturalisations of Georgian citizens undermine the personal jurisdiction of Georgia, and to that extent affect Georgian sovereignty as well.

In that vein, it has been argued that "by conferring its nationality on the national of another state the naturalising state purports to deprive the other state of its right of protection."[158] The state's right to protect its nationals is indeed a traditional prerogative of sovereignty. It might be argued that under the premise that states are not ends in themselves, the protection offered to their own nationals is rather a duty and not a right of the state. However, the conflict under scrutiny demonstrates that the option to grant protection to their nationals is an important value for the states in conflict. Russia, especially, has attempted to justify its activities, including military activities in Georgia, by relying on its right to protect Russian nationals. Against this background, the deprivation of the right to protection indeed constitutes an infringement of sovereignty.

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[157] *Ibid*., at 113.

[158] Weis 1979 (note 103), at 101.

On the other hand, it could be argued that Georgian jurisdiction over the disputed territories is not effective anyway, so that Georgia is not able to protect its citizens there. But such an argument would be based on the (illegal) *fait accompli*. That fact can not be held in law against Georgia's sovereign right to protect its nationals, however virtual that right is in the territories.

Conclusion: The conferral of Russian nationality on a large scale is apt to deprive Georgia of its jurisdiction over persons, forecloses Georgian diplomatic protection for those persons, and may be a basis (or rather a pretext) for military intervention. The more individuals that are removed from the Georgian nation, the more plausible is the qualification of these actions as an infringement of Georgian sovereignty, which encompasses jurisdiction over persons.

3. Violation of Georgia's territorial sovereignty

The mere fact that foreign citizens are among the addressees of the Russian Law on Citizenship does not in itself infringe their home states' territorial sovereignty. But this principle may be affected by the fact that the Law specifically seeks to deploy effects on Georgian territory.

The principle of territorial sovereignty seeks to guarantee and protect the exclusive performance of state functions within the territory of a state.[159] "Between independent States, respect for territorial sovereignty is an essential foundation of international relations," the International Court of Justice stated.[160] Acts of foreign states that violate the territorial sovereignty of another state are prohibited by international law.

There is no infringement of territorial sovereignty when such an Act has effects only within the borders of the issuing state (in our case Russia). However, "[w]hen the law specifically aims at deploying its effects on foreign citizens in a foreign country abroad, its legitimacy is not so straightforward. It is not conceivable, in fact, that the home-State of the individuals concerned should not have a word to say on the matter."[161] So the principle of territorial sovereignty of states requires the consent of the home-state affected by the other state's measures.[162] This state's consent can be implied or presumed where merely cultural and

[159] *Palmas*-awards, arbitrator Max Huber, RIAA, Vol. II (1928), 829 at 838.

[160] ICJ, *The Corfu Channel Case* (Merits), ICJ Reports (1949), 4 at 35.

[161] *Ibid*., Part D a) i).

[162] See on consent as precluding the unlawfulness of an act Art. 20 ILC Articles on State Responsibility: "Consent: Valid consent by a State to the commission of a given act by another State precludes the

educational benefits are granted, because there is relevant international custom in that respect. Beyond this, however, the state's consent must be explicit.

According to the Venice Commission, respect for territorial sovereignty is especially necessary "when the document has the characteristic of an identity document".[163] "In such form, this document […] creates a political bond between these foreigners and their kin-State. Such a bond has been an understandable cause of concern for the kin home-States, which, in the Commission's opinion, should have been consulted prior to the adoption of any measure aimed at creating the documents in question."[164]

The Venice Commission's reasoning with regard to an identity-card-like document applies *a fortiori* to the conferral of nationality on persons residing in another state. This is all the more compelling if the conferral of nationality has the consequence of the extinction of the previous nationality.

Conclusion: The relevant clauses of the Russian Law on Citizenship have direct effects on Georgian citizens in a foreign country. Applied to Georgia, they infringe Georgian territorial sovereignty.

4. Interference in the internal affairs of Georgia

The conferral of Russian nationality constitutes interference in the internal affairs of Georgia, because Georgia does not allow dual citizenship.[165] This type of interference in internal affairs can not be belittled by the observation that Georgia could or should allow dual citizenship and could continue to treat dual nationals as Georgians and thereby avoid the reduction of the sum of Georgian nationals. International law leaves it to each state to decide freely which consequences it attaches in its internal law to the fact that a citizen acquires another nationality.[166] There has been a long standing tradition in international law, and also in the

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wrongfulness of that act in relation to the former State to the extent that the act remains within the limits of that consent." (Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN General Assembly on 12 Dec. 2001 in Resolution A/RES/56/83).

163 European Commission for Democracy through Law (Venice Commision), Report on the preferential treatment of national minorities by their kin-state, adopted by the Venice Commisison at its 4th plenary meeting (Venice, 19-20 October 2001), Doc. CDL-INF (2001) 19, part D c).

164 *Ibid*. The Commission opined that any document issued by the kin-state "should be a mere proof of entitlement to the services provided for under a specified law or regulation. It should *not aim at establishing a political bond between its holder and the kin-State and should not substitute for an identity document* issued by the authorities of the home-State".

165 Art. 1(2) of the Georgian Law on Citizenship of 1993 (above note 97).

166 See the preamble of the Convention on Nationality of 6 Nov. 1997, and also its Art. 15: "The provisions of this Convention shall not limit the right of a State Party to determine in its internal law whether: a) its nationals who acquire or posess the nationality of another State retain its nationality or lose it".

practice of states, to avoid dual nationality. In that tradition, many states foresee in their domestic law that a citizen who becomes naturalised in another state will lose his current nationality. Although in the age of globalisation, high mobility of persons, and tempered nationalism, the reduction of dual nationality is no longer an important international policy objective, the Georgian regulation is not unusual and is fully in conformity with international law.

So Georgia can not be compelled to admit dual citizenship and to revise its legislation, because states are free in that regard.

Conclusion: The Russian "passportisation" policy interferes with Georgia's internal affairs.

5. Violation of the principle of good neighbourliness

The mass conferral of Russian nationality on persons living in neighbouring states risks violating the international legal principle of good neighbourly relations. This principle is enounced in the Preamble of the UN Charter ("to practice tolerance and live together in peace with one another as good neighbours", and also explicitly in Article 74 UN Charter. It was spelled out in the General Assembly's "Friendly Relations Declaration" of 1970.[167] Also, the General Assembly's Resolution "Development and Strengthening of Good-neighbourliness between States" of 1984, calls "upon states, in the interest of the maintenance of international peace and security, to develop good-neighbourly relations…".[168] Although no concrete *positive* obligations can be derived from the principle of good neighbourliness, it arguably requires states to *refrain* from abusive activity towards their neighbouring states.

With the same approach, the Venice Commission's report on Hungarian extraterritorial "citizenship" found that the creation of a "political bond" without the consent of the home state of the persons runs against the "principle of friendly neighbourly relations".[169] This reasoning applies *a fortiori* to large-scale conferrals of nationality.

Conclusion: The "passportisation" policy runs counter to the principle of good neighbourliness.

[167] GA Res. 2625 (XXV) of 24 Oct. 1970.

[168] GA Res. 39/78, para. 2 (of 13 Dec. 1984).

[169] Venice Commission (above note 204) passim, also in part E (conclusions).

6. Possible violation of individual rights

Russian nationality shall not be imposed on persons. Any imposition by law or through pressure on individuals would be illegal.

According to information available to the IIFFMCG, the Russian "passportisation" policy was not, in general, based on use of force, but rather on political, economic and social incentives. These incentives do not violate the prohibition of an imposition of nationality against the will of the persons concerned.

If Russia conferred passports specifically to South Ossetian residents of a certain ethnic descent and refused the naturalisation of ethnic Georgians (factual question) this would violate the CERD. The question of how far the "passportisation" policy was based on racial discrimination will be dealt with by the International Court of Justice.[170] The Mission refrains from analysing this question while proceedings before the court are pending.

7. No justification on "humanitarian" grounds

Abkhazia justified the Russian naturalisation *en masse* of Georgian citizens living in South Ossetia and Abkhazia by the difficulties encountered by Abkhaz travelling abroad.[171] Indeed, residents of Abkhazia and South Ossetia could not travel abroad with the "passports" issued by the *de facto* authorities,[172] because these documents were not recognised by other states. Despite several attempts and concrete proposals, the United Nations did not succeed in bringing about a solution acceptable to all sides.

Nevertheless, these circumstances do not justify the large-scale naturalisation of Georgian citizens. Difficulties in travelling to Russia were created by the unilateral introduction of a visa regime by Russia. Therefore, Russia is estopped from "remedying" the problem to which it had contributed.

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[170] See ICJ, *Case concerning application of the international convention on the elimination of all forms of racial discrimination* (Georgia v. Russian Federation).

[171] See official Abkhaz answer to the IIFFMCG questionnaire related to legal issues, including international humanitarian law and human rights law issues.

[172] The Georgian side accepted a special card isssued by the South Ossetian authorities for travelling within Georgia. Yet, for travelling abroad it was necessary to use the Georgian passports with a special indication that the person came from South Ossetia. In the case of Abkhazia, Russia agreed to provide the Abkhaz with international-type Russian passports that enabled them to travel abroad.

IV. Large-Scale Naturalisation of Stateless Residents of South Ossetia and Abkhazia as an Abuse of Rights

1. No *de facto* statelessness

The naturalisation of stateless persons, even if it is not illegal under international law, is still apt to constitute an abuse of rights.

As explained above, the residents of South Ossetia and Abkhazia were, as a rule, not formally stateless, but Georgian citizens (Part B). One objection might be that South Ossetians and Abkhaz refusing Georgian citizenship are *de facto* stateless. De facto stateless persons are those who possess the nationality of a state but enjoy no protection by it "either because they themselves decline to claim such protection, or because the state, mostly for political reasons, refuses to protect them."[173] However, the idea of *de facto* statelessness of persons does not seem to enjoy widespread approval in state practice and scholarship. Moreover, Georgia did not refuse to protect the residents of South Ossetia and Abkhazia.

Only those residents of Abkhazia and South Ossetia who explicitly refused Georgian nationality in 1993 became and remained in legal terms stateless, because the "nationality" of South Ossetia and Abkhazia cannot be opposed to those states that do not recognise those two entities.

The naturalisation of stateless persons does not touch upon the interests of Georgia, or does so only marginally. From the point of view of international law, the principal requirement is the consent of the person concerned. Therefore the Russian nationality conferred on stateless persons living in South Ossetia and Abkhazia must in principle be recognised by third states including Georgia.

However, under certain circumstances, the extra-territorial naturalisations even of stateless persons, especially if they occur on a massive scale, may be abusive.

2. The contents of the international prohibition of abuse of rights

The prohibition of the abuse of rights[174] is known in many legal systems and is therefore accepted by most scholars and those in state practice as a "general principle of law" which

[173] Randelzhofer (above note 118), at 508; see also Weis (above note 103), at 164.

[174] See Alexandre Kiss, "Abuse of Rights", *Max Planck Encyclopedia of International Law* online 2009; Michael Byers, "Abuse of Rights: An Old Principle, A New Age", *McGill L.J.* 47 (2002), 389-431.

forms part of the body of international law,[175] or as a principle of international customary law. Various international treaties (e.g. Art. 300 of the Convention on the Law of the Sea,[176] Art. 263 of the Functioning of the European Union of Lisbon (Article 230 EC Treaty),[177] Art. 17 of the European Convention of Human Rights,[178] or Art. 3 of the Optional Protocol to the ICCPR[179]) prohibit the abuse of rights. In the case law of international courts and tribunals, abuse of rights has frequently been an issue.[180]

Abuse of rights is closely linked to the principle of good faith. The concept implies a distinction between the existence and the exercise of a right. The gist of the principle is that, despite the existence of a state's right, the manner in which it is exercised can still amount to an abuse. "A state which, though not with the actual object of breaking an international obligation as such, uses its right to apply certain laws, or to apply them in a certain way, in such a manner that the obligation is not in fact carried out, may be said to have committed an abuse of rights."[181]

An abuse of rights is present when a state does not behave illegally as such, but exercises rights that are incumbent on it under international law in an arbitrary manner or in a way which impedes the enjoyment by other states of their own rights, which, as a consequence, suffer injury.[182] The finding of an abuse of rights requires the finding that there has been some

[175] The 'general principles of law recognised by civilised nations' are, under Article 38(1) lit c) of the ICJ-Statute a source of international law. 'Abuse of rights' was specifically mentioned as an example for a general principle in the sense of the Statute by a member of the Committee of Jurists preparing the draft statute of the PCIJ. (The PCIJ Statute contained the same provision as now Art. 38 ICJ-Statute). See A. Ricci-Busatti, in League of Nations, Permanent Court of International Justice, Advisory Committee of Jurists Procès Verbaux of the Proceedings of the Committee June 16th July 24th 1920 (Van Langenhuysen Brothers: The Hague 1920), at 314-315 (quoted in Kiss para. 8).

[176] United Nations Convention on the Law of the Sea of 10 December 1982, entered into force 16 November 1994, UNTS vol. 1833 No. 397.

[177] Treaty on the Functioning of the European Union of 9 May 2008. OJ 2008, C 115/1.

[178] European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 Nov. 1959, entered into force on 3 Sept. 1963, UNTS vol. 213, p. 221.

[179] Art. 3 of the Optional Protocol to the International Covenant on Civil and Political Rights of 16 December 1966, entered into force 23 March 1976, UNTS vol. 999, No. 14668, p. 302.

[180] See notably WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* (Complaint by the United States) (1998), WTO Doc. WT/DS58/AB/R (Appellate Body Report), para. 158.

[181] Gerald Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1954-9: General Principles and Sources of Law", *British Yearbook of International Law* 35 (1959) 183-231, at 209. See in this sense also Kiss (above note 174), paras 3 and 32.

[182] Kiss (above note 174), paras 1 and 4. Another type of an abuse of rights is the situation that a state exercises a right for an end different from that for which the right was created, to the injury of another state (Kiss, *ibid*., paras 1 and 5). That second type of abuse of rights which resembles the French concept of 'détournement de pouvoir' is not relevant in our case.

injury.[183] Bad faith or an intention to harm is not necessary to constitute this form of abuse of rights.[184]

3. Application of the principle to the present case

Russia is in principle entitled to confer its nationality, in individualised procedures and upon individual application, on stateless persons living abroad. But by doing so on a wide and liberal scale, it may injure other states.[185]

The injury of Georgia lies in the reduction of one element of statehood, the population (understood in a large sense, independent of nationality[186]), and in the detrimental effects for Georgia's sovereignty over its territory.

The conferral of nationality is often used as an instrument of foreign policy. It creates tensions and problems without necessarily constituting an abuse of rights. However, the OSCE High Commissioner on National Minorities has recently warned of an abuse of rights through the *en masse* conferral of nationality to individuals abroad.[187]

Moreover, the Russian "passportisation" policy displays some specific circumstances that have to be taken into account. First, it is performed on a massive scale and concerns people living in breakaway territories in a neighbouring state. The more persons that are affected in number, the more plausible is the existence of an abuse of Russia's right to naturalise persons. Second, the policy was not only implemented during an on-going conflict of secession, but was even intensified at times of rising tensions. Third, it was well planned, organised and implemented. Fourth, the policy has been used as a lever to destabilise an already fragile country. Finally, it has been employed as a rhetorical justification for the use of force.

Under those very specific circumstances it can be argued that Russia has abused the right of conferring Russian nationality on stateless residents of those territories. This is especially true as Russia's role in the conflict was deemed to be that of a impartial mediator.

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[183] Kiss (above note 174), para. 31.

[184] Kiss, paras 6 and 32; Georg Dahm/Jost Delbrück/Rüdiger Wolfrum, *Völkerrecht*, vol. I/3 (2nd ed. Berlin: de Gruyter 2002), at 850.

[185] At the Hague conference of 1930, the delegate of Uruguay referred to the limitations of abuses under certain laws which might grant naturalisations on so wide and liberal a scale as to constitute an abuse of a recognised right. Minutes of the First Committeee, at 209, quoted in Weis (above note 103), at 113.

[186] See above text with notes 17 and 18.

[187] OSCE High Commissioner on National Minorities, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations and Explanatory Note* (June 2008), para. 11.

D. Consequences under International Law

I. Independent Scrutiny of the International Legality of Naturalisation by other States and International Bodies

Exorbitant attributions of nationality (those overstepping the limits of international law) may not have an international effect, notably no effect outside the state's territory.[188] Other states are not obliged to recognise exorbitant conferrals of nationality.[189] This principle has been endorsed by Art. 1 of the 1930 Hague Convention on Nationality,[190] and – in almost the same words – by Art. 3 of the 1997 European Convention on Nationality: "(1) Each State shall determine under its own law who are its nationals. (2) This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law, and the principles of law generally recognised with regard to nationality."[191] The rule stated here is part of customary international law. Russia and Georgia must comply with this rule, regardless of whether they ratified the mentioned conventions or not.

A state's assertion that, in accordance with its own law, a person possesses a nationality "creates a very strong presumption both that the individual possesses that nationality and that it must be recognised or acknowledged for international purposes."[192] However, this presumption can be reversed upon an examination of that fact.[193] Also, the issue of a passport does not conclusively establish, as against other states, that the person to whom it is issued has the nationality of the issuing state. It constitutes merely a *prima facie* evidence of nationality.[194]

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188 *Ibid*., at 853.

189 Cf. also ICJ, *Nottebohm case* (above note 93), at 20 and 43; cf. also ECJ, case C-369/90, *Micheletti v. Delegaciòn des Gobierno en Cantabria*, ECR 1992, I-4239, para. 10.

190 "It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States *in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.*" Art. 1 of the Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws of 12 April 1930 (League of Nations Treaty Series, vol. 179, p. 89, No. 4137). The convention entered into force on 1 July 1937; Russia is not a party.

191 European Convention on Nationality of 6 Nov. 1997, ETS No. 166.. The Convention entered into force on 1st March 2000. Neither Russia nor Georgia is a party.

192 Jennings/Watts (above note 95), at 856. See in that sense also Brownlie (above note 2), at 384.

193 See French-Mexican Claims Commission, *Pinson* case, (France v. United Mexican States), award of 13 April 1928-24 June 1929, Reports of International Arbitral Awards (RIAA) vol. 5 (1928), 307-560, at 381. See also German-Mexican Claims Commission, *Rau claim, decision of 14 January 1930*, Annual Digest of Public International Law Cases, ed. by Hersch Lauterpacht 6 (1931-32), No. 124 (p. 251).

194 Jennings/Watts (above note 95), at 854-5 with fn. 16. Italian-United States Conciliation Commission, *Flegenheimer claim*, award of 20 Sept. 1958, English translation in ILR 25 (1958-I), 91-167 at 112.

So international tribunals and domestic actors are empowered to investigate by themselves the state's claim that a person is its national, if there are serious doubts with regard to the truth and reality of that alleged nationality.[195] This is particularly the case where the grant of nationality is questioned because of alleged non-conformity with international law.[196] But domestic courts are usually very reluctant to question the international legality of a state's grant of nationality to an individual.[197] The general rule seems to be that other states (and national courts) are allowed to refuse the recognition of a foreign nationality only in exceptional cases. The presumption of (international) lawfulness applies also to nationality acquired through naturalisation.

II. Non-Recognition of excessive conferral of Russian nationality

In those cases where the former Soviet nationality and a temporary residence permit in the Russian Federation are the only factual connection between Georgian citizens and Russia, their naturalisation is not, as just explained, in conformity with international law (see Part B).

The consequence of this non-conformity of the naturalisations on the international plane is that other states are not obliged to acknowledge the Russian nationality of the persons thus "naturalised". Neither Georgian authorities nor third states nor international tribunals must acknowledge the alleged Russian nationality in those cases.

That also means that Russia cannot exercise diplomatic protection for those persons. The diplomatic protection of nationals can never justify the use of force (see Chapter 6 "Use of Force"). This applies *a fortiori* if the bond of nationality is not recognised by international law.

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[195] Italian-United States Conciliation Commission, *Flegenheimer claim*, award of 20 Sept. 1958, English translation in ILR 25 (1958-I), 91-167 at 110.

[196] Jennings/Watts (above note 95), at 856. Such examinations of the international validity of a grant of nationality have been performed for instance by several courts in connection with the imposition of German nationality on certain inhabitants of the Sudetenland in violation of the Munich Agreement of 1938 (Judicial Chamber of the Council for the Restoration of Legal Rights of the Netherlands, *Weber and Weber* v. *Nederlands Beheers Instituut,* judgements of 27 May 1953 and 4 July 1955, English transation in ILR 24 (1957), 431; Judicial Division of the Council for the Restoration of Legal Rights of the Netherlands, *Ratz-Lienert and Klein* v. *Nederlands Beheers Instituut,* judgment of 29 June 1956, English translation in ILR 24 (1957), 536).

[197] For instance in the *Joppi* case, the plaintiff claimed Swiss citizenship and argued that the conferral of German nationality to them without residence in Germany was contrary to international law (and to the Swiss ordre public). But the Swiss Federal Tribunal held that it was not for the Swiss authorities "to determine whether the provisions of the foreign laws are in conformity with international law". Swiss Federal Tribunal (*Bundesgericht*), BGE 86 I 165, *Joppi* v. *Canton of Lucerne,* judgment of 15 July 1960, English translation in repr. in ILR 27 (1960), 236, at 237.

In those cases where the naturalisations have been and continue to be operated with the free consent of the affected persons, Georgia could *ex ante* consent to the naturalisations and thereby preclude their wrongfulness.[198] Georgia could also *ex post* waive its right to invoke the illegality of the naturalisations.[199]

If, however, a naturalisation was based on pressure, threat, or force, the concerned individual's rights are affected. In that situation, Georgian approval could not remedy the illegality, because it is not the state's rights alone that are at stake. Here wrongfulness could only be removed by a subsequent free consent of the affected person.

If a state already issued visas for persons residing in Abkhazia or South Ossetia although their naturalisation was illegal under international law, these visas would not remedy the illegality under international law, because it is not within the competence of third states to dispose of the rights in question.

This finding does not rule out that the conferral of Russian nationality on those residents of Abkhazia and South Ossetia who indeed have closer links to the Russian Federation (e.g. because of marriage or close family relations) is valid under international law and opposable to Georgia. This would have to be shown in individual cases.

III. No Loss of Georgian Nationality for Purposes of Georgian Domestic Law

Under Georgian law, dual citizenship is not accepted (Article 32 of the Law on citizenship[200]). However, that does not mean that former Georgian citizens having accepted Russian nationality have automatically lost their Georgian citizenship. As explained above, the conferral of the Russian citizenship was not opposable to other states on the international plane. Therefore third states, including Georgia, were free to recognise it or not.

According to Article 33 of the Georgian Law on Citizenship, a decision by the President is required for the loss of citizenship.[201] Since February 2009 a special procedure is prescribed.[202]

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198 See on consent as a condition precluding wrongfulness Art. 20 ILC Articles on State Responsibility (above note 162).

199 "Article 45 Loss of the right to invoke responsibility: The responsibility of a State may not be invoked if: (a) the injured State has validly waived the claim; (b) the injured State is to be considered as having, by reason of its conduct, validly acquiesced in the lapse of the claim."

200 Organic Law of Georgia "On Citizenship of Georgia" (as last amended in 2006, above note 97): "A person loses the citizenship of Georgia in case if (…) d) he/she acquires the citizenship of another State".

201 "The President of Georgia has the authority to take decisions on (…) d) the loss of citizenship of Georgia."

202 Article 35 – Motion on Losing Citizenship of Georgia (19.12.2008 n. 802, in force since 1 February 2009): Motion on losing citizenship of Georgia is brought by the Court, Prosecution, Ministry of Internal Affairs and Ministry of Foreign Affairs. Motion on losing citizenship of Georgia against residents of foreign states is

According to the information provided by the Georgian authorities to the Venice Commission in spring 2009, these procedural requirements had not been fulfilled with respect to the people living in Abkhazia and South Ossetia.[203]

Conclusion: Residents of South Ossetia and Abkhazia who had, as explained above, acquired Georgian citizenship on the basis of the Georgian Law on Citizenship in 1993, were still Georgian citizens for purposes of Georgian law (and – as explained above – also for purposes of international law) at the beginning of the armed conflict between Russia and South Ossetia in August 2008.

IV. Illegality of Russian Extraterritorial Governmental Acts Related to Naturalisation

A different question is whether the naturalisation of non-residents (legal or not) can be effective within the territory of that other state (in this case Georgia) in which the concerned individuals still reside**.** The effects of Russian nationality, e.g. the right to receive pensions, would have to be realised by state authorities. However, international law prohibits Russian authorities to exercise governmental authority within the territory of Georgia. They are, for instance, not allowed to perform administrative acts, except the usual acts of consular authorities which are by customary law allowed as an exception to the prohibition on the exercise of extraterritorial jurisdiction. [204]

The performance of Russian state functions in South Ossetia and Abkhazia going beyond these traditional consular functions would violate Georgia's territorial sovereignty. The issuance of passports is an act based on governmental authority. To the Mission's knowledge, the passports were in many cases distributed on the territories of the breakaway entities. To the extent that these acts have been performed in Georgia without Georgia's explicit consent, Russia has violated the principle of territorial sovereignty.

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brought by appropriate diplomatic representations and consulate departments." Article 36 – Review of Issues on citizenship of Georgia (19.12.2008 n. 802, in force since 1 February 2009): The Agency reviews and prepares decisions on applications and motions on issues regarding citizenship of Georgia. In case the Agency discovers the fact of loss of citizenship by a person, without motions of the organs specified in Article 35 of this Law, the Agency considers the issue of loss of citizenship according to the rules of the first paragraph of this Article. Finally, the Agency presents all documentations to the President of Georgia.

[203] Opinion on the Law on Occupied Territories, adopted by the Venice Commission at its 78th Plenary Session (Venice, 13-14 March 2009) on the basis of comments by Bogdan Aurescu, James Hamilton and Angelika Nußberger, CDL-AD(2009)015.

[204] According to the Venice commission's report on the Hungarian case, "the official acts must be of ordinary nature, and the consulates must not be vested with tasks going beyond what is generally practiced and admitted." European Commission for Democracy through Law (Venice Commission), Report on the preferential treatment of national minorities by their kin-state, adopted by the Venice Commission at its 4th plenary meeting (Venice, 19-20 October 2001), Doc. CDL-INF (2001) 19, part D a) ii.

Again, the breach of territorial sovereignty could only be avoided or remedied by Georgia's consent to that performance.[205]

It is immaterial that Georgian territorial sovereignty is dormant in the regions under the control of South Ossetian and Abkhaz *de facto* authorities. South Ossetian and Abkhaz *de facto* authorities are not entitled and competent to dispose of Georgian territorial sovereignty and can therefore not validly consent to Russian extraterritorial acts in the breakaway regions.

Conclusion: Russia is not allowed under international law to issue passports directly in South Ossetia and Abkhazia, and to pay pensions there, except in consular institutions allowed by Georgia.

[205] Weis (above note 103), at 101: "[A]ny such naturalisation … requires, in order to be effective, the consent of the State in whose territory it shall have effect, as it means giving extraterritrial effect to municipal legislation." See on consent as a condition precluding wrongfulness Art. 20 ILC Articles on State Responsibility (above note 162).