

# International Law and the Post-2008 Status Quo in Georgia: Implications for Western Policies

Johanna Popjanevski

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## Executive Summary and Recommendations

The war between Russia and Georgia in August 2008 changed the situation in the South Caucasus fundamentally. Russia's invasion of Georgia's territory made it clear that the conflicts over Georgia's breakaway regions of Abkhazia and South Ossetia were not merely domestic issues, but had been absorbed into a larger conflict between Russia and Georgia. Moreover, it highlighted the essential differences in Russian and Western foreign policy objectives in the region, and the limited mechanisms for challenging Russia's policies in what Moscow considers its exclusive sphere of influence.

In the post-war era, Western powers have largely failed to establish a policy towards Georgia's conflicts that takes these new realities into account. This is problematic for several reasons. The post-war *status quo* is not only unsustainable, but also conflicts directly with Western interests in the region. Russia's significant military presence in Abkhazia and South Ossetia remains a violation of fundamental principles of international law, and thus, threatens the upholding of internationally recognized norms and standards in the region. This, in turn, sets dangerous precedents with implications beyond Georgia and the South Caucasus. Secondly, Russia's military buildup on Georgian territory, coupled with continued tensions along the Administrative Boundary Lines, suggest that the situation in the region is far from stable. This is a direct concern for the West, as the security deficit in the South Caucasus continues to delay reform processes, hamper economic development, and prevent the West from helping develop this vital transport corridor to Central Asia.

Indeed, the absence of a pro-active Western policy with regard to Georgia's conflicts is largely the result of continuing reluctance among Western states to challenge Moscow on issues in relation to its neighborhood. In this respect, the legal aspects of the current *status quo* in Georgia may appear as subordinated to the political realities in the region after the 2008-war. However, the international political rhetoric in relation to Georgia's conflicts remains

highly centered on questions that are of legal nature. These include the current status of Abkhazia and South Ossetia; whether or not Russia's military presence in the two territories amounts to occupation; and the question on how to engage in the two territories, in light of the West's non-recognition policy vis-à-vis the two regions.

This paper examines these key issues from the perspective of international law. First, it addresses the international legal status of Abkhazia and South Ossetia after 2008. This issue is particularly important given that Russia bases its continuous military presence in the two territories on bilateral agreements with the leaderships in Sukhumi and Tskhinvali – both unrecognized by the overwhelming majority of the international community as legitimate governments. The issue is examined out of several different angles, including the right of Abkhazia and South Ossetia to self-determination and statehood; the role and implications of the unilateral recognition of the two regions by Russia, Venezuela, Nicaragua and Nauru; and, finally, the notion that Kosovo's independence in February 2008 constitutes a legal precedent for independence of Georgia's secessionist territories. It concludes that neither Abkhazia nor South Ossetia lives up to the norms of statehood in contemporary international law. This conclusion is inescapable for several reasons, not least because statehood requires effective control of a territory independent of foreign powers. There is moreover increasing consensus in international law and practice that the process of state-formation is only lawful in the absence of the use of force or other violations of fundamental international norms. Given the forceful demographic changes that have taken place in the region over the last two decades, Abkhazia and South Ossetia fail on both counts.

Second, the paper studies the nature of Russia's troop presence in Abkhazia and South Ossetia. It concludes that Russia's military presence in Georgia, for all practical purposes, amounts to occupation of Georgian territory. Russia's significant troop presence in, and overall influence over, Georgia's secessionist territories has already been deemed by international expert commissions as constituting effective control over the two regions. This, in effect, enforces the international law on occupation, whose primary aim is to protect humanitarian standards in the territories.



Third, it addresses the prospects for deeper engagement by the West in Abkhazia and South Ossetia and highlights particular issues for Western governments to consider in this respect, mainly the need to establish an appropriate balance between engagement and the West's non-recognition policy, and, indeed, Georgian national legislation.

In light of the conclusions drawn from these assessments, this paper concludes with the following recommendations for Europe and the U.S.:

1. First, as a lead in fulfilling the objective of restoring Georgia's territorial integrity, the EU and the U.S. should recognize that Abkhazia and South Ossetia are currently under occupation by the Russian Federation, and establish the reversal of this occupation as a long-term policy objective. This is not merely a means of de-legitimizing Russia's military presence on Georgian territory, and therefore of simply symbolic or rhetorical value. It would underline that the current *status quo* is not permanent but a transitional stage, with the ultimate objective of safeguarding Georgia's territorial integrity and ensuring the return of the large number of Internally Displaced Persons (IDPs) to the two regions. It would ultimately also determine the humanitarian responsibility that Russia has assumed through its continuous military presence in Georgia's conflict zones.
2. Second, the EU and U.S. should step up their demand for Russia to abide by its commitments under the cease-fire treaty. In a first stage, efforts should center on insisting on extending the European Union Monitoring Mission's monitoring to include both sides of the administrative boundary lines, especially the regions of Akhgori in South Ossetia, and the Southern regions of Abkhazia. In parallel, efforts should focus on transparency in Russia's military posture in the two territories. Yet expanded monitoring and transparency are not goals in themselves: they are only a first step toward the long-term aim of reversing Russia's illegal occupation. Thus, the EU and U.S. must continue to put demands for the withdrawal of Russian military forces front and center in their policy toward the region, while urging for

their replacement with unbiased peacekeeping forces from third countries.

3. Third, the EU and the U.S. should as far as possible coordinate their policies with regard to engagement and conflict resolution in Georgia, to avoid the Western approach being interpreted as ambiguous and inconsistent. Moreover, the West should as far as possible seek to support and influence Georgia's own strategy to engage and build confidence between communities across the Administrative Boundary Lines. Indeed, lack of coordination between Western policies and Georgia's own efforts only signals lack of determination and trust between Tbilisi and its Western allies, with potentially damaging consequences for the eventual processes of conflict resolution.
4. Fourth, the West should seek to strengthen the role and presence of Western institutions in Georgia, in order to address, gradually, the security deficit in the region. At the EU level, Brussels should, at a minimum, integrate dialogue on conflict resolution in its Eastern Partnership initiative, and encourage experience-sharing between the partner countries on topics relating to engagement and confidence-building. Both NATO and the EU should adopt a more explicit stance with regard to Tbilisi's path towards formal inclusion into Euro-Atlantic structures. Indeed, Georgia's closer association with the EU and NATO would not only facilitate Western engagement throughout Georgian territory and increase Western leverage over Georgian policies, but also establish incentives for the secessionist authorities to engage in closer dialogue with Tbilisi.
5. Fifth, the EU and U.S. should design an engagement strategy with Abkhazia and South Ossetia that does not conflict with the non-recognition policy toward these regions, or foster the further alienation of the two territories from Georgia. Rather, efforts to engage with the two regions should reflect the West's continuous support for Georgia's territorial integrity and security in the South Caucasus region. Thus, engagement should aim at changing the current deadlock in the peace processes, and not at introducing or reinforcing a new *status quo*. Furthermore, Western engagement strategies should take into account the

Georgian government's strategy for engagement through cooperation, seeking to support the implementation of that strategy, thus also resulting in greater Western influence over Georgian policy-making.

## International Law and the Key Issues in the Post-War Era

The outbreak of full-scale war in Georgia in August 2008, and the events that followed, left Western powers faced with a number of unprecedented outstanding issues. Moscow's forceful intervention in Georgia, and its subsequent recognition of Abkhazia and South Ossetia as independent states, led to a belated realization that Moscow had become a party to the conflicts rather than an impartial peace-broker in the region. Moscow has since established a troop presence of approximately 7,600 troops in Georgia's two conflict regions – more than twice the number of the Russian peacekeepers present there before the war – and expelled the only two international monitoring bodies on the ground, UNOMIG in Abkhazia and the OSCE in South Ossetia, leaving the two regions closed to international monitoring.

While the Russian-Georgian war caused a brief but serious setback in relations between the West and Russia, the post-war era has not seen a significant change in the political landscape in the region. While the war called for a deeper involvement by Western institutions in conflict management throughout the post-Soviet space, this has yet to happen. Indecisiveness on how realities on the ground should be understood, along with the institutional weaknesses of organizations such as the OSCE and the UN, continue to hamper the potential for stronger Western involvement. The UN continues to be deadlocked by Russia's veto power, as does the OSCE, whose true function on the European scene is in question. Brussels and Washington, for their part, remain reluctant to clash with Moscow over issues relating to its immediate neighborhood. The EU's Monitoring Mission (EUMM), which ideally could have challenged Russia's security monopoly in the two regions, remains effectively kept out of the two territories by the Russian and secessionist troops. While this undermines the EU-brokered six-point cease-fire agreement concluded between Tbilisi and Moscow on August 15 2008, Brussels has largely refrained from putting political pressure on Russia to comply

with its legal obligations in this regard. At best, the policy appears to agree to disagree with Russia, which only feeds the current deadlock between the parties.

Importantly, there has been only an implicit shift in the predominant understanding of the nature of the conflicts on Georgia's territory. The 2008 war made it abundantly clear that the conflicts were no longer simply conflicts between Georgia and two of its secessionist minorities, in which Russia played a secondary role. While that dimension continues to exist, it is equally clear that Russia's involvement in the erstwhile localized conflicts makes Moscow a direct party to an inter-state conflict with Georgia. As will be discussed, this did not happen in 2008; indeed, Russian involvement was blatant in the early 1990s, and grew considerably since 1999. Georgia is thus involved in conflicts on two levels: intra-state conflicts with the secessionist minorities, and an inter-state conflict with Russia. Moreover, the secessionist conflicts have to a significant extent been subjugated to and subsumed under the Russia-Georgia conflict. This in no way implies that all would be well in Georgia if Russia magically changed its policies, as deep differences remain with the South Ossetian and especially Abkhazian minorities. But both Georgia and these two minority populations have been negatively affected by Russia's overarching role in the conflicts.

Western powers before the war in 2008 in official terms viewed Russia as an impartial mediator in these conflicts, while being well aware of Moscow's growing manipulation of them, and its direct influence over the secessionist authorities. Following 2008, Western powers have refused to accept Moscow's insistence that it is not a party to the conflicts, yet the West has also failed to unequivocally accept the existence of a Russian-Georgian inter-state dispute as the main dynamic in the region.

There is also continuous uncertainty with regard to the legal issues surrounding Georgia's conflicts after 2008. Three questions are particularly central in this regard. The first of these questions concerns the current legal status of Abkhazia and South Ossetia. Since the 2008 war, Russia justifies its large-scale military presence in Abkhazia and South Ossetia on its recognition of these territories as independent states, and, on this basis, rejects the need for Georgia's consent to Russian military presence in the two regions. Sukhumi

and Tskhinvali, for their part, argue that they enjoy a right to secession from Georgia by virtue of their right to self-determination and statehood in accordance with international law. Thus, the post-2008 status of the two regions must be assessed from several different angles, including the right to self-determination, the traditional criteria for statehood, and indeed, the role of Russia's recognition in this regard. It is also important to assess the impact and relevance of the Kosovo precedent, as both the secessionist governments and Russia argues in favor of Kosovo as a model for independence of Georgia's break-away territories.

In light of the conclusions reached with regard to the status issue, the second issue to consider concerns the nature of Russia's military presence in Abkhazia and South Ossetia. Following Tbilisi's suspension of the peacekeeping agreements, which before the war formed the legal basis for Russia's presence in Abkhazia and South Ossetia,<sup>1</sup> Russia has remained on Georgian territory in violation of international law and standards, not least the 2008 cease-fire agreement. However, the question of whether (as Tbilisi argues) Russia's military presence in the two regions amounts to occupation has proven highly contentious. While Tbilisi has declared the two regions occupied territories, there is still reluctance in the West to use the term occupation in relation to Georgia in any formal sense. Thus, it is necessary to clarify what military occupation is, and, indeed, what it implies in terms of rights and obligations for the occupying power.

The third issue to consider is the role and shape of Western engagement in Abkhazia and South Ossetia after the August 2008 events. While before the war, Western engagement was largely based on the ambition of building confidence between the parties in order to bring them closer to a settlement of the conflicts, the West has adopted a far more ambiguous approach with regard to these objectives in the post-war era. Thus, in the context of engagement, two questions will be raised: What is the Western objective in Abkhazia and South Ossetia? And how should this objective be achieved?

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<sup>1</sup> The peacekeeping agreements (the 1994 *Moscow agreement* with regard to Abkhazia and the 1992 *Sochi agreement* with regard to South Ossetia), were formally ended through a decree by Georgian Prime Minister Lado Gurgenedze on August 28, 2008. See "Government Formally Scraps Russian Peacekeeping," *Civil Georgia*, 29 August 2008.

Following a short overview of the Fallout of the Georgia-Russia war, this paper will seek to clarify these issues from a legal viewpoint. Finally, it will conclude with concrete recommendations on how to achieve progress with regard to Georgia's conflicts.

## The Fallout of the 2008 War

The Georgia-Russia war in August 2008 had troublesome implications for all parties. The war led to a severe setback to Georgia's aims to restore its territorial integrity and to rebuild the Georgian state. It also dealt a heavy blow to Georgia's economy, dependent as it was on foreign investments. Moreover, the war led to an entirely new security situation in the Caucasus, and even to a new reality in European security. It exposed Russia's rejection of the rules of the game laid out at the end of the cold war. Specifically, Russia refused to abide by the August 2008 cease-fire agreement and withdraw its forces from Georgian territory, instead recognizing the independence of Abkhazia and South Ossetia and building up a significant military presence in the two territories on the basis of bilateral treaties with the *de facto* governments. This forced Western states to confront the *fait accompli* that Russia had created.

Indeed, the post-war *status quo* in Georgia is destructive for important reasons. With tensions simmering around the administrative boundary lines, the risk of renewed conflict cannot be disregarded. This became clear in the summer of 2009, when a series of incidents were close to result in outbreak of new violence.<sup>2</sup> More recently, rows over terrorist activity,<sup>3</sup> in which Tbilisi

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<sup>2</sup> Michael Mainville, "Russia, Georgia Trade Barbs as War Anniversary Looms," *AFP*, 4 August 2009; Kim Zigfeld, "Russia Seeking Provocation in Georgia," *American Thinker*, 20 April 2009; Brian Whitmore, "Is A New Russia-Georgia War on the Horizon," *RFE/RL*, 26 May 2009, [http://www.rferl.org/content/Is\\_A\\_New\\_RussiaGeorgia\\_War\\_On\\_The\\_Horizon/1740028.html](http://www.rferl.org/content/Is_A_New_RussiaGeorgia_War_On_The_Horizon/1740028.html); Gregory Feifer, "Friction Feeds Fear of New Russia-Georgia Conflict," *RFE/RL*, 29 June 2009, [http://www.rferl.org/content/Fears\\_Grow\\_Of\\_New\\_RussiaGeorgia\\_Conflict/1765258.html](http://www.rferl.org/content/Fears_Grow_Of_New_RussiaGeorgia_Conflict/1765258.html); Paul Goble, "Russian Experts Divided on Probability of New War with Georgia," *Window on Eurasia*, 1 July 2009, <http://windowoneurasia.blogspot.com/2009/07/window-on-eurasia-russian-experts.html>; "Russia to Plot a Second War Against Georgia?" *Panarmenian.net*, June 29, 2009, <http://www.panarmenian.net/eng/world/news/33516/>; Gregory Feifer, "Friction Feeds Fear of New Russia-Georgia Conflict," *Radio Free Europe/Radio Liberty*, June 29, 2009, [http://www.rferl.org/content/Fears\\_Grow\\_Of\\_New\\_RussiaGeorgia\\_Conflict/1765258.html](http://www.rferl.org/content/Fears_Grow_Of_New_RussiaGeorgia_Conflict/1765258.html); Yulia Latynina, "New War With Georgia Could Lead to 'Collapse of Russia,'" *Yezhednevnyy Zhurnal* (Moscow), August 3, 2009; Brian Whitmore, "Is a Rus-



and Moscow blame each other, further suggest that tensions between Georgia and Russia are far from fading. Indeed, as the war in August 2008 showed, war in the South Caucasus region has repercussions far beyond Georgia's borders. Should a new war erupt, the EU and the U.S. will again be faced with costly consequences. Moreover, the risk of conflict escalation increasing in Nagorno-Karabakh, and, albeit to a lesser extent, also in Transnistria and Crimea, there is indeed reason to establish a consistent Western strategy that could serve as an example for these regions too.

Yet, Western powers have proved indecisive on how to approach the new reality, in particular how to balance their support for Georgia's territorial integrity with their relations with Moscow.

### *The European Union*

The role of the EU in the South Caucasus had grown even before the war, as momentum rose for the EU taking a role in conflict resolution in the region. Then EU High Representative for Foreign Affairs Javier Solana's visit to Tbilisi and Sukhumi in 2008 signaled that a deeper EU engagement was forthcoming. However, the eruption of war in August 2008 showed that the shift towards a more visible stance by the EU was overdue. Indeed, the EU had to pay a bitter price for its earlier reluctance to get involved at an earlier stage.<sup>4</sup> Post-war rehabilitation came with a EUR 1 billion price tag, and the EU Monitoring Mission (EUMM) that was deployed in the immediate aftermath of the war well exceeded the level of engagement that previous monitoring initiatives had required.<sup>5</sup>

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sia-Georgia War Off the Table?" *Radio Free Europe/Radio Liberty*, July 14, 2009, [http://www.rferl.org/content/Is\\_War\\_Off\\_The\\_Table\\_In\\_Georgia/1776909.html](http://www.rferl.org/content/Is_War_Off_The_Table_In_Georgia/1776909.html)

<sup>3</sup> See *Civil Georgia* reporting, e.g. "Georgia Links Blast to Russia, Arrests Suspects," 7 December 2010; "Russian MFA Accuses Tbilisi of Staging Provocations," 9 December 2010; "Police Say Foiled Terrorist Attacks in Kutaisi," 31 March 2011.

<sup>4</sup> For more info see Lili Di Puppò, *Between Hesitation and Commitment: The EU and Georgia after the 2008 War*, Silk Road Paper, Central Asia-Caucasus Institute & Silk Road Studies Program, November 2010.

<sup>5</sup> For instance, in 2005 the EU was invited by Georgia to take over the 150-strong OSCE border mission (tasked with monitoring the Georgia-Russia border), vetoed by Russia in late 2004. Several member states, including France, Spain and Italy, were reluctant to such involvement by the EU, and thus, Brussels stopped at deploying a 12-person border support mission under the EU Special Representative's office. See e.g. Nicu

After the August 2008 war, Brussels took a leading role in seeking to resolve the escalating situation. Yet the mechanisms put in place for conflict resolution continued to lack efficiency and resolve. The initial unity displayed by EU member states in the wake of the war, when Brussels conditioned talks on a new Partnership and Cooperation Agreement with Russia with the withdrawal of Russian troops, suggested that the EU would adopt a more determined and principled stance vis-à-vis Moscow. However, such talks were resumed already in November 2008, less than three months later. It is worth noting that the EU more or less simultaneously established an investigative commission<sup>6</sup> tasked with assessing the causes of the war. This managed to shift focus onto the issue of who was to blame for the war, rather than its implications of the new reality for EU-Russian relations. Moreover, the EU did not wait for the results of the inquiry before resuming negotiations with Moscow on a partnership agreement, negotiations that the EU had suspended as a result of the war.

The EU's monitoring mission, deployed on 1 October 2008, faces severe limitations to its ability to fulfill this mandate. First, the mission is refused access to the secessionist territories, contradicting the EUMM's mission to operate throughout Georgian territory. In effect, due to its non-coercive nature, the mission relies on acceptance by all parties, which only the Georgian side is providing. As a result, the mission is limited to simply monitor the *status quo* from one side of the administrative boundary lines. That is important in order to provide eyes on the ground for Western capitals, enabling the Mission to corroborate or deny claims made by the different parties, but it is far from an ideal situation.

Likewise, the Geneva talks have yet to achieve any significant results.<sup>7</sup> The lack of EU leverage in the talks enables Moscow – in spite of being a party to

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Popescu, "The EU's Conflict Prevention Failure in Georgia," *Central Asia-Caucasus Analyst*, 14 October 2009.

<sup>6</sup> The Commission, formally entitled "The Independent International Fact-Finding Mission on the Conflict in Georgia," under the leadership of Ambassador Heidi Tagliavini subsequently, on 30 September 2009, produced a report comprising 3 volumes that mapped out the origins and causes of the Russia-Georgia war, see the Commission's website at <http://www.ceiig.ch>

<sup>7</sup> Minor achievements should be noted, among those is the decision to establish a hotline for reporting of security incidents; regular discussions between the parties on secu-

the conflict – to use the forum as a platform for pushing its own agenda, which is to argue that the conflict is one between Georgia and the two breakaway regions. For example, Moscow has insisted on the signing of a non-use of force agreement between Georgia and the two breakaway authorities, but refused to be party to such an agreement.<sup>8</sup>

In December 2009, the EU laid down its policy of non-recognition and engagement towards Abkhazia and South Ossetia.<sup>9</sup> The policy, which currently remains at the declaratory level, claims to take into account the EU's continuous support for Georgia's territorial integrity, as well as the need for deeper engagement in Abkhazia and South Ossetia. The policy was adopted in parallel to the development of Georgia's own engagement strategy, which emphasizes cooperation at the community level and efforts in the zones surrounding the Administrative Boundary Lines. However, as will be discussed below, the EU has yet to overcome the legal as well as political obstacles for such engagement.

The EU has been ambiguous on the issue of whether Russia's military presence amounts to occupation. While individual member states have made references to the occupation of Georgian territory,<sup>10</sup> the EU has yet to adopt a common line on the issue of occupation. The Head of the European Commission, Jos  Manuel Barroso, stated in a speech that the EU "will never

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rity-related issues and, more noteworthy, Russia's decision in 2010 to withdraw its forces from the village of Perevi, located 30km from Tbilisi. For more information about the progress and challenges in the negotiations, see e.g. Nona Mikhelidze, "The Geneva talks over Georgia's Territorial Conflicts: Achievements and Challenges," *Istituto Affari Internazionali*, Documenti IAI 10 – 25, November 2010.

<sup>8</sup> See e.g. "Non-use of Force Treaty discussed at Geneva Talks," *Civil Georgia*, 18 September 2009.

<sup>9</sup> See e.g. Sabine Fischer, "How to Engage with Abkhazia," *ISS Analysis*, November 2010, at [http://www.iss.europa.eu/uploads/media/How\\_to\\_engage\\_with\\_Abkhazia.pdf](http://www.iss.europa.eu/uploads/media/How_to_engage_with_Abkhazia.pdf)

<sup>10</sup> Both Lithuania and Rumania have adopted formal resolutions on the issue of occupation, and several member state representatives, including Swedish Foreign Minister Carl Bildt, have on several occasions publically used the term occupation in relation to Georgia. In January 2011, the European Parliament adopted a resolution in which it for the first time referred to Abkhazia and South Ossetia as occupied territories, see *European Parliament Resolution of 20 January 2011 on an EU Strategy for the Black Sea* (2010/2087(INI), available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0025+0+DOC+XML+Vo//EN>

come to terms with Georgia's occupation,"<sup>11</sup> but failed to identify Russia's role as an occupying power.

### *The United States*

While Russia has displayed a clearly antagonistic attitude towards any engagement by the U.S. in its neighborhood, the U.S. has pursued a policy in which it is continuously seeking common ground with Moscow. Especially since the coming to power of the Obama administration, Washington's policy toward Georgia has largely been subsumed under the broader "Reset" policy in U.S.-Russian relations. While this policy has enabled enhanced U.S.-Russia cooperation on key issues relating to Iran and Afghanistan, it has allowed the Georgia-Russia conflict to emerge as an issue over which the two powers continue to agree to disagree. Thus, pushing Russia on the issue of Abkhazia and South Ossetia at the cost of other issues of importance is not a priority for Washington.

As a result, while the EU has recognized the need for a new strategy vis-à-vis Georgia, the U.S. continues to rely on the notion of 'strategic patience' as the key to a breakthrough – namely that continued investments into reform processes will eventually create an attractive climate for re-association of Abkhazia and South Ossetia with Georgia. The U.S. also continues to avoid the contentious issue of arms sales to Georgia, in effect upholding a 'soft arms embargo' on Georgia.

Nonetheless, Washington has been more explicit than Brussels with regard to declaring Russia's presence to constitute occupation. During U.S. Secretary of State Hillary Clinton's visit to Tbilisi in July 2010, Clinton continuously used the term occupation when speaking of Russia's military presence.<sup>12</sup> In December 2010, the chairperson of the Subcommittee on European Affairs of U.S. Senate Committee on Foreign Relations Jeanne Shaheen (Democrat of New Hampshire) submitted a draft resolution to the U.S. Senate which recognizes Abkhazia and South Ossetia as regions occupied by

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<sup>11</sup> See the Administration of the President of Georgia's Press Release at [http://www.president.gov.ge/index.php?lang\\_id=ENG&sec\\_id=226&info\\_id=5822](http://www.president.gov.ge/index.php?lang_id=ENG&sec_id=226&info_id=5822)

<sup>12</sup> See e.g. William Dunbar, "Clinton Backs Georgia on Russia Occupation," *The Independent*, 6 July 2010, at <http://www.independent.co.uk/news/world/europe/clinton-backs-georgia-on-russia-occupation-2019191.html>

the Russian Federation.<sup>13</sup> At the time of writing, the resolution is still pending.

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<sup>13</sup> Senate Resolution 698 “Expressing the Sense of the Senate with Respect to the Territorial Integrity of Georgia and the Situation within Georgia’s Internationally Recognized Borders,” in the *Congressional Record – Senate*, of December 9 2010, available at: <http://www.gpo.gov/fdsys/pkg/CREC-2010-12-09/pdf/CREC-2010-12-09-pt1-PgS8714.pdf#page=1>

## **The Legal Status of Abkhazia and South Ossetia**

As noted above, the legal status of Abkhazia and South Ossetia constitutes the first of several issues that continue to impede Western policy-making vis-à-vis the region after 2008.

Prior to 2008, the question of whether Abkhazia and South Ossetia enjoyed a right to secession or statehood was virtually a non-issue. There was broad consensus in the international community that Georgia's sovereign borders needed be protected, and that neither Abkhazia nor South Ossetia lived up to the complex set of criteria that determine statehood in international law. Indeed, even while increasingly overtly interfering in these regions, Russia refrained from even discussing their independence until 2007–8.

The proclamation of Kosovo's independence and its recognition by most Western powers, followed by Russia's recognition of Abkhazia and South Ossetia after the August 2008 war, introduced a number of question marks in this regard. In particular, if seen in conjunction with the emergence of new states such as Montenegro and Timor-Leste, these events gave rise to a debate on whether the international system is in fact becoming more accepting of secession, and on the implications of these events for the legal status of Abkhazia and South Ossetia.

This chapter will address the international legal status of Abkhazia and South Ossetia by Abkhazia and South Ossetia from the viewpoint of international law, including the right to self-determination, statehood and the relevance of the Kosovo case as a precedent for Abkhazia and South Ossetia in this regards. Before doing so, it is relevant to briefly look at the rise of secessionism in independent Georgia, starting from the early 1990s.

### **The Evolution of Secessionism in Independent Georgia**

Indeed, Tbilisi's relationship with its secessionist capitals of Sukhumi and Tskhinvali has been marked by controversy ever since the early 1990s. The

coming to power of nationalistic President Zviad Gamsakhurdia in Georgia in 1990 and the subsequent break-up of the Soviet Union introduced a highly ethno-centric climate in the region. Gamsakhurdia's policies, which largely disregarded the interests of national minorities, coupled with Georgia's own declaration of independence in 1991, fuelled independence aspirations in Georgia's regions of Abkhazia and South Ossetia, who both held autonomous status in Soviet Georgia. This, with Tbilisi's reaction, resulted in secessionist wars first in South Ossetia in 1991–92, and subsequently in Abkhazia in 1992–93.

The first round of hostilities broke out in South Ossetia in 1991. In response to South Ossetia's declaration of independence in 1990, Tbilisi abolished the region's autonomous status and launched a military intervention to re-take control of the territory. The operation was met with fiery resistance from the Ossetian militia, which was supported by Russian troops and paramilitary troops from North Ossetia. By June 1992, Tbilisi was forced to surrender its control over two thirds of the South Ossetia's territory, to a peacekeeping force led by Russian troops.<sup>14</sup>

In Abkhazia, war broke out shortly after ceasefire had been reached in South Ossetia, as irregular Georgian forces invaded the territory as a response to Abkhazia's declaration of sovereignty.<sup>15</sup> At the time, the ethnic Abkhaz made up 18 percent of the population of Abkhazia, while Georgians amounted to 46 percent.<sup>16</sup> Following a forceful counter-offensive by Abkhaz forces and North Caucasian volunteers, the war resulted in the ethnic cleansing of half of Abkhazia's pre-war population – and virtually its entire ethnic Georgian population.<sup>17</sup> This offensive was facilitated by transfers of arms from Russian forces

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<sup>14</sup> For a more detailed account of these events, see e.g. Svante Cornell, *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus*, Richmond: Curzon, 2001.

<sup>15</sup> On July 23, 1992, the Abkhaz-dominated faction of the Abkhaz Supreme Soviet (the ethnic Georgian faction boycotted the session) declared the restoration of Abkhazia's 1925 constitution, which provided that Abkhazia was an independent republic in a treaty relationship with Georgia – thus not an autonomous region within Georgia, as envisaged both within the Constitution of Soviet Georgia and the 1921 Constitution of the Democratic Republic of Georgia.

<sup>16</sup> Paul B. Henze, "The Demography of the Caucasus According to 1989 Soviet Census Data," *Central Asian Survey*, vol. 10 no. 1/2, 1991, 153.

<sup>17</sup> Some of the ethnic Georgians, mainly residents of the Gali district, subsequently returned. *De facto* Abkhaz authorities have claimed a population of over 215,000 people,

in the North Caucasus, North Caucasian volunteers that were partially facilitated by the Russian military, as well as direct assistance to the Abkhaz side by the Russian Air Force.<sup>18</sup>

In spite of Moscow's direct involvement in the two conflicts, Russia assumed the role of the main peace-broker between Tbilisi and its secessionist capitals.<sup>19</sup> This put the secessionist authorities in a confident position vis-à-vis Tbilisi. With Russia's blessing, throughout the 1990s, both Sukhumi and Tskhinvali confidently held to their position of demanding full independence and resisted the return of IDPs; in 1999, Abkhazia held a referendum on independence that yielded an overwhelming majority of votes in favor – but in which the ethnic Georgian population in exile was unable to vote. Combined with Tbilisi's refusal to compromise on its status as anything but the central authority vis-à-vis the two regions and the Georgian government's general weakness at the time, this resulted in a deadlock in the negotiations that lasted almost two decades.

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with Abkhaz a clear plurality of 43%. These figures nevertheless almost certainly overstate the Abkhaz population and understate the Georgian and Armenian population. Official Georgian sources in 2005 claimed a population of 178,000. The International Crisis Group estimated in 2009 a population of between 157,000 and 190,000.

<sup>18</sup> See e.g. Thomas Goltz, "Letter from Eurasia: The Hidden Russian Hand," *Foreign Policy*, Fall 1993; Evgeni M. Kozhokin, "Georgia-Abkhazia," in Jeremy R. Azrael and Emil A. Payin, eds., *US and Russian Policymaking with Regard to the Use of Force*, Santa Monica: Rand Corp., 1996; Alexei Zverev, "Ethnic Conflict in the Caucasus, 1988–94," in Bruno Coppieters, ed., *Contested Borders in the Caucasus*, Brussels: VUB Press, 1996, p. 53; Fiona Hill, and Pamela Jewett, "Back in the USSR": *Russia's Intervention in the Internal Affairs of the Former Soviet Republics and the Implications for United States Policy Toward Russia*, Cambridge, MA: Strentghening Democratic Institutions Project, John F. Kennedy School of Government, Harvard University, January 1994; Svante E. Cornell, *Small Nations and Great Powers*, 349–51.

<sup>19</sup> In South Ossetia, the parties formed in 1992 the Joint Control Commission (JCC) – a quadripartite peacekeeping mission comprising Georgian, Ossetian and Russian troops. The JCC also served a forum for negotiations between the parties. In Abkhazia, the UN Security Council established in 1993 a multilateral mediation process chaired by a Special Representative of the United Nations Secretary General, and a Group of Friends of the Secretary General, comprising Russia, the UK, France, Germany and the U.S. The talks were initiated within this framework in Geneva in November 1993, introducing the Geneva Peace Process. On the ground a CIS peacekeeping force (entirely Russian in practice) was deployed to ensure compliance with the agreement.



Following the coming to power of Vladimir Putin in Russia in 1999, Russia's support for the secessionist regions became explicit.<sup>20</sup> From the early 2000s Moscow employed a number of policies amounting to creeping annexation of the two territories. This included distributing Russian passports to the local populations of Abkhazia and South Ossetia. Within several years, the overwhelming majority of residents had acquired these passports, creating an artificial diaspora that Moscow used to legitimize its intervention in 2008.

In South Ossetia, Russia also engineered the removal of members of the *de facto* government seeking reconciliation with Georgia, and had them replaced with serving Russian security officers under the leadership of Eduard Kokoity, a former wrestling champion who had spent most of his life in Moscow.<sup>21</sup> The new Ossetian leadership killed hopes for progress in peace talks brokered by the OSCE, in which Kokoity's predecessor, Ludvig Chibirov, had proven increasingly cooperative. Thus, by 2005, the Ministers of Defense, Security and Interior as well as the Prime Minister in South Ossetia's *de facto* government were all officials of the Russian military or special services seconded to Tskhinvali.<sup>22</sup>

In Abkhazia, too, Russia managed to install several new members of the administration – especially in the defense and security sphere, but failed to secure the same level of influence, because the Abkhaz *de facto* government appeared determined to maintain a certain distance from Moscow. Indeed, in the 2004 Abkhazian presidential elections, the Kremlin's favorite candidate, Raul Khajimba, was defeated by Abkhaz nationalist Sergei Bagapsh.<sup>23</sup> Nonetheless, Abkhazia remained dependent on Russia's support, not least in negotiations with Tbilisi; and Moscow used a threat of an economic embargo to

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<sup>20</sup> See e.g. Ronald D. Asmus, *A Little War that Shook the World*, Palgrave Macmillan, 2010, Chapter 2.

<sup>21</sup> See Ibid and Andrei Illarionov, "The Russian Leadership's Preparation for War," in Cornell and Starr, eds., *The Guns of August 2008: Russia's War in Georgia*.

<sup>22</sup> See Konstantin Preobrazhenski, "South Ossetia: KGB Backyard in the Caucasus," *Central Asia-Caucasus Analyst*, 11 March 2009 (<http://www.cacianalyst.org/?q=node/5060>); Yulia Latynina, "South Ossetia Crisis Could be Russia's Chance to Defeat Siloviki," *RFE/RL*, 8 August 2008.

<sup>23</sup> In response, Russia closed the border with Abkhazia until Bagapsh succumbed, and appointed Khajimba vice-president. See e.g. Vladimir Socor, "Russia Blockading Abkhazia to Overturn Presidential Election," *Eurasia Daily Monitor*, Vol. 1 Issue 138, 1 December 2004.

force Bagapsh to appoint Khajimba as Vice President with influence over the security and defense structures.<sup>24</sup>

Thus, while the conflicts between Georgia and its secessionist capitals have local roots, their evolution – just like the current *status quo* – would likely have been different without Russian interference and influence. Almost twenty years after the launch first negotiations between the parties, there are still fundamental issues to be resolved, most importantly the return of the large numbers of IDPs that remain stranded in Georgia proper as a result of the conflicts. In light of this background, a legal assessment of the conditions for statehood and independence is in order.

### The Right to Self-Determination

The right to self-determination constitutes perhaps the most commonly quoted principle in discussions regarding the secession of minority communities from their parent states. Both Sukhumi and Tskhinvali have continuously evoked this principle as a basis for the claim to independence from Georgia. Since August 2008, these claims have been backed up by Moscow: in August 2008, Russian President Dmitry Medvedev directly linked its recognition of Abkhazia and South Ossetia to “the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments.”<sup>25</sup>

Indeed, the right to self-determination is a fundamental principle of international law and practice.<sup>26</sup> Article 1 (2) of the UN Charter<sup>27</sup> establishes that one of the purposes of the UN is to “develop friendly relations among na-

<sup>24</sup> “Russia Threatens to Blockade Abkhazia,” *Civil Georgia*, 1 December 2004; Jean-Christophe Peuch, “Georgia: Could Abkhaz Election Deal Prove A Pyrrhic Victory For Russia?,” *RFE/RL*, 7 December 2004 (<http://www.rferl.org/content/article/1056264.html>).

<sup>25</sup> Statement by Russian President Dmitry Medvedev on 26 August 2008, available at: [http://archive.kremlin.ru/eng/speeches/2008/08/26/1543\\_type82912\\_205752.shtml](http://archive.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml)

<sup>26</sup> Concerning the establishment of the concept of self-determination as a legal right, see Rupert Emerson, “Self-Determination,” *American Journal of International Law*, vol. 65 no. 3, July 1971; Malcolm N. Shaw, *International Law*, 6th Edition, Cambridge University Press, 2008, pp. 251–57.

<sup>27</sup> The Charter of the United Nations, signed on 26 June 1945.

tions based on respect for the principle of equal rights and self-determination of peoples.” The UN’s widely quoted Friendly Relations Declaration (FRD) elaborates on this principle, stating that “all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.”<sup>28</sup> However, the notion that the right to self-determination enables a minority-populated region (or, in the words of the FRD: “peoples”), to freely decide on its existence or not as a state is a serious misassumption.

First, it is important to note that the principle of self-determination originally emerged as a legal principle aimed at protecting the rights of peoples residing in so called non-self-governing territories, trust territories and mandated territories,<sup>29</sup> not minorities within a sovereign state’s territory. The basic rationale was that oppressed peoples, often under colonial rule, should have a right to determine their political fate. As colonialism became increasingly marginal and stigmatized in international relations, and as ethnic minority groups with secessionist claims began challenging the concept of territorial integrity on the basis of their right to self-determination, the principle evolved into two separate principles, the right to *internal* and *external* self-determination.<sup>30</sup>

The former principle, which applies to all peoples, aims at protecting the right to a certain cultural and political autonomy, but within the territory of the state of which they form a part. The latter, external self-determination, which may entail a right to secede, is applied far more restrictively, and is mainly applicable to peoples that are exposed to severe oppression by their parent states, either, for instance, through large-scale human rights violations, or through continuous rejection by the parent state of the rights of the population in question to exercise its fundamental rights under international

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<sup>28</sup> The United Nation General Assembly Resolution 2625 (XXV): Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, of 24 October 1970.

<sup>29</sup> This was confirmed by the International Court of Justice in its advisory opinions on *Namibia* (ICJ Reports, 1971) and *Western Sahara* (ICJ Reports, 1975).

<sup>30</sup> See Milena Sterio, “On the Right to Self-Determination: ‘Selfistans’, Secession and the Great Powers’ Rule” *Minnesota Journal of International Law*, vol. 19 no. 1 2010, pp. 137–76.

law.<sup>31</sup> Thus, self-determination does not automatically provide a right for a people to form a new state.<sup>32</sup> On the contrary, the principle of external self-determination is highly disputed, as it conflicts with the emphasis on the inviolability of borders and territorial sovereignty in international law.

There are cases where the correlation between self-determination and secession has been tried. For instance, the Canadian Supreme Court addressed the issue of self-determination as a basis for secession in relation to Quebec in 1998, and made a careful examination of the principles that international law provides in this regard. The Court noted that: "a right of secession exists "where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part."<sup>33</sup> While, naturally, the Canadian Supreme Court would have benefited little from arguing in favor of Quebec's independence, its findings have been guiding in several other cases on the right to self-determination and are widely quoted in international doctrine.

How, then, does this apply to the cases of Abkhazia and South Ossetia? One should recall that from the viewpoint of international law, neither Abkhazia nor South Ossetia may be regarded as having been deprived their right to exercise their fundamental rights as peoples. The populations of Abkhazia and South Ossetia are neither part of a colonial empire, nor have they been exposed to domination or exploitation by the state of which they form part. On the contrary, Georgia as the mother-state has lacked access to the two regions since independence, and while human rights violation were indeed committed by Georgian militias in both territories, it is the ethnic Georgian population in both regions that has been exposed to the great majority of acts of ethnic cleansing and human rights violations, in the early 1990s as well as in 2008. Georgia has also on a number of occasions offered the populations of Abkhazia and South Ossetia far-reaching autonomy to exercise their political

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<sup>31</sup> See e.g. Hurst Hannum, "The Specter of Secession: Responding to Claims for Ethnic Self-Determination," in *Foreign Affairs*, Vol. 77, 1998, pp. 13–18.

<sup>32</sup> For details on the limits of the right to self-determination, see Emerson.

<sup>33</sup> Reference re Secession of Quebec, [1998] 2 S.C.R. 217 - In the matter of Section 53 of the *Supreme Court Act*, R.S.C., 1985, c. S-26, at <http://scc.lexum.umontreal.ca/en/1998/1998scr2-217/1998scr2-217.pdf>

and cultural rights. Thus, it is safe to conclude that the right to self-determination for the populations of Abkhazia and South Ossetia would likely stop at internal self-determination, including rights in the cultural and linguistic spheres, as well as a certain level of self-governance and regional autonomy.

In fact, awarding the right to external self-determination and, thus, secession to the current populations of Abkhazia and South Ossetia would carry potentially dangerous legal and political consequences, as it would equal international acceptance of the unlawful demographic changes that have taken place in the regions since the early 1990s – and specifically, implicit acceptance of the results of ethnic cleansing. This would in turn contradict the very nature of the right to self-determination, which is far more concerned with the protection of fundamental human rights than with territorial claims.<sup>34</sup> Equally, it should be recalled that invoking the right to external self-determination with regard to territories such as Abkhazia also risks resulting in abuse by the new majority of its supremacy in the new “state,” leading to oppression of the remaining minority groups in the region, in turn with claims of their own for self-determination.<sup>35</sup> In this light, it is clear why the right to self-determination is not applicable as a basis for secession in relation to Georgia’s conflict zones.

### **The Right to Statehood**

Concluding from the above that the right to self-determination does not constitute a valid basis for statehood for Abkhazia and South Ossetia, it is as a next step relevant to look closer at what the traditional criteria for statehood are, and how Abkhazia and South Ossetia relate to such principles.

The legal principles on statehood are laid down in the Montevideo convention<sup>36</sup> of 1933, which provides three main qualifications to be fulfilled in order to achieve statehood: a) a permanent population; (b) a defined territory, and;

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<sup>34</sup> See e.g. Hannum, pp. 15–16.

<sup>35</sup> *Ibid.*

<sup>36</sup> The Montevideo Convention on the Rights and Duties of States, signed in Montevideo at the 7<sup>th</sup> International Conference of American States, 26 December 1933.

(c) government.<sup>37</sup> Indeed, the Montevideo criteria have been subject to wide interpretation by states, guided by policy concerns and state interests. Nonetheless, its provisions tend to play a central part in the discourse surrounding secession, even by secessionist authorities themselves. The Abkhazian leadership, for instance, has made several references to the convention, attempting to argue that Abkhazia in fact meets the requirements. It argues that since Abkhazia has a permanent population of around 200,000, 44% of whom are Abkhaz in ethnic origin, has had parliamentary elections since 1996 and a constitution since 1994 run by a functioning government which governs over a specific area of land and who formally engages in diplomatic meetings with Georgia and Russia amongst others, it satisfies the Montevideo criteria.<sup>38</sup>

With regard to Abkhazia and South Ossetia, two of the Montevideo criteria are particularly relevant to study, namely *permanent population* and *government*. The criterion of permanent population is a complex one – as it is closely connected to the issue of territory and governance. While the principle does not require that a population is of a certain size, or composition, it is reasonable to argue that a certain level of consistency is required for this criteria to be considered fulfilled. In this light, the eviction of the ethnic Georgian population from Abkhazia and South Ossetia makes it problematic to argue that the populations of the two regions are permanent. A significant number of IDPs from the wars in the early 1990s as well as from 2008 are still awaiting the ability to return to their pre-war homes. In September 2010, the UN General Assembly adopted a resolution which reaffirmed the unacceptability of forceful demographic changes and stressed the right of Georgia's IDPs to return to their homes, including those in Abkhazia and South Ossetia.<sup>39</sup>

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<sup>37</sup> Its article 4 reads: The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states. An additional fourth criterion provides a state to have (d) capacity to enter into relations with the other states, albeit this is naturally dependent on the acceptance by other states of the first three requirements.

<sup>38</sup> See information provided by the *de facto* Ministry of Foreign Affairs of Abkhazia on the Unrecognized Nations and Peoples Organization website, at <http://www.unpo.org/article/7854>

<sup>39</sup> 50 states voted in favor of the resolution and 17 states voted against. See General Assembly Resolution A/64/L.62, of 16 July 2010, and "General Assembly Adopts Text Recognizing Right of Return of Internally Displaced Persons throughout Georgia, In-

The criterion of government also raises problems for Abkhazia and South Ossetia. As a basic principle, international law requires that statehood is based on a foundation of effective control.<sup>40</sup> Naturally, in order to be effective, the control needs to be, as far as possible, exercised without the interference of external actors. This notion traces back to the League of Nations' view on Finland in 1920, where the Legal Committee of Jurists in the *Aaland island case* concluded that it was difficult to determine what exact date the Finnish republic had become a constituted sovereign state, due to its dependence on Russia's troop presence. The Committee noted that:

“...this certainly did not take place until a stable political organisation had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops. It would appear that it was in May, 1918, that the civil war ended and that the foreign troops began to leave the country, so that from that time onwards it was possible to re-establish order and normal political and social life, little by little.”<sup>41</sup>

The criterion of effective governance has also been suggested as preventing Palestine from constituting a state in the view of international law. Scholars argued that due to Israel's occupation of Palestine territory, both the Palestine Liberation Organization and the Palestine National Council were prevented from exercising enough control over the territory to be regarded as effective.<sup>42</sup>

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cluding Abkhazia and South Ossetia,” *Department of Public Information, United Nations*, New York, at <http://www.un.org/News/Press/docs/2010/ga10976.doc.htm>

<sup>40</sup> See e.g. Shaw, p. 201.

<sup>41</sup> “Report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands question,” *League of Nations—Official Journal* 3 1920, at <http://www.ilsa.org/jessup/jessup10/basicmats/aaland1.pdf>

<sup>42</sup> See e.g. James Crawford, “The Creation of the State of Palestine: Too Much Too Soon?” in *European Journal of International Law*, 1990; and Frederic L. Kirgis Jr., “Admission of Palestine as a Member of a Specialized Agency and Withholding the Assessments of Payments in Respons,” in *American Journal of International Law*, Vol. 84, 1990. PLO's lack of control over Palestine Territory was also confirmed by UNESCO Ex-

Thus, the question with regard to Abkhazia and South Ossetia would be to which extent the *de facto* governments can be viewed as exercising effective control of their territories, independently from Russia. The Tskhinvali-based authorities may easily be said to be failing this criteria, even at an initial glance, as Russia to a large extent controls the *de facto* government. As discussed above, since 2005 if not earlier, Moscow wielded decisive influence on the composition of the South Ossetian government, including the seconding of Russian security service officials to its bodies. In addition, Moscow's military dominance over the territory is total.<sup>43</sup>

The case of Abkhazia, however, is somewhat different. The *de facto* leadership in Sukhumi – albeit not representing the pre-1992 population – appears to enjoy a certain level of autonomy from Russia, as policies conflicting with Russian priorities are pursued, and the government appears intent not to be completely absorbed by Russia. However, Abkhazia's dependence on Russia's military presence in the territory does to a significant extent prevent the *de facto* government from exercising effective control over the territory – especially in regions around the administrative boundary lines. Furthermore, even in Abkhazia, there is considerable evidence suggesting strong Russian interference in Abkhazian affairs.

In this context it is important to recall the conclusions by the European Court of Human Rights (hereafter the ECHR) in the case of *Ilascu and Others*, with regard to Russia's influence in Moldova's secessionist region of Transnistria. The ECHR established, *inter alia*, that Russia – due to its political and military support to the Transnistrian secessionist authorities – exercises effective control in the region.<sup>44</sup> Russia's military presence in Transnistria (estimated at between 1,500 and 2,400 troops) is considerably smaller than in either Abkhazia or South Ossetia (estimated at 3,500 or more in each territory) – while Transnistria's population, at 550,000, is more than double that of Abkhazia (180,000–220,000) and far over ten times that of South Ossetia (25,000–45,000). Thus, there is one Russian soldier per 300 inhabitants of

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ecutive Board in its response to Palestine's application to become a member of the organization, see *UNESCO Archives* 131 EX/INF.7, Paris, 26 May 1989.

<sup>43</sup> See Illarionov, "The Russian Leadership's Preparation for War."

<sup>44</sup> European Court of Human Rights, *Ilascu and Others v. Moldova and the Russian Federation* (App. No. 48787/99), judgement of 8 July 2004.



Transnistria; the corresponding number in Abkhazia is one per 50 inhabitants, and in South Ossetia one per ten inhabitants. Thus, it appears reasonable that based on ECHR case law from Moldova, the same conclusion would be drawn in relation to Georgia's secessionist regions. Logically, if Russia exercises effective control in Abkhazia and South Ossetia, the *de facto* authorities cannot be considered to enjoy enough effective autonomy from Russia to exercise effective control as required by international law.

Notably, even Russia has resorted to the argument that lack of effective control by a *de facto* government over its territory poses an obstacle to *de jure* independence. In a Written Statement by the Russian Federation of April 16, 2009,<sup>45</sup> submitted to the International Court of Justice regarding the legality of the Universal Declaration of independence of Kosovo, Russia noted that the inability of the Kosovo leadership to control the Serb-dominated northern parts of Kosovo; the "regular incidents of violence" against the Serb population in these areas; and the dependence on international assistance in governing the territory (for example foreign coercive presence being larger than the local), "raises, *inter alia*, questions of whether Kosovo met the necessary criteria of statehood."<sup>46</sup>

In sum, Russia's political and military influence in Abkhazia and South Ossetia makes it highly unlikely that the leaderships in Sukhumi and Tskhinvali could be deemed to exercise effective control over their territories as required by international law.

It must also be noted that article 11 of the Montevideo Convention explicitly provides that the "the territory of a state is inviolable and may not be the object of military occupation," and establishes an "obligation not to recognize territorial acquisitions or special advantages which have been obtained by force." As will be seen in the next section, this principle, first articulated by the U.S. after Japan's unlawful invasion of Manchuria in China in 1931 (known as the "Stimson Doctrine"), restricts the right to statehood when claimed on the basis of unlawful actions, such as the use of force or through

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<sup>45</sup> Available at: <http://www.icj-cij.org/docket/files/141/15628.pdf>, pp. 17-18.

<sup>46</sup> *Ibid*, paras. 50 and 52.

other violations of a state's sovereign rights.<sup>47</sup> This suggests that not even effective governance is sufficient to achieve statehood, if the actual *process* of achieving statehood is unlawful.<sup>48</sup> In effect, this poses another concrete obstacle to the secession of Georgia's breakaway territories, Abkhazia in particular, whose claim to sovereignty rests partly on the ethnic cleansing of the plurality ethnic Georgian population in the early 1990s, and which obtained recognition by Russia, Venezuela, Nicaragua and Nauru as a result of Russia's unlawful intervention in Georgia in August 2008. It will be suggested in the next section that these factors may even pose a direct *obligation* on states not to recognize Abkhazia and South Ossetia as independent states.

### The Role and Effects of Russia's Recognition

Having assessed the general requirements for independence and statehood, the question arises whether the events of 2008 testify to a shift in perceptions in international law and relations regarding statehood. In other words, did the Kosovo case, followed by Russia's recognition of Abkhazia and South Ossetia, open up for the legitimacy of the independence of Abkhazia and South Ossetia? And what does the West's non-recognition policy mean in this context?

A first step in seeking answers to these questions is the role of recognition in international law. Put in legal terms, do recognitions by other states *per se* determine whether an entity may be regarded as a state, or are recognitions simply declaratory by nature? In contemporary international law, the latter view prevails.<sup>49</sup> While expressing the will and intentions of individual states, recognitions, especially uni-lateral ones, in fact have little bearing in international law and practice. Thus, if an entity fails to live up to the Montevideo criteria, including the requirement of lawful conditions for statehood, the

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<sup>47</sup> The principle has later been laid down in several legal documents, including the UN General Assembly Resolution on the Definition of Aggression of 1975 and the International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts of 2001.

<sup>48</sup> See e.g. David Raic, *Statehood and the Law of Self-Determination*, The Hague: Kluwer Law International, 2002, chapters 2, 4 and 8. For a discussion on how this relates to Abkhazia see also Anne Peters, "Statehood after 1989: 'Effectivités' between Legality and Virtuality," *Proceedings of the European Society of International Law*, Vol. 3, 2010.

<sup>49</sup> Shaw, chapter 9.

same entity will have difficulties in gaining acceptance as an independent state on the international arena, based solely on the recognition as such by individual, or even a number of states.<sup>50</sup>

In effect, this means that the recognitions by Russia, Venezuela, Nicaragua and Nauru do not give Abkhazia or South Ossetia a legal personality in international law, as long as the traditional criteria for statehood are not fulfilled.

The paradox is, of course, that the question of whether an entity constitutes a state is ultimately in the hands of other states. The Kosovo case is an obvious example of an entity achieving independence through the recognition of other states rather than fulfillment of the traditional criteria for statehood. However, due to the particularities of the Kosovo case it cannot be deemed to have established a precedent for other breakaway entities in this regard. The Kosovo case will be further examined in the next section.

Thus, it may be concluded that recognition mainly serves as formal acceptance by states of the fulfillment of the traditional criteria for statehood. Equally, policies of *non-recognition*, which are becoming increasingly common in international politics, have emerged as a means of expressing the *non-acceptance* by states of an entity's right to statehood. Such policies did not exist prior to the 1930s. Traditionally, states recognized or did not recognize an entity, and the silent act of not recognizing was sufficient display of non-acceptance of a state's sovereignty.<sup>51</sup> In more contemporary times, active non-recognition policies have emerged as a policy tool to underline the refusal of statehood, in order partly to counter acts of unilateral recognition and their effect. Such policies of non-recognition have been applied in particular in cases when an entity is viewed by other states as gaining independence,

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<sup>50</sup> The guiding source in this regard is the Montevideo Convention of 1933, which (article 3) reads: "The political existence of the state is independent of recognition by the other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interests, administer its services, and to define the jurisdiction and competence of its courts."

<sup>51</sup> See e.g. David Turns, "The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law," in *Chinese Journal of International Law*, 2003, 2 (1), p. 6.

*de jure* or *de facto*, by unlawful means. As noted in the previous section, the U.S. first established this doctrine in 1932, expressing its rejection of the secession of Manchuria from China as a result of an unlawful Japanese invasion of Chinese territory. Ever since, policies of non-recognition have become increasingly common, underlining the legal or political obstacles of gaining statehood.

Applying the Stimson Doctrine to the case of Abkhazia and South Ossetia, several circumstances – including the cleansing of ethnic Georgians from the two territories since 1992; Russia’s unlawful intervention in Georgia in August 2008; and its continuous occupation of Georgian territory – could even be deemed as posing a concrete obligation on the international community not to recognize of the independence of the two regions. Importantly, this is true also for Russia’s recognition *per se*. While international practice is vague on the actual legality of unilateral recognitions, premature recognitions may in fact amount to illegal intervention into the affairs of another state and thus violate the sovereignty of that state.<sup>52</sup> In other words, while a declaration of independence may not be illegal, as argued by the ICJ in the Kosovo case, recognizing that declaration may

#### The Stimson Doctrine

The Stimson doctrine (after Henry L. Stimson, Secretary of State in the Hoover administration) was established in 1932 in response to Japan’s seizure of Manchuria in northeast China in late 1931. The issue concerned the right for the region to secede from China as a result of an illegal intervention by Japan. Manchuria was at the time regarded as a puppet regime under heavy Japanese military control. The doctrine, laid down in a written note of January 7, 1932, gave rise to policy in which the U.S. refused to recognize territorial changes resulting from illegal use of force. The League of Nations, similarly, refused “to recognize as valid any situation brought about in violation of the League Covenant.”

Scholars argue that the Stimson doctrine has since developed into a principle of international customary law, which restricts the right of states to recognize the lawfulness of acquisition of territory, annexation and even secession, through illegal means, including the use of force.<sup>1</sup> This principle is reflected in several sources of contemporary international law. As noted above, the Montevideo Convention of 1933 explicitly prohibits states to recognize territorial acquisitions or special advantages which are a result of the use of force.<sup>1</sup> Moreover, the UN General Assembly Resolution on the Definition of Aggression<sup>1</sup> notes, *inter alia*, that: “No territorial acquisition or special advantage resulting from aggression is or should be recognized as lawful.”

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<sup>52</sup> See e.g. Jean Salmon, “The Declaration of the State of Palestine” in *Palestine Yearbook of International Law*, 1989.

be illegal. In Georgia, the situation on the ground did not *call* for recognition in any objective sense, fore Russia's recognition, just like the military intervention, violated Georgia's sovereign rights.<sup>53</sup>

### The Kosovo Analogy

A third point for examination is the argument that Kosovo serves as a precedent for the right to secession in international law. Moscow in particular has relied on the Kosovo case as a direct precedent for Abkhazia and South Ossetia, in spite of continuing to strongly oppose the West's decision to recognize Kosovo's independence.<sup>54</sup>

In the West, too, Kosovo's declaration of independence in February 2008 was surrounded by controversy and disagreement. Those in favor of Kosovo's independence, led by the United States, maintained that Kosovo constituted a unique case that should be viewed as an exception rather than a normative interpretation of contemporary international law.

Instead, acts of ethnic cleansing by the Serbian leadership, Belgrade's unwillingness to compromise on Kosovo's status and the prolonged international governance over the territory that followed, led to the conclusion that Serbia

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The International Law Commission's Draft Articles on State Responsibility for Internationally Wrongful Acts, art. 41(2) reads: "No State shall Recognize as lawful a situation created by a serious breach within the meaning of art. 40"<sup>53</sup> (article 40 defines as a serious breach a breach of an absolute, *jus cogens*, provision of international law, such as the non-use of force under the UN charter).

The Stimson doctrine was re-invoked by the U.S. in 1940 in response to the Soviet annexation of the Baltic States, which the West refused to recognize due to its coercive nature. The principle has since been applied in a number of cases regarding territorial disputes. With regard to Southern Rhodesia's declaration of independence in 1965, the UN Security Council imposed an obligation on its member states not to recognize the "illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance."<sup>54</sup> The obligation of non-recognition was based on the illegality of the declaration of independence, which violated the principle of self-determination of the Rhodesian people. The principles of the Stimson doctrine were also applied in relation to Northern Cyprus, whose independence declaration was declared illegal due to the Turkish invasion and occupation of Cypriot territory. The UN Security Council, in its resolution 541, called on all states "not to recognize any Cypriot state other than the Republic of Cyprus."

<sup>53</sup> Articles 2(1) and 2(7) of the Charter of the United Nations.

<sup>54</sup> In total, 74 states have recognized Kosovo as an independent state. Furthermore, Kosovo is a member of IMF and the World Bank. Powers that have not recognized Kosovo include Russia, China and Spain (along with four other EU member states).

had lost its claims for the reintegration of Kosovo and that recognition was the sole solution.

Several countries,<sup>55</sup> many of them with separatist concerns of their own, objected to recognition, arguing that Kosovo would set a dangerous precedent for other regions. Russia, seemingly in fear of similar claims being voiced over its own Southern territories, sought to have the declaration of independence deemed “null and void” at the UN Security Council level – claiming it violated Serbia’s territorial integrity and sovereignty as well as the UN Charter, the Helsinki Final Act, and Security Council Resolution 1244. Failing to gain support, the Russian Foreign Ministry warned of a domino effect and the dangerous consequences of support for separatism for the principles of the world order.<sup>56</sup> As noted above, Moscow moreover warned the West that recognition of Kosovo’s independence could set a direct precedent for Abkhazia and South Ossetia, thus contradicting its arguments in relation to Serbia.

While the implications of the Kosovo case continue to be subject to debate, the notion that Kosovo could serve as a relevant model for Abkhazia and South Ossetia is seriously flawed. On the contrary, Kosovo differs from both of Georgia’s separatist territories in fundamental ways.

Kosovo, previously an autonomous region of Serbia, became subject to massive ethnic cleansing by the Milošević regime in 1999, forcing some 500,000 ethnic Albanians to flee the region. Discrimination of Kosovo Albanians in the region had been a systematic policy by the Serbian leadership, tracing back several decades, and clearly aiming to reduce Albanian predominance in the region. Following NATO’s intervention and the Serbian surrender, Kosovo fell under international protection through UNMIK and KFOR troops,<sup>57</sup> later joined by an EU civilian mission. In 2007, UN Special Envoy Martti Ahtisaari stated in a report to the UN that the negotiations to find a mutual agreement between Serbia and Kosovo regarding the status of Kosovo had been “exhausted,” recommending that “the only viable option for Koso-

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<sup>55</sup> E.g. China, Spain, Cyprus, Greece, Russia, Slovakia and Romania.

<sup>56</sup> See statement of the Russian Ministry of Foreign Affairs on Kosovo, *Information and Press Department*, 17 February 2008, at [http://www.mid.ru/brp\\_4.nsf/e78a48070f128a7b43256999005bcbb3/041c5af46913d38ac32573f30027b380?OpenDocument](http://www.mid.ru/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/041c5af46913d38ac32573f30027b380?OpenDocument)

<sup>57</sup> Under United Nations Security Council Resolution 1244 (S/RES/1244), as adopted on 10 June 1999.

vo is independence.”<sup>58</sup> At that point, in light of Serbia’s actions, reunification of Kosovo with its larger neighbor appeared out of the question.

As such, the Kosovo case differs fundamentally from Abkhazia and South Ossetia. Where Kosovo was subject to widespread violations of international humanitarian law by the Serbian government, the situation with regard to Georgia’s breakaway regions was in fact on the whole the opposite. The Georgian government deserves its share of blame for human rights violations committed in Abkhazia and South Ossetia during the conflicts in the early 1990s as well as in 2008. Indeed, the Georgian advance into Abkhazia in August 1992 was accompanied by serious human rights violations, and there is a consensus that the Georgian government used excessive force when targeting Tskhinvali in the early phases of the 2008 war. Nevertheless, both in 1992–93 and in 2008, it was unquestionably the Georgian side that suffered the most severe long-term humanitarian consequences. During the wars of the early 1990s, the expulsion of ethnic Georgians from Abkhazia, and to a lesser extent South Ossetia, amounted to ethnic cleansing that left up to 250,000 ethnic Georgians displaced from their homes. The war in 2008 increased that number by several tens of thousands, as the Georgian-populated areas of Akhalkgori in South Ossetia and the Kodori gorge in Abkhazia were exposed to systematic ethnic cleansing.<sup>59</sup> These populations still reside as IDPs in Georgia proper and neither the secessionist authorities, nor Russia, are willing to negotiate on the issue of their return.

Georgia, unlike Serbia, has had no access to its secessionist territories since the wars in the early 1990s – thus posing no acute threat to the humanitarian situation in the conflict territories. Moreover, whereas Kosovo was discriminated against under Serbian rule in the late Communist period of the 1980s, Abkhazia enjoyed a position of autonomy under Soviet Georgia whose affirmative action policies provided the ethnic Abkhaz, in spite of forming only 18% of the autonomous republic’s population, with practical control over

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<sup>58</sup> Report of the Special Envoy of the Secretary-General on Kosovo’s future status, S/2007/168, 2007, at <http://www.unosek.org/docref/report-english.pdf>

<sup>59</sup> Human Rights Watch, “Georgian Villages in South Ossetia Burnt, Looted,” 12 August 2008, available at: <http://www.hrw.org/en/news/2008/08/12/georgian-villages-south-ossetia-burnt-looted>

its governing bodies.<sup>60</sup> While the mixed messages emanating from Tbilisi and the belligerent rhetoric that was adopted in particular by former Defense Minister Irakli Okruashvili for a time needs to be acknowledged, it nevertheless remains the case that since the end of the conflicts in the early 1990s, Tbilisi has also repeatedly made far-reaching proposals to Tskhinvali and Sukhumi regarding the status of the two regions. This was never the case in relation to Kosovo: the Serbian leadership up until 2008 consistently refused to engage in negotiations regarding Kosovo's future. Therefore, the argument arguing that recognition of Abkhazia and South Ossetia constitutes an inevitable resort for the international community lacks ground. Moreover, Moscow made this argument in August 2008 on the basis of allegations that were false. While Russian officials referred to a "genocide" of Ossetians and alleged that over 2,000 civilians had been killed by Georgian forces, the total number of persons killed in South Ossetia (including men in arms) was later estimated at around 130 by both Human Rights Watch and the Russian prosecutor's office.

While secessionist authorities such as those in Taiwan, Abkhazia and Transnistria have pointed at Kosovo as an example of the right for self-determination being realized through secession, several factors put that assertion in doubt. First, the legality of the Western recognition of Kosovo is by no means self-evident. While that discussion is beyond the scope of this paper, it is important to note that Kosovar officials in fact made no such claims. At the time of the declaration of independence, confident in international support for their strive for independence, the Kosovar authorities did not refer to international legal provisions to justify its cause. Instead, the Kosovo independence declaration repeats the Western line that Kosovo constitutes "a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation."<sup>61</sup> Indeed, invoking the right to self-

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<sup>60</sup> This is detailed in Jürgen Gerber, *Georgien:: Nationale Opposition und Kommunistische Herrschaft seit 1956*, Baden-Baden: Nomos Verlagsgesellschaft, 1997, p. 292; Chapter one in Vakhtang Kholbaia et. Al., *Labyrinth of Abkhazia*, (trans. Nana Japaridze-Chkoidze), Tbilisi 1999; Svante E. Cornell, *Autonomy and Conflict: Ethnoterritoriality and Separatism in the South Caucasus*, Uppsala: Dept. of Peace and Conflict Research, 2002, 184–85.

<sup>61</sup> See Kosovo's Declaration of Independence of February 17, 2008, available at: <http://www.assembly-kosova.org/?cid=2,128,1635>



determination and statehood based on international law would have been far more difficult both for Kosovo and for the West.

In conclusion, the Kosovo case in reality holds little international legal relevance as a precedent for Abkhazia and South Ossetia. Nonetheless, the implications of Kosovo's independence for the international community should not be underestimated. In particular, the recognition of Abkhazia and South Ossetia proved that whether or not an act of policy makes any difference in the viewpoint of international law, it will inevitably serve as a reference point for claims for secession, especially in unstable regions and countries. It is therefore important to separate the legal precedent from the political one, as the latter provides more room for interpretation. Nonetheless, with Western powers united on the inapplicability of Kosovo on other regions, it is unlikely to provide a legitimate model for secession in the foreseeable future.

## **What is the Nature of Russia's Military Presence in Georgia?**

Russia's significant military presence in Abkhazia and South Ossetia after the 2008 events has been a major source of concern, not only for Tbilisi, which regards its territory as occupied by the Russian Federation, but for Western powers as well. Europe in particular is faced with the unpleasant reality that Moscow, through its troop presence in Georgia, is continuously violating the EU-brokered cease fire agreement of August 2008, which stipulates that the conflicting parties must withdraw to their pre-war positions. This is embarrassing for Brussels, given its role as the broker of the agreement. Adding to complexity, the EU is refused access to Abkhazia and South Ossetia, in spite of its ambition to carry out monitoring functions across the administrative boundary lines through the EUMM.

Yet, as noted above, Russia's military presence in Georgia post-2008 remains largely unchallenged. While urging Russia to comply with the 2008 peace agreement, Western powers are reluctant to label Russia's presence in Abkhazia and South Ossetia as occupation. Before moving onto an assessment of the question of whether or not the international law on occupation is applicable with regard to Abkhazia and South Ossetia, it is important to look at the pre-2008 status of Russian military presence in Georgia, and, indeed, how it differs from the present.

### **The Buildup of Russian Military Presence in Georgia**

While Russian military presence after 2008 has more than doubled after the August 2008 events, Russian troop presence in Georgia traces back more than two decades. Already at the time of Georgian independence in 1990, Russia inherited four Soviet-time military bases in Georgia, in Batumi, Vaziani, Akhalkalaki and Gudauta. Moreover, as noted in the previous chapter, Russia

after 1994 assumed the role as a peacekeeper in the two regions, establishing a presence of nearly 2,000 troops in the two regions.<sup>62</sup>

The establishment of these arrangements must be viewed a product of the realities in the region at the time. Indeed, Russia's base presence in Georgia relied on a doubtful legal ground, relying mainly on declarations of intentions between Georgian President Shevardnadze and Russian President Yeltsin.<sup>63</sup> Amid Western neglect of the South Caucasus region, Shevardnadze at the time proved unable to manage the Kremlin's growing interest in rebuilding its sphere of influence.<sup>64</sup> Equally, Russia's dominance of the peacekeeping structures was largely the result of Western pre-occupation with the Balkans in the early 1990s. The UN was overwhelmed and unable to deploy peacekeepers to the post-Soviet conflicts. Georgia, which seemed a distant country, seemed best handled by the power that knew the region best – Russia. As a result, the UN Security Council only sent an observer mission, UNOMIG, to Abkhazia. The UN had no role at all in South Ossetia, as the role of observer was handed to the OSCE.

As Georgian-Russian relations began to deteriorate in the late 1990s, Tbilisi increasingly voiced its concerns about Russia's destructive role in the region. In 1999, Shevardnadze made Tbilisi's discontent over the CIS peacekeeping operation official, through withholding his support for renewal of its mandate and demanding the withdrawal of the Russian forces.<sup>65</sup> The Georgian government also began contesting Russia's military presence in Georgia, demanding the withdrawal of the bases in Batumi and Akhalkalaki. Moscow responded by employing a number of punitive policies, including a restrictive

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<sup>62</sup> In South Ossetia, the parties formed in 1992 the Joint Control Commission (JCC) – a quadripartite peacekeeping mission comprising Georgian, Ossetian and Russian troops. In Abkhazia, a CIS peacekeeping force (entirely Russian in practice) was deployed. The UN Security Council only sent an observer mission, UNOMIG, to Abkhazia. The UN had no role at all in South Ossetia, as the role of observer was handed to the OSCE.

<sup>63</sup> For details, see M. Gribincea, *The Russian Policy on Military Bases: Georgia and Moldova* Bucharest: Cogito Publishing house, Romania, 2001.

<sup>64</sup> See Thornike Gordadze, "Georgian-Russian Relations in the 1990s" in Svante E. Cornell and S. Frederick Starr, *The Guns of August 2008: Russia's War in Georgia*, Armonk: M.E. Sharpe, 2009; Ghia Nodia, "Georgian Perspectives" in *Accord*, Issue 7, 1999.

<sup>65</sup> As a result, the mandate of the CISPKF was retroactively renewed, but not prolonged.

visa regime for Georgians working in Russia or travelling there, but exempting residents of Abkhazia and South Ossetia from this requirement. This was a key moment, as it marked the first of a long series of Russian policies that undermined Georgia's territorial integrity. However, at the international level, no actions were taken to challenge Russia's dominance of the peacekeeping structures in Georgia's conflict regions.

After the Rose Revolution in 2003, the new Georgian government under the leadership of Mikheil Saakashvili showed new determination to rebuild the Georgian state and transform the failed state of the Shevardnadze era into a functioning government apparatus, able to take initiatives and implement them in both the domestic and foreign policy spheres. This meant raising the conflicts on the international agenda, and demanding the internationalization of Russian-dominated negotiation and peacekeeping mechanisms.<sup>66</sup> Nevertheless, Western powers remained unwilling to respond to Tbilisi's requests for a reformation of the peace mechanisms; instead, Tbilisi was repeatedly urged to show restraint and to trust the existing institutions tasked with conflict management in the region.

Meanwhile, Moscow expanded its leverage in the secessionist territories. Following the recognition of Kosovo by a majority of Western powers in February 2008, the Kremlin institutionalized official relations with the Abkhaz and South Ossetian administrations, including the establishment of local consular departments in the two unrecognized regions.<sup>67</sup> Moscow also unilaterally beefed up its peacekeeping contingent in Abkhazia with paratroopers, in violation of its peacekeeping mandate, and deployed Russian engineering troops to rebuild a railway in Abkhazia that would later be used to carry Russian tanks deep into Georgia. As is well-known, the tensions boiled over into war in the summer of 2008.

On August 28, 2008, Tbilisi announced its decision to make real of its long-standing objective to suspend the peacekeeping agreements that prior to the

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<sup>66</sup> See e.g. Vladimir Socor, "UN, US turn blind eye to Georgia," *Eurasia Daily Monitor*, January 2005.

<sup>67</sup> See Svante E. Cornell and David J. Smith, "Moscow Moves to De Facto Annexation of Georgian Breakaway Regions," *Central Asia-Caucasus Analyst*, vol. 10 no. 8, 16 April 2008, 3-5. (<http://cacianalyst.org/files/o8o416Analyst.pdf>)

war had formed the legal basis for Russian presence in the conflict zones.<sup>68</sup> Thus, Russia's recognition of Abkhazia and South Ossetia as independent states appears to have been mainly an attempt to secure a legal basis for its continued presence in the two regions, since its only option was now to conclude "inter-governmental" treaties that it effectively dictated to the secessionist leaderships. However, since Russia's unilateral recognition of the two regions has no effect with regard to their legal status, the argument that Russia's current troop presence is justified based on legal arrangements with de facto authorities in Abkhazia and South Ossetia does not hold water.

### The Question of Occupation

In spite of the absence of a legal basis for Russia's military presence in Georgia after August 2008, both Brussels and Washington have assumed an ambiguous line on the issue of whether or not Russia's military presence in Georgia amounts to occupation. In Europe especially, positions on the issue of occupation remain divided. Some European governments, such as Lithuania and Romania, have officially labeled the presence occupation; while other high-level officials such as EU Commission Head José Manuel Barroso and Swedish Foreign Minister Carl Bildt have rhetorically referred to Abkhazia and South Ossetia as occupied territories. Nevertheless, the lack of consensus on the issue within the EU is likely to remain. In the U.S., references to Abkhazia and South Ossetia as occupied territories are becoming increasingly common in the political rhetoric, but, as noted above, the U.S. Senate has yet to adopt a formal stance on this matter, and while Secretary Clinton used the term repeatedly in her remarks in Tbilisi, the terminology has not become widely used in U.S. diplomacy.

There are, seemingly, two main reasons behind this hesitation on part of Western governments. First, international law fails to provide for a universally established definition of occupation, and it is thus a disputed issue what exactly constitutes an occupied territory, and what the implications are. International humanitarian law provides that "a territory is considered 'occupied' when it is under the control or authority of the forces of the opposing

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<sup>68</sup> See *supra* note 1.

State, without the consent of the government concerned.”<sup>69</sup> This principle has in practice been translated into two key conditions for occupation: 1) that the occupied government is no longer capable of exercising its authority in the area in question and, 2) that the occupying power is in a position to substitute its own authority for that of the recognized government.<sup>70</sup>

Indeed, in cases where a foreign power, as a result of a military intervention, takes control of another state’s territory and effectively prevents the latter from exercising its control over that territory, the question of whether an occupying power is exercising “authority” and “control” appears unproblematic. If the alleged occupying force has replaced the authority of the occupied government in the territory in question, there should be little doubt that the territory is under occupation by the former power. More disputed are situations where, like in Georgia, there are self-proclaimed governments in place in the occupied territory, claiming to be exercising *de facto* control over the territory in question.

Russia has seemingly taken note of the ambiguity of international law in this regard, and argues that its presence does not amount to occupation because it has not replaced, and/or does not exercise control over, the *de facto* authorities of Abkhazia and South Ossetia. Instead, it argues that its military presence is based on bilateral agreements with the *de facto* leaderships, who, in turn, are legitimate because Russia has recognized Abkhazia and South Ossetia as independent states. Moreover, Moscow argues that it does not have enough of a troop presence to amount to occupation. To illustrate the latter, Moscow has compared its troop presence to Cyprus, where 30,000 troops are present in a much smaller territory.<sup>71</sup>

For several reasons, however, Russia’s arguments do not hold up to closer scrutiny. It is important to note that the international law on occupation is less concerned with the status of the territory in question than with the protection of the population residing on that territory. As responsibility for in-

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<sup>69</sup> Article 42 of “The Regulations concerning the Laws and Customs of War on Land” (The Hague Regulations), of 18 October 1907, available at: <http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6>

<sup>70</sup> Shaw, pp. 1178–79.

<sup>71</sup> See the report by the Independent International Fact-Finding Mission on the Conflict in Georgia (Tagliavini Commission), Volume II, pp. 304–11.

dividuals is foremost attributable to states, international occupation law focuses on the relationship between the occupier and the expelled sovereign, rather than the division of control between the occupant and unrecognized governments. Put in other words, since the international community does not recognize Abkhazia and South Ossetia as independent states, it is either Georgia or Russia that can assume responsibility for the two territories. Thus, the central question is not whether Russia exercises control over the *de facto* governments, but instead whether Russia exercises enough control in the regions to replace, for practical purposes, Georgia as the protector of humanitarian standards in Abkhazia and South Ossetia.

In light of Georgia's lack of access to the territories, and given the emphasis on the protection of such standards in international law, the law on occupation must be deemed applicable. This notion has support both in international case law, as in the *Ilascu* case mentioned above<sup>72</sup> and in the ECHR case of *Loizidou v. Turkey*,<sup>73</sup> as well as in conclusions drawn by international legal experts on the matter. In its comments on Georgia's Law on Occupied Territories, the Council of Europe's Venice Commission concludes that Russia appears to be exercising effective control in Abkhazia and South Ossetia, and that it may therefore be accountable for human rights violations in the two regions.<sup>74</sup> The Tagliavini Commission comes to a similar conclusion in its 2009 report, and states that: "If [...] Russia's military intervention cannot be justified under international law, and if neither Abkhazia nor South Ossetia is a recognized independent state, IHL [International Humanitarian Law] – and in particular the rules concerning the protection of the civilian population [...] and occupation – was and may still be applicable."<sup>75</sup> The Tagliavini Commission, moreover, rejects Moscow's arguments about its comparably low troop presence, stating that the number of troops is not what determines

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<sup>72</sup> See e.g. the ECHR ruling, *Ilascu and Others*.

<sup>73</sup> European Court of Human Rights, *Loizidou v. Turkey* (310 Eur. Ct. H.R. (ser. A)), judgment of March 23, 1995.

<sup>74</sup> European Commission for Democracy through Law (Venice Commission) opinion on the Law on Occupied Territories of Georgia, adopted by the Venice Commission At its 78<sup>th</sup> Plenary Session (Venice, 13–14 March 2009), para. 38.

<sup>75</sup> Report by the Independent International Fact-Finding Mission on the Conflict in Georgia (Tagliavini Commission), Volume II, p. 311.

whether its presence constitutes occupation in terms of international law.<sup>76</sup> In this respect, the conclusions of the ECHR in the case of Transnistria are again relevant. In spite of having significantly fewer troops in Transnistria than in Abkhazia or South Ossetia, Russia was regarded by the court as exercising effective control in the region.<sup>77</sup>

Secondly, Western reluctance towards using the term occupation is likely a consequence of its stigmatized nature. State approaches to occupation are often driven by traditional perceptions of the law on occupation constituting a means of labeling the military presence illegal, or making prejudice to the events preceding the occupation. This, however, is a misassumption of the role and nature of the law on occupation. In reality, international humanitarian law does not regulate the lawfulness of the occupation as such. Rather, its rationale is to establish a legal regime during the phase of the occupation, particularly aiming at protecting the rights of the individuals on the territory in question.<sup>78</sup> To this end, it imposes a number of obligations on the occupying power. First, the very term occupation suggests that the military presence on the territory is temporary, and as such, establishes withdrawal of forces and de-occupation as an implicit objective. This, naturally, is connected with the protection of the rights of the expelled sovereign, and underlines that the occupation does not entail any changes to the legal status of the territory in questions. In this light, the occupying power must refrain from undertaking acts of annexation during the phase of the occupation, including exploitation of natural resources, damage to property, or displacement of people and other changes to the demographic situation.<sup>79</sup> Secondly, the occupying power as-

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<sup>76</sup> Ibid.

<sup>77</sup> The ECHR established the following guidelines for Russia's responsibility in the region; "the military and political support" by Russia, "military, economic, financial and political support given by the Russian Federation" as well as "the participation of its military personnel in the fighting," see e.g. the ECHR ruling, *Illascu and Others.*, paras. 382 and 392.

<sup>78</sup> Art. 43 of the Hague Regulations reads: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country."

<sup>79</sup> See articles 46–56 of the Hague Regulations, and articles 47 and 49 of the Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.



sumes responsibility for protecting the rights of the population on the territory in question, which the occupied government is unable to do.

In this light, several important factors suggest the danger of failing to recognize Abkhazia and South Ossetia as occupied territories. Refraining from doing so carries the risk of constituting a silent acceptance of Russia's claims that the legal status of Abkhazia and South Ossetia has changed as a result of the August 2008 events. In fact, deeming Russia's military presence in Georgia as occupation constitutes perhaps the *only* means of challenging Russia's argument that its presence in Abkhazia and South Ossetia is legitimate due to its recognition of the two territories as independent states. It is also an important means for legally preventing Russia from further annexing or even absorbing the two territories, which has been a long-standing concern of Western governments. Finally, given that the international community does not recognize Sukhumi and Tskhinvali as legitimate governments, failure to recognize Russia as an occupying power leaves the populations of the two territories in something of a normative vacuum. If Georgia is unable to uphold humanitarian standards in the two regions, and if Russia cannot be considered responsible as an occupying power, then who is in fact responsible for protecting the rights of the population of the two regions? In this view, Russia's status as an occupying power in Georgia is all the more glaring.

## Engagement with Abkhazia and South Ossetia

A third contentious issue for Western powers is the question whether engagement with the secessionist regions is compatible with its policy of non-recognition, and – if answered in the affirmative – what the appropriate shape of such engagement is? While such questions were present also before the war, Russia's explicit recognition of the two regions' independence has significantly altered the conditions for engagement, which now need to be carefully balanced against the West's non-recognition policy.

Indeed, it is not the first time Western powers are faced with the dilemma of how to design its engagement policy vis-à-vis separatist entities. With regard to Northern Cyprus, the West has struggled with on the one hand maintaining a non-engagement policy, and at the same time awarding Northern Cyprus *de facto* citizens the same rights as other EU citizens, as they reside on a territory that Europe has recognized as part of the EU. This has led some Western countries to allow for residents of the *de facto* Turkish Republic of Northern Cyprus (TRNC) residents to travel to both Europe and the U.S. on TRNC passports. As for Taiwan, the West has, in spite of its non-recognition policy, maintained strong economic links with Taipei, and the entity is currently the EU's seventh most important trade partner in Asia.<sup>80</sup> Needless to say, in the case of Kosovo, the West chose instead to engage massively in both security and post-war reconstruction, resulting in a dependence of Kosovo on Western states and organizations that remains to this day.

While the issue of how the West should engage with Abkhazia and South Ossetia deserves close attention, it should not overshadow another central issue in this regard: namely that of *why* the West should engage in the two regions. Needless to say, engagement without a clear articulation of the de-

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<sup>80</sup> See the website of the European Commission, "Trade: Bilateral Relations: Taiwan," <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/taiwan>

sired end-game, or carried out for the sake of engagement, carries the risk of being interpreted by all parties as ambiguity and indecisiveness by the West. Thus, a discussion regarding the shape of Western engagement with Georgia's conflict regions two important questions with regard to Western engagement: what the West is seeking to achieve in regards to Abkhazia and South Ossetia? And how should it be achieved?

### **What is the Western Objective in Abkhazia and South Ossetia?**

Before the August 2008 war, engagement in Abkhazia and South Ossetia was largely anchored to the objective of building confidence between the parties, as a lead in the overall objective by the international community of conflict resolution and restoration of Georgia's territorial integrity.<sup>81</sup> Since the August 2008 war, there are notable changes in the West's approach in this regard. First, in the political rhetoric the objective of restoring Georgia's sovereign borders is increasingly being replaced by the need to de-isolate the regions in order to prevent them from being further absorbed by Moscow.<sup>82</sup> Secondly, the establishment of a separate EU strategy on engagement (Engagement and Non-recognition) that operates parallel to Tbilisi's strategy (Engagement through Cooperation), suggests that EU's ambitions are now differing from Tbilisi's objectives of de-occupation and reintegration of its territory. In EU policies and rhetoric, indeed, engagement with the secessionist regions largely overshadows conflict resolution and steps to be taken to achieve that latter objective.

This approach by the West, the EU in particular, testifies to a troublesome shift in policy vis-à-vis Georgia's conflicts. First, it shows that the EU is becoming less confident with regard to conflict resolution in the region. This is a notable step away from the core European objectives of building security

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<sup>81</sup> Engagement as a means for settlement of Georgia's conflicts was established as a priority for the European Commission, the current largest donor in Abkhazia and South Ossetia, in the European Neighbourhood Partnership Initiative, see e.g. European Neighbourhood Partnership Initiative, National Indicative Programme, Policy Priority: 4, 2007–2010, at: [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_nip\\_georgia\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_nip_georgia_en.pdf); and European Neighbourhood Partnership Initiative, Georgia – Country Strategy Paper, 2007–2013, 5.2 EC assistance priorities, at [http://ec.europa.eu/world/enp/pdf/country/enpi\\_csp\\_georgia\\_en.pdf](http://ec.europa.eu/world/enp/pdf/country/enpi_csp_georgia_en.pdf)

<sup>82</sup> For an example of this line of reasoning, see Alexander Cooley and Lincoln Mitchell, "Georgia's Territorial Integrity," *The American Interest*, May-June 2010.

and peace in the Caucasus, and is likely to cause concern not only in Tbilisi, but in Baku and Chisinau as well. It would not be too far-fetched to interpret this as signaling an implicit acceptance by the EU of the post-war *status quo* in the region. This, in turn, fails to acknowledge the existence of a number of outstanding issues in relation to Georgia's conflicts that demand urgent attention, such as the return of IDPs to the two regions and the reversal of the results of ethnic cleansing.

Secondly, it signals lack of determination with regard to the objective of achieving peaceful and negotiated conflict resolution, as well as upholding Georgia's territorial integrity. This is problematic, given the normative value of the principle of territorial integrity. Indeed, territorial integrity is not merely a policy term, it is a legally established norm flowing from the principle of non-intervention, non-use of force and border inviolability (*uti possidetis*).<sup>83</sup> Thus, if the West was to renege on this long-standing objective, it would have unforeseeable implications both from a policy and legal perspective, not least because it would implicitly legitimize Russia's resort to force against Georgia in August 2008. Moreover, it would threaten the very fundamentals of the West's non-recognition policy. Direct involvement with the secessionist entities, if not coupled with a firm rhetoric on the protection of Georgia's sovereign borders, inevitably risks being interpreted by all parties as a step towards recognition of the two entities as independent from Georgia.

Moscow has seemingly taken note of the changing trends in the West's engagement policy with regard to Abkhazia and South Ossetia. In December 2010, Russian Foreign Minister Lavrov stated that: "The main thing [now] is to ensure an opportunity for these young republics to [...] actively cooperate with the external world *de facto*, rather than *de jure* [...] In fact, there is a considerable interest of a whole number of foreign partners in establishing economic ties [with Abkhazia and South Ossetia], and we will only welcome this."<sup>84</sup>

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<sup>83</sup> See e.g. Shaw, pp. 522–28; Suzanne Lalonde, *Determining Boundaries in a Conflicted World: The Role of Uti Possidetis*, Montreal: McGill-Queen University Press, 2002.

<sup>84</sup> Interfax news agency, Moscow (in Russian), 0901 gmt 24 Dec 10, through BBC *Worldwide Monitoring*.

### **How Should this Objective be Achieved?**

Recognizing that engagement needs to reflect the overarching objective of bringing about a peaceful resolution to Georgia's conflicts with respect to Georgia's sovereign borders, the West has a number of issues to consider.

The first of these issues concerns Georgia's own strategy for engaging with Abkhazia and South Ossetia. In light of the largely overlapping objectives by the West and Georgia with regard to Abkhazia and South Ossetia, it is noteworthy that the EU is seeking to pursue a separate strategy for engagement. While the Georgian government has continuously sought to invite Brussels in joint efforts to build confidence between communities across the Administrative Boundary Lines, Tbilisi's policies are continuously viewed as the problem rather than the solution. This not only undermines Georgia's strategy, which, importantly, was elaborated in close consultation with the EU and the U.S., but signals a lack of trust towards Tbilisi's intentions. Needless to say, this directly contradicts the ambition of building confidence between the parties.

Thus, greater cooperation between the EU and Tbilisi with regard to engagement is a vital and inevitable step in achieving progress with regard to engagement.

The second issue to consider is the consideration of Georgian national legislation. The Georgian Law on Occupied Territories, and the recently adopted modalities for engagement, testifies to the concerns of the Georgian government with regard to potential implications of Western engagement with its conflict territories, especially in light of its own lack of access to the two regions. While before the war, engagement in the two regions relied largely on the Georgian government turning a blind eye to economic activity and interactions with the separatist authorities, Tbilisi has displayed that it is no longer prepared to accept activities by the international community that may ultimately amount to creeping recognition of its secessionist territories. Indeed, Tbilisi has made clear its intention to monitor foreign activity in its two conflict territories, and to retain its sovereign right to approve or disapprove of such activities. While Tbilisi's concerns in this respect may appear exaggerated at times, they nevertheless need to be taken into account by Western donors when engaging with Abkhazia and South Ossetia.

Third, given the highly politicized climate in the two regions, the Western donor community is forced to re-think traditional concepts of engagement and development cooperation in Abkhazia and South Ossetia. Efforts in the spheres of institution-building, good governance and democratization carry the obvious risk of strengthening the preconditions for independence of the two regions, and would as such conflict with the West's non-recognition policy. This includes to some extent support to local civil society organizations, as leading civil society actors in the two regions tend to take a strong political standpoint in their inter-actions with Western donors, and their level of independence from secessionist authorities and Russian government agencies cannot be taken for granted.<sup>85</sup> Put otherwise, engagement with civil society groups needs to be framed in such a way that it does not amount to strengthening proxy groups for the forces Western agencies decide not to interact with. The Georgian government has also expressed concern regarding reconstruction effort with regard to properties in Abkhazia, as this may ultimately violate the property rights of the expelled ethnic Georgian populations.<sup>86</sup> Thus, even pure humanitarian efforts need to be undertaken with careful consideration of the complex realities on the ground in the two regions.

In recent times, the issue of travel facilitation for residents of the secessionist regions, Abkhazia in particular, has become increasingly central. While the majority line among Western states has been to deny visas to Abkhaz and South Ossetian residents, Brussels in particular is gradually realizing that engagement and de-isolation may not in fact be possible without arrangements which allow the Abkhazian population access to European or American visas in order to interact with Western stakeholders. Moreover, there is seemingly hope that the visa facilitation policy would lessen the incentives, or need, for the two populations of applying for Russian passports, which currently serve as their only means of travelling abroad.

At the same time, the travel issue constitutes perhaps one of the most controversial aspects of the West's engagement policy in the regions. Notwithstanding the potential benefits of such a policy, it is hard to envisage how visa issuing could take place without a *de jure* acceptance of the validity of

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<sup>85</sup> Author's interviews, Tbilisi and Sukhumi, August 2009.

<sup>86</sup> Author's interviews, Tbilisi, March–April 2011.

Abkhazian and South Ossetian identification documents, or of the Russian passports that residents hold, and the distribution of which the EU's own inquiry into the war found to be illegal. The symbolic significance of such a policy, therefore, is far-reaching, and carries the risk of blurring out the already fine line between engagement and implicit recognition.

Indeed, such concerns were present also in the case of Northern Cyprus, where several Western governments, in spite of its explicit non-recognition policy towards the region, nonetheless lifted their visa restrictions for TRNC residents, allowing TRNC passport holders to apply for visas to Europe and the U.S. While this policy appears as a useful precedent with regard to Abkhazia and South Ossetia,<sup>87</sup> one should also recall the significant difference between Northern Cyprus and Abkhazia and South Ossetia on a vital point. Due to its non-recognition policy towards the TRNC, the region is viewed by the West as *de jure* part of Cyprus, and therefore EU territory.<sup>88</sup> Thus, travel policies vis-à-vis TRNC residents must be viewed against the imperative of awarding the populations rights as EU citizens.<sup>89</sup> It is far more problematic to argue in favor of such a policy in relation to Georgia, which is unlikely to obtain EU membership anytime soon. Another seemingly relevant example to look at in this context is Taiwan. Since 2010, the EU has lifted its visa requirements for Republic of China passport holders, in spite of not recognizing the region as independent from China. However, there are again important differences between this example and the case of Georgia's secessionist entities. As noted previously in this paper, the West has adopted an active non-recognition policy vis-à-vis Abkhazia and South Ossetia (as well as in relation to TRNC) based on the unlawfulness of the circumstances surrounding their claims for independence. This policy, in turn, stems from the Stimson Doctrine and the obligation for states not to recognize secession achieved through unlawful means. The same is not true with regard to Taiwan, where the West has instead subsumed its lack of recognition of Taiwan

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<sup>87</sup> See e.g. Alexander Cooley and Lincoln A. Mitchell, "Engagement without Recognition: A new Strategy toward Abkhazia and Eurasia's unrecognized States," *The Washington Quarterly*, October 2010.

<sup>88</sup> Cyprus' invitation to join the EU was originally condition of re-unification of TRNC with the rest of Cyprus.

<sup>89</sup> See the European Commission website, "Enlargement: Turkish Cypriot Community," at [http://ec.europa.eu/enlargement/turkish\\_cypriot\\_community/index\\_en.htm](http://ec.europa.eu/enlargement/turkish_cypriot_community/index_en.htm)

under its “One-China” policy, which traditionally has not prevented the establishment of bilateral links with Taipei. Thus, maintaining travel and trade links with Taiwan is far less problematic from an international legal point of view than in the cases of Abkhazia, South Ossetia and TRNC.

It also important to note that Tbilisi has already established a policy that enables Abkhaz and South Ossetian residents to apply for so called status-neutral identification documents (neutral with regard to citizen status), which in turn allow for travel abroad on the same conditions as Georgian citizens, as well as social, economical and educational benefits reserved for Georgian citizens.<sup>90</sup> Thus, a separate travel policy on part of the EU is likely to be contested by the Georgian government, which views the status-neutral documents as one of the key elements of its engagement strategy towards the breakaway regions. At the same time, the process of developing and distributing the status neutral documents is likely to take time, wherefore alternative arrangement for travel facilitation for the residents of Abkhazia and South Ossetia may be unavoidable to avoid further isolation of the two territories. Nonetheless, as noted above, greater coordination between EU’s efforts and Georgia’s objectives in this regard is essential to overcome potential differences with regard to such arrangements.

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<sup>90</sup> For details, see Georgia’s “Action Plan for Engagement.”



## Policy Recommendations

In view of the assessments made in this paper, the paper concludes with the following recommendations for Western governments.

### *Recognizing that Abkhazia and South Ossetia are under Occupation by the Russian Federation*

Given the priority of restoring Georgia's territorial integrity, recognizing that Georgian territories are currently under occupation by Russia is a necessary step for Western powers. As noted above, adopting a determined line on the issue of Russia's occupation is important for several reasons. First, it serves to strengthen the West's rejection of Russia's military presence in Georgia, which currently violates both the 2008 cease-fire agreement and international law in general. It would also underline that the current *status quo* is merely a temporary stage which all parties should work toward changing. From a legal perspective, it would moreover impose a responsibility on Russia to maintain law and order in the two territories, to refrain from exploiting the two regions or annexing them through violations of property rights or displacement of people. Finally, though counter-intuitive, it would likely also facilitate engagement with the secessionist regions in the long term, as it would reassure Tbilisi of Western adherence to its territorial integrity, and thus lower Georgian objections to foreign activities in the regions. Even as far as the secessionist authorities are concerned, it would bring clarity to the Western position, and work against the tendency, already visible, to put conditions on Western presence in the hope of weakening the non-recognition regime.

Both the U.S. and the EU have taken some steps in this regard, the term occupation increasingly appearing in European and U.S. rhetoric. Moreover, both the Venice and Tagliavini Commissions have already concluded that Russia exercises enough effective control over the territory to assume respon-

sibility for human rights violations. In this, light, formalizing the issue of occupation constitutes a logical next step.

There are several comparable precedents to rely on in this regard. With regard to the Baltic States, East Germany and more recently, Northern Cyprus, Western policies relied on the notion of the territories being occupied or annexed by a foreign power – Russia in the first two cases and Turkey in the latter. This notion was formalized through different means. In the case of Northern Cyprus, the position of the international community was laid down in various Security Council declarations. With regard to the Baltic States, Europe and the U.S. adopted separate declarations to this effect. The U.S. adopted a similar position through the Welles declaration of 1940,<sup>91</sup> through which it condemned Soviet annexation of the three Baltic states and established a non-recognition policy based on its refusal to recognize the legitimacy of Moscow's policy vis-à-vis the three states. In a 1983 resolution on the situation in Estonia, Latvia and Lithuania, the European Parliament condemned the fact that the Baltic States had been occupied by the Soviet Union in 1940.<sup>92</sup> The U.S. Senate resolution, pending at the time of writing, would be a welcome first step, which should be followed up by the European Parliament.

### *Expanding the Role of the EUMM*

The EUMM, in spite of the current impasse, constitutes the potentially most important key to a breakthrough in the post-war *status quo* in Georgia. Indeed, the presence of a European monitoring mission in the conflict regions was long a much desired step towards internationalization of the conflict management mechanisms in relation to Abkhazia and South Ossetia. However, the EUMM is effectively prevented from carrying out its monitoring functions across the administrative boundary lines. Expanding the mission to the Southern parts of Abkhazia and to the Akhgori district of South Ossetia is not only required in order for the EUMM to fulfill its mandate, it is

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<sup>91</sup> "Statement by the Acting Secretary of State, The Honorable Sumner Welles," *Department of State - No. 354*, 23 July 1940, available at: [http://upload.wikimedia.org/wikipedia/commons/3/39/Welles\\_declaration.jpg](http://upload.wikimedia.org/wikipedia/commons/3/39/Welles_declaration.jpg)

<sup>92</sup> European Parliament Resolution "On the Situation in Estonia, Latvia and Lithuania," *Official Journal of the European Communities*, No. C 42/78, available at: <http://upload.wikimedia.org/wikipedia/en/8/80/Europarliament13011983.jpg>

also potentially feasible. Tbilisi is supportive of such an arrangement. The Georgian government remains determined to de-frost the *status quo* and continuously advocates expanded international presence across the administrative boundary lines. The secessionist authorities, too, may ultimately benefit from allowing the EU to deploy monitors in its Southern districts. The regions of Gali in Abkhazia, and Akhalkgori in South Ossetia, have constituted major security concerns for all sides in the post-war era and tensions around the boundary lines remain on the verge of escalating into armed clashes. Russia's strong military foothold in those regions is essentially also unfavorable for the independent standing of the two leaderships. This is particularly troublesome for Sukhumi, who should have a direct interest in allowing for the presence of an international force to balance up Russia's military monopoly.

Russia is unlikely to agree to an expansion of the EUMM in the near term. However, the prospects for gaining acceptance to the deployment of EU monitors across the Administrative Boundary Lines should not be disregarded. To begin with, the policy proposed here is long-term, designed to be in place perhaps for decades, when the governing structures in Russia may look very different from the present. The issue is also closely linked to amount of political pressure put on Russia with regard to the issue of occupation and support for Georgia's territorial integrity. Indeed, should the West officially deem Russia as an occupying power, it would gradually be in Moscow's interest to open up to at the very least partial international monitoring in the region.

#### *Engagement with an Aim at Conflict Resolution*

The EU's ambition to engage more actively in Abkhazia and South Ossetia is an important step in enhancing the EU's role with regard to Georgia's conflicts, and to prevent those territories from being further annexed by the Russian Federation. The current isolation of the two regions also prevents the dissemination of Western standards – which in turns fails to counter the existence and growth of ethnic nationalism, widespread corruption and crimi-

nal networks in the two territories.<sup>93</sup> Engagement is also important in order to promote Europeanization as a more favorable option to integration with Russia, and encourage the elites to embark on the same path as the Georgian government.

In this regard, it is to some extent necessary to differentiate between the two regions, as the prospects for engaging in Abkhazia are higher than with regard to South Ossetia. In particular, the ambiguity of the Abkhaz leadership with regard to foreign engagement is worth noting. While challenging the current shape of Western engagement, the Abkhaz leadership appears more inclined to maintain contacts with the West than what it publicly admits. The Tskhinvali authorities, however, have signaled no such interest. This has led South Ossetia to be largely excluded from the practical discussions regarding engagement. While this is understandable given the political climate in South Ossetia, one should be careful not to leave South Ossetia in the shade of international efforts. Doing so may be interpreted as inconsistency by the West, and only risk undermining the sincerity of Europe's engagement approach, especially in Tbilisi. It may also signal that the West has different objectives and expectations on the two regions, which could result in distrust on all sides towards Western input.

In light of these concerns, it is necessary to design an engagement strategy that does not conflict with the West's non-recognition policy toward Georgia's secessionist regions, or foster further alienation of the two territories from Georgia. Rather, efforts to engage with the two regions should reflect the West's continuous support for Georgia's territorial integrity and security of the South Caucasus region. While recognizing the territories as occupied is an important first step in this regard, signaling that engagement aims at changing the current deadlock in the peace processes rather than safeguarding a new *status quo*.

Georgia's own engagement strategy, which focuses largely on interaction and cooperation between populations in the regions along the administrative boundary lines, may be ambitious in part, but deserves increased attention from the international community. It should be recalled that Georgia pos-

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<sup>93</sup> See e.g. S. Frederick Starr and Svante E. Cornell, "The Caucasus: A Challenge for Europe," *Silk Road Paper*, June 2006.

esses insights and experiences with regard to its conflict territories that the Western community is unable to compete with. It should also be recalled that the Georgian government introduced a similar approach already in 2006 in South Ossetia, where it invested substantially in building incentives for interaction across the Administrative Boundary Line in South Ossetia.<sup>94</sup> While this initiative was interrupted by the 2007 domestic crisis and the August 2008 war, it was widely believed to have the potential for facilitating a resolution of the South Ossetia conflict. Georgia's new strategy – especially the proposal of establishing community zones along the Administrative Boundary Lines – elaborates further on this previous approach, introducing practical elements such as joint cultural projects, free medical consultancy and educational exchange. However, given Georgia's lack of access to the conflict zones, Western assistance in realizing such projects will be vital. Overall, without Western support for its strategy, Georgia's relations with its secessionist populations risk being further undermined.

#### *Coordination of Efforts*

Given the highly interlinked interests of Europe and the U.S. in Georgia, Brussels and Washington should work more actively in partnership to achieve the objective of breaking the current *status quo* in Georgia. Indeed, stability in the South Caucasus region is for all intents and purposes a lowest common denominator for Western powers – but views on how to achieve this objective still differ significantly between Brussels and Washington. Europe's engagement approach and Washington's promotion of strategic patience does little to display coherence and determination with regard to the South Caucasus region, and is likely to be perceived as inconsistency and lack of credibility in the regional capitals.

Uniting around a declaration of occupation would constitute an important step in this regard, as it would display a determination of changing the *status quo* and safeguard international norms and standards in the region. As a

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<sup>94</sup> In November 2006, Tbilisi installed a provisional administration in South Ossetia led by Dmitri Sanakoyev, a former South Ossetian freedom fighter, and launched large-scale rehabilitation projects in Georgian-controlled areas to encourage movement across the Administrative Boundary Line. For more information, see Johanna Popjanovski, "Georgia Speeds up Efforts Toward Conflict Resolution in South Ossetia," *Central Asia – Caucasus Analyst*, 25 July 2007.

second step, the EU and U.S. have potentially important complementary roles to play. The EU's soft power approach coupled with Washington's emphasis on security reform could form a cooperative backbone of conflict resolution processes in Abkhazia and South Ossetia.

The EU and U.S., moreover, should seek to engage Turkey in dialogue on Abkhazia and South Ossetia. Indeed, Western and Turkish interests in the South Caucasus are closely interlinked and as a direct neighbor, Ankara continues to play a crucial role in determining the dynamics of the South Caucasus region. There are also mutual interests between Turkey and Georgia, which makes conflict resolution and stability in the region a priority for Ankara. Turkey continues to be Georgia's main trade partner, and Georgia plays a crucial role for Ankara as a corridor for trade and transportation of Caspian energy supplies to Europe. Moreover, the simultaneous presence of a large ethnic Georgian as well as Abkhaz diaspora in Turkey makes Georgia's conflicts a direct concern for Turkey.

Finally, there is reason to argue that Western policies should seek, as far as possible, to support Georgia's own policies vis-à-vis Abkhazia and South Ossetia. Given Tbilisi's shift away from its previous isolation approach and towards more incentive-based policies, Georgia should be viewed as a part of the solution rather than a part of the problem. It should be noted that the current ambitions by the West are already largely overlapping with the strategies of the Georgian government, which has established engagement as a main priority to achieve a resolution to its conflicts. Indeed, for the West, pursuing a strategy that is uncoordinated with Tbilisi's own policies sends a number of undesired signals. First, it potentially ignores Georgian national legislation and is therefore contrary to the principles of international law. Second, it suggests that the West no longer trusts Tbilisi's agenda, which does little to build confidence between the parties.

#### *Strengthening the Role of Western Institutions in the Region*

Western institutions such as NATO and the EU continue to play an important role for the prospects of democratic and security reform in Georgia in general, and for the resolution of Georgia's conflicts in particular. These institutions share the potential of constituting indispensable forums for coordi-

nation and communication on conflict resolution issues. In particular, considering Russia's influence over decision-making at the OSCE and UN levels, the EU and NATO have important roles to play as alternative, impartial institutions where credible dialogue on conflict resolution, as well could take place.

At the EU level, the Eastern Partnership initiative plays a central role in this regard. The initiative should be expanded to include dialogue on conflict resolution issues at the multilateral level, which has largely been left in the shade of the initiative's bilateral tracks. This could enable experience-sharing across the black sea region – including also Nagorno-Karabakh and Transnistria – and thus enable a broader outlook and understanding of conflict resolution in the regional context. Ideally, this could be coupled with dialogue on energy diversification and trans-Caspian cooperation, an added EU ambition. Expanding the Eastern Partnership in this regard would likely contribute to greater coordination among EU member states, who traditionally find themselves divided on how to approach its Eastern neighborhood.

NATO also constitutes a potentially important forum for enhanced dialogue on conflict resolution. The organization is the only forum that brings together the majority of European states, the U.S. and Turkey, and thus offers an important coordinating function with regard to policies on the South Caucasus.

However, without a membership perspective, neither NATO nor the EU will be able to pull their full weight in the region. Prospective NATO and EU membership continues to be an important carrot for closer interaction with the West, and indeed, adherence to Western values. Yet, efforts to bring Georgia closer to membership of these institutions continue to be marked with ambiguity and a reluctance to irritate Moscow.

A more determined stance with regard to Tbilisi's path towards formal inclusion into Euro-Atlantic structures would not only underline that the August 2008 events did not intimidate the West to submission in relation to Georgia, but would essentially also facilitate engagement with Abkhazia and South Ossetia. It should be recalled that as long as Georgia falls outside the scope of EU membership, engagement with the two territories will remain an intricate issue. While the EU's principled policy towards other secessionist enti-

ties, including Northern Cyprus, is essentially that of non-engagement, Tbilisi is on the one hand faced with the reality of remaining outside the realms of Western institutions, and on the other, to allow for direct access of the EU to its conflict territories. Stronger indications of a realistic Georgian membership perspective in Western institutions would likely put Tbilisi at greater ease with regard to the intentions of the West with regard to its secessionist regions, providing greater momentum for closer cooperation on conflict resolution issues. It would potentially also provide incentives for Sukhumi to a closer dialogue with the Georgian government.



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