The Right to External Self-Determination

The Cases of Abkhazia, South Ossetia, Donetsk and Lugansk

Preface

Dear reader,

This master's thesis is written as completion of the Master's Program in International Security and Law at the department of Political Science and Public Management of the University of Southern Denmark.

I would like to express my deepest gratitude to my supervisor, Dr. Ulrike Barten, for her useful comments, remarks, patience and engagement through the learning process of this master's thesis.

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Glossary

art./arts.	Article/s (of a treaty/declaration/agreement)
CIS	Commonwealth of Independent States
CSCE	Commission on Security and Cooperation in Europe
DPR	Donetsk People's Republic
EU	European Union
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally displaced persons
LN	League of Nations
LRP	Lugansk People's Republic
NATO	North Atlantic Treaty Organization
OSCE	Organization for Security and Cooperation in Europe
para./paras.	Paragraph/s (of a treaty, declaration/agreement=
Res.	Resolution
SMM	Special Monitoring Mission of the OSCE in Ukraine
SSR	Soviet Socialist Republic
UDHR	Universal Declaration of Human Rights
U.K.	United Kingdom
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
U.S.	United States of America
USSR	Union of Soviet Socialist Republics
VDPA	Vienna Declaration and Programme of Action
WW	World War

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Summary

This study examines two questions in regard to the tension between the principle of territorial integrity and a people's right to *external* self-determination. First, the study investigates whether, and under which circumstances, international law provides a right to *external* self-determination under the *classical*, *remedial* and *romantic* approach. Second, based on the findings, the study determines whether the claims of *external* self-determination in the cases of Abkhazia, South Ossetia, Donetsk (DPR) and Lugansk (LPR) may be legally justified, and whether Russia's influence in each of the cases was in accordance with international law.

The first chapter elaborates on the research question and the methodology. The second chapter presents the facts in connection with the cases of Abkhazia, South Ossetia, Donetsk and Lugansk and looks into Russian influence in these cases. Following a presentation of the assumptions of the *classical*, *remedial* and *romantic* approach to *external* self-determination, the third chapter discusses legal instruments and cases with the purpose of delimiting the circumstances in which the right justified by the three approaches can be exercised in accordance with international law. In the fourth chapter, these circumstances serve to determine whether the claims of *external* self-determination in the cases of Abkhazia, South Ossetia, the DPR and the LPR can be legally justified. Finally, the study summarises the findings.

The three approaches are considered to constitute a theoretical continuum. On the one side, the *classical* approach favours the sovereignty and territorial integrity of the existing state, and only authorises *external* self-determination if the statehood becomes questionable (*abnormality*). On the other, the *romantic* approach advocates for an unconditional right of *external* self-determination for all *peoples*, including ethnic and political groups, as long as these groups express a *will* to secede. In between these, the *remedial* approach assumes that if a group has been subject to certain injustices conducted by state authorities, *external* self-determination may be exercised as a last resort.

Based on a discussion of United Nations documents, soft law instruments and cases, the study argues that, first, the *classical* conception of *abnormality* is supported as a justification for the *external* right to self-determination. Second, in order to preserve its territorial integrity, a state must refrain from international crimes or the implementation of policies depriving a group of basic rights. The *remedial* proposition that the denial of such rights entitles a group to *external* self-determination is thus supported by interna-

tional law. Third, the assumption of the *romantic* approach that the *will of the people* is a sufficient criterion for the exercise of a right to *external* self-determination is not accepted under international law. Nevertheless, the approach is upheld in regards to minorities' and political groups' rights of *internal* self-determination. Finally, third-state actors' interference in the exercise of the right to *internal* and *external* self-determination is considered a violation of international law.

These finding serve as guidelines in regards to the question of the legality of the secessionist claims of Abkhazia, South Ossetia, the DPR and the LPR. First, the situation in Georgia did not amount to *abnormality*. Hence, Abkhazia and South Ossetia do not have a right to *external* self-determination under the *classical* approach. By contrast, although the Euromaidan movement in Ukraine constituted a situation of *abnormality*, the DPR and the LPR were unable to ensure functional statal procedures. The claims of secession can therefore no longer be justified. Second, allegations of international crimes committed by state authorities in all three cases were highly exaggerated. The study hence argues that neither Abkhazia, South Ossetia nor the DPR and the LPR are entitled to a right to *external* self-determination under the *remedial* approach. Finally, all three groups constituted *peoples* and expressed a *will*, entitling them to *internal* rights of self-determination under the *romantic* approach. Although Georgia ensured satisfactory guarantees to the inhabitants of Abkhazia, it did not provide *internal* rights to the Ossetians. In Ukraine, the restored constitution and the Minsk II Agreement obliged the government to introduce reforms providing for *internal* rights of self-determination. However, as of summer 2016, the agreement has not been fulfilled. Conclusively, the study argues that Russia's direct and indirect involvement in the regions is to be considered as violations of international law.

1. Introduction

It is beyond debate that the notion of the state and its embedded principle of sovereignty have long occupied a primary role in the fields of international law and international relations. Externally, states are the central actors of the international community, coexisting independently and on an equal foundation, and entering into relations with each other. Internally, states have, without dictation or interference of any other state, a right to exercise jurisdiction over their territory and over all persons and things therein.[1] This right, moreover, entitles states to uphold their borders if these are threatened either from the outside or from the inside.[2] Yet, despite these fundamental rights and duties enshrined in various legal sources, the implications, requirements and thresholds of the principle of state sovereignty have, since the moment of its emergence until today, remained subject to legal, philosophical and political debates.

Among subjects of these debates, state sovereignty appears to be contested by yet another controversial and disputed principle: the principle of self-determination, setting forth that all peoples have a right to freely choose their sovereignty and political status. As a starting point, this principle is at least aimed at rights for specific groups and territorial and political changes within a state's boundaries (*internal* self-determination). Yet, in its most extreme form, the principle might be interpreted as justifying the separation of the territory of one state for the purpose of establishing another (*external* self-determination).[3] Hence, an alleged right to *external* self-determination providing groups with a justification for the creation of new independent political entities, opposing it as an international crime or possibly a breach of a peremptory norm of international law,[4] obviously creates tensions with the principles of sovereignty and territorial integrity.[5] On the one hand, it might be argued that calls for self-determination, autonomy or secession not only potentially challenge the authority of the state, but might simultaneously pose a threat to the broader international order within which each state locates itself.[6] On the other, however, these tensions also demonstrate how modern tendencies in in-

[1] Matthew Craven, *Statehood, Self-Determination and Recognition* in: Malcolm D. Evans (ed.), International Law, 2014, pp. 216-217.
[2] David Raič, *Statehood and the Law of Self-Determination*, 2002, p. 2.
[3] *ibid.*
[4] Matti Koskenniemi, "National Self-Determination Today- Problems of Legal Theory and Practice," *International and Comparative Law Quarterly*, vol. 43, no. 2 (1994), p. 241.
[5] Christian Walter, *Introduction,* in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, p. 1.
[6] Craven, *supra* note 1, p. 202.

ternational law, promoting human rights against the authority of the state, might clash with older approaches emphasising the importance of the state for the protection of international peace and stability.[7] The debate between those favouring sovereignty and those favouring human rights and self-determination therefore seems ambiguous as neither of the arguments readily overrules the other.[8]

Self-determination traces its roots back to the Age of Enlightenment and the French Revolution with its triadic philosophical imperatives of liberalism, nationalism and independence.[9] By the 19th century, in the spirit of nationalism, the principle mobilised European populations to overthrow foreign rulers and to establish new nation states. Promoted by President Wilson and various socialist leaders, it further played a considerable role in the post-WWI settlement of territorial arrangements in Central and Eastern Europe.[10] Influenced by the post-WWII reactions to the excesses committed in the name of extreme nationalism, the principle did, however, only materialise into a legal right with the establishment of the United Nations (hereinafter 'the UN'). The renewed principle of self-determination of the *peoples*, enshrined in the Charter of the UN and other legal instruments, became the justification for both national and political movements in colonial territories seeking legitimacy for secession from the imperial states, and eventually the basis for the establishment of new independent entities all over the globe.[11]

The question of the principle's applicability in the postcolonial era has similarly been subject to legal debate. With the end of decolonisation and the world being divided by various entities almost all bearing the characteristics of sovereign states, international lawyers assumed that the applicability of the principle of self-determination had come to an end.[12] A renewed wave of its application in connection with the dissolutions of the Soviet Union, Czechoslovakia and Yugoslavia, and the independence of Kosovo and other entities, has, however, disproved the latter assumption, demonstrating that the principle, although highly controversial, is still alive.[13] As of today, a growing number of communities, basing their distinctiveness on ethnicity, culture, history or political affiliation,

[7] *ibid.*
[8] Koskenniemi, *supra* note 4, p. 250.
[9] Edward McWhinney, *Self-determination of Peoples and Plural-ethnic States in Contemporary International Law: Failed states, Nation-building and the Alternative, Federal Option*, 2006, p. 1.
[10] McWhinney, *supra* note 9, p. 3.
[11] Koskenniemi, *supra* note 4, p. 241.
[12] Walter, *supra* note 5, pp. 1-2; Raič, *supra* note 2, p. 1.
[13] *ibid.*

are attempting, by pacific or violent means, to achieve the very same goal. It is, however, important to understand the complexity of these conflicts, which, instead of solely placing their foundations on ethnical or cultural differences, often rather might be described as centre-periphery tensions. The need to protect the interests of groups against the more powerful centre may arise due to many factors, but the solutions pursued in many of such instances are similar.[14] Among others, regions such as Transnistria in Moldova, Abkhazia and South Ossetia in Georgia, Chechnya in Russia, Somaliland in Somalia and most recently the regions of Donetsk and Lugansk in Ukraine have all sought to legitimise their claims of greater political autonomy or secession by referring to the right to self-determination of peoples.

In addition to the aforementioned legal issues in connection with the existence of a right to *external* self-determination and its tension with the principle of sovereignty, this study aims at determining the actors entitled to the application of the principle, the principle's embedded requirements and implications, the role of third-state actors and whether *external* self-determination solely applies in situations of decolonisation and occupation, or, whether it might be justified by suppression and human rights violations. In referring to the principle, this study primarily analyses legal issues in connection with *external* self-determination, that is, the pursuit of full legal secession for a given people from a larger political entity. This said, the importance of *internal* self-determination, understood as the aspiration for more political and social rights, including the possibility of autonomy, cannot be neglected and will be referred to throughout the study, as it constitutes a significant step in groups' self-expression and may serve as a crucial instrument in the de-escalation of intra-state tensions. Cases of special rights to self-determination, that is, when the possibility of secession is already enshrined in a state's constitution, are outside the scope of the study. Instead, the investigation of the existence of such right will exclusively be founded on sources of international law. Finally, justifications based on historical arguments, such as a right to establish a new state on the basis of a state's previous existence, will not be considered.

The first chapter of the study elaborates on the research question and the methodology. The second chapter presents the relevant facts in connection with self-determination in the cases of the self-proclaimed republics of Abkhazia, South Ossetia,

[14] Hurst Hannum, *Procedural Aspects of International Law: Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights*, 2nd edition, 1996, p. 4.

Donetsk and Lugansk. After a brief account of the common features of these regions, the chapter examines the context in which each of the cases' claims of *external* self-determination appeared. Finally, the chapter will look into existing allegations and the plausibility of Russian influence in the self-proclaimed republics' pursuit of independence. Following a presentation of the main assumptions of the *classical*, *remedial* and *romantic* approach to *external* self-determination, the third chapter identifies and discusses relevant legal instruments and cases with the purpose of delimiting the circumstances in which the right justified by the three approaches can be exercised in accordance with international law. Once these circumstances are identified, they will, in the fourth chapter, serve to determine whether the claims of *external* self-determination in the cases of Abkhazia, South Ossetia, Donetsk and Lugansk can be legally justified. Finally, the study will end with a set of conclusions aimed at summarising the findings and briefly outline the relationship between lessons learned, practices and the way forward for the discussed cases.

1.1. Research question

With the dissolution of the USSR and the emergence of fifteen independent states basing their foundation on the principle of *uti possidetis iuris,* recognising their former administrative boundaries, certain ethnically, culturally or linguistically distinct groups found themselves within the borders of new governments.[15] As a result of the Soviet democratisation reforms towards the end of the 1980s, among others resulting in openness towards issues of prior oppression and resurgent nationalism, these groups raised demands of autonomy and ultimately expressed a will to secede.[16] Consequently, demands of both *internal* and *external* self-determination have threatened the territorial integrity of existing states[17], and have, in various cases, led to violent conflicts in the pursuit of independence. Peace agreements intended to stabilise and reconcile the state authorities and the separatist groups have often proved to be ineffective, turning the situations into unresolved, frozen conflicts.

The present study examines two essential questions in regard to the tension between the principle of territorial integrity and a peoples' right to *external* self-

[15] Christopher Waters, *South Ossetia,* in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, p. 181.
[16] Neil MacFarlane et. al., *Armed Conflict in Georgia: A Case Study in Humanitarian Action and Peacekeeping*, 1996, pp. 14-15.
[17] Walter, *supra* note 5, p. 1.

determination. First, the study investigates whether, and under which exact circumstances, international law provides a right to *external* self-determination. For this purpose, three different and in part contradictory approaches on the matter will be considered: the *classical*, *remedial* and *romantic* approach. Second, based on the findings, the study determines whether the claims of *external* self-determination in the cases of the self-proclaimed republics of Abkhazia, South Ossetia, Donetsk and Lugansk may be legally justified. In this endeavour, the study moreover examines whether Russia's direct and indirect influence in each of the cases was in accordance with international law.

1.2. Methodology

The investigation of the existence of a right to *external* self-determination under the *classical*, *remedial* and *romantic* approach will be traced in various legal sources and cases reflecting the development of the right from the beginning of the twentieth century until today. The sources interpreted are respectively United Nations documents (Chapter 3.2), soft law instruments (Chapter 3.3) and cases (Chapter 3.4) reflecting international custom, general principles of law and the opinion of law set forth in judicial decisions and advisory opinions of highly qualified publicists.[18]

United Nations documents. Besides certain provisions of the UN Charter, comprising what might be understood as a constitution for the international system with the highest authority of international law,[19] the legal instruments presented and interpreted in the chapter are primarily resolutions of the UN General Assembly (hereinafter 'the UNGA'). The purpose of the examination of these resolutions serves to reflect the historical and legal development of the principle of self-determination and its implications, as affirmed by the members of the UN. The study takes into consideration that UNGA resolutions serve as recommendations and are not attributed a force of bindingness by the Charter on an equal footing with resolutions of the UN Security Council (hereinafter 'the UNSC') It is, however, simultaneously acknowledged that these resolutions are state propositions of general law and are often assented to by a large majority of member states. Legal consequences may flow from acts which are not binding and may be developed by various non-legislative acts which do not seek to secure direct compliance from the

[18] United Nations, *Statute of the International Court of Justice*, 18 April 1946, art. 38.
[19] Ian Hurd, *International Organization: Politics, Law, Practice*, 2nd edition, 2014, p. 102.

member states.[20] In other words, largely supported instruments may be evidence of either existing law or formative of the *opinio juris* or state practice that generates new customary international law.[21] Following this argument, it is easy to confer such resolutions with the authority of binding instruments and to consider nothing more than the instrument itself in examining a rule.[22]

Soft law instruments. The two instruments examined, both declarations of the Conference on Security and Cooperation in Europe (hereinafter 'the CSCE', later renamed 'the OSCE'), do not have the statuses of legally binding international treaties, but may be considered soft law.[23] As the three cases of self-determination examined in Chapter 4 of this study relate to states parties to the organisation (Georgia and Ukraine), the instruments are considered to be highly relevant and are believed to serve as a contribution to the identification of a right to *external* self-determination. Similarly to UNGA resolutions, soft law instruments are generally not considered legally binding, but may nevertheless provide evidence of existing law or, perhaps, the formation of new customary law. Widespread acceptance of such instruments may legitimise conduct, make the legality of alternative positions harder to sustain,[24] and may constitute a "subsequent agreement between the parties regarding the interpretation of [a] treaty or the application of its provisions".[25] Hence, the important point is that some forms of soft law, such as interstate conference declarations or other codes of conduct, guidelines and recommendations of international organisations, are potentially law-making in the same way as multilateral treaties.[26]

Cases. The right to *external* self-determination will be examined in the cases of the Åland Islands, Bangladesh and Kosovo, representing circumstances in which the right was considered outside decolonisation. The chapter assesses the facts which did or did not result in independence and discusses advisory opinions, judicial decisions and international reactions. By evaluating existing authoritative statements of international

[20] Ian Brownlie, "The Legal Status of Natural Resources in International Law," *Recueil des Cours*, vol. 1, no. 162 (1979), p. 261.
[21] Alan Boyle, *Soft Law in International Law-Making* in: Malcolm D. Evans (ed.), International Law, 2014, p. 119.
[22] Hugh Thirlway, *The Sources of International Law* in: Malcolm D. Evans (ed.), International Law, 2014, p. 113.
[23] Eric Manton, "The OSCE Human Dimension Process and the Process of Customary International Law Formation," *Organization for Security and Co-operation in Europe*, OSCE Yearbook (2005), pp. 13-14, 16.
[24] Boyle, *supra* note 21, p. 119.
[25] *Vienna Convention on the Law of Treaties (VCLT)*, Vienna, 23 May 1969, *United Nations Treaty Series*, vol. 1155, p. 331, art. 31(3)(a).
[26] Boyle, *supra* note 21, pp. 119-120.

judicial institutions,[27] and further, in some of the cases, the presence of uniform state practice and states' conviction that a right to *external* self-determination is consistent with international law,[28] the chapter aims at identifying whether such a right has been established as an international custom.

The interpretation and discussion of the aforementioned legal instruments and cases will serve to identify the circumstances in which the right justified by respectively the *classical*, *remedial* and *romantic* approach can be exercised in accordance with international law. The findings will be applied to the cases of Abkhazia, South Ossetia, Donetsk and Lugansk, all regions bordering Russia. Moreover, the study will determine whether Russia's influence in these regions can be considered legal. The presentation of the relevant facts in connection with the cases will be based on academic writings, reports by fact-finding missions and international observers, preliminary investigations, press releases and addresses of government officials, and newspaper articles. The study takes into consideration the politicised character of some of these sources. Finally, the conflicts' unresolved and frozen nature and Russia's prevention of attempts at deploying international observers in the regions[29] are considered to constitute limitations in regards to the gathering and presentation of evidence and ultimately the application of the three approaches to *external* self-determination to the cases.

2. Relevant Facts

The following part of the study presents the relevant facts in connection with self-determination in the cases of the self-proclaimed republics of Abkhazia, South Ossetia, Donetsk and Lugansk. After a brief account of the common features of these regions, the chapter examines the context in which each of the cases' claims of *external* self-determination appeared, and how these claims have been justified. Finally, the chapter looks into existing allegations and the plausibility of Russian influence in the self-proclaimed republics' pursuit of independence.

[27] *Statute of the International Court of Justice*, *supra* note 18, art. 38.
[28] Thirlway, *supra* note 22, p. 98.
[29] Parliamentary Assembly of the Council of Europe, *The consequences of the war between Georgia and Russia*, res. 1633 (October 2008) (available at www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=17681&lang=en), para. 20.

2.1. Cases: common features

The cases examined and the conflicts in connection with them trace their roots back to the dissolution of the Soviet Union. The democratisation reforms towards the end of the 1980s and the crumbling of communist power opened up for new, or renewed, demands for self-determination and claims of prior oppression, previously neglected or silenced by a common ideological project. With an increasingly obvious power vacuum, new ethnically, culturally or politically based nations became the most prominent alternative source of identity.[30] With the fall of the Union and the emergence of fifteen states basing their foundation on the principle of *uti possidetis iuris*, certain ethnic groups found themselves within the borders of new governments.[31] For some of these groups, often constituting a majority in a subordinate administrative unit, the abnormal circumstances were considered to be an opportunity to establish their own states.[32]

Neither Abkhazia, South Ossetia, Donetsk nor Lugansk, inhabited by ethnically, linguistically or culturally distinct populations, had themselves formed union republics, but enjoyed some degree of autonomy within other republics. Disagreements within the newly establish states resulted in proclamations of self-determination, in all cases leading to violent conflicts in the pursuit of independence. As of 2016, the self-proclaimed entities are largely unrecognised by the international community and are considered unstable regions within existing states. Moreover, peace agreements intended to stabilise and reconcile the conflicting sides have proven to be ineffective, turning the situations into unresolved, frozen conflicts.

2.1.1. Republic of Abkhazia

Disagreements regarding the future division of the dissolving USSR created tensions between the government of the Georgian Soviet Socialist Republic (hereinafter 'the Georgian SSR') and its subordinate regions, including the Abkhaz Autonomous Republic, inhabited partly by ethnically, culturally and linguistically distinct Abkhazians. The Georgian government's decision to nullify all treaties concluded by Moscow since 1921, signalising a clear move towards independence, worried the Abkhazian population, who feared that an independent Georgia would disregard its autonomous status ensured by

[30] MacFarlane et. al., *supra* note 16, pp. 14-15.
[31] Waters, *supra* note 15, p. 181.
[32] Thomas Burri, *Secession in the CIS,* in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, p. 143.

the Soviet constitution.[33] Unlike the Georgian population, the Abkhazians were among a few minorities who did not support the independence and instead argued for a separate republic within a renewed Soviet Union. In 1988, leading Abkhazian intellectuals sent a letter to Gorbachev in which they expressed concerns regarding the authorities' suppression of their culture through Georgianisation following Georgian intentions to merge the Abkhaz State University with the State University of Tbilisi, consequently calling for separation from Georgia.[34] Similar concerns were expressed during the All-Union referendum in March 1991, when the majority of the Abkhazian population voted to preserve the Soviet state, and further when they boycotted Georgia's referendum on independence a few weeks later.[35] Despite these objections, in April 1991 Georgia declared its independence abolishing the Soviet constitution and restoring the constitution of the 1921 Democratic Republic of Georgia. Many Abkhazians, erroneously, believed that this decision indicated the abortion of the Abkhazian Autonomous Republic causing public disorder and eventually a call for effective Abkhazian independence by members of the regional Supreme Council in July 1992.[36]

The declaration, followed by heated anti-Georgian rhetoric,[37] a campaign of ousting Georgian officials from their offices and growing violence against civilians, soon lead the new breakaway republic into an armed conflict.[38] In August 1992, in an attempt to restore order and halt increasing secessionist sentiments, Georgian forces entered the region, taking the regional capital of Sukhumi and forcing the leadership to retreat to the north-western part of the republic, consequently initiating the Abkhazian War.[39] The next months saw several attempts at recapturing Sukhumi, various unsuccessful ceasefire agreements and accusation of gross human rights violations, including genocide, by both sides of the conflict.[40] By 1993 separatist forces succeeded at recapturing large parts of Abkhazia, forcing Georgian troops to withdraw and causing coercive displace-

[33] Farhad Mirzayev, *Abkhazia,* in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, pp. 191-192.
[34] MacFarlane et. al., *supra* note 16, p. 9.
[35] Svante E. Cornell, *Small Nations and Great Powers: A study of ethnopolitical conflict in the Caucasus*, 2001, p. 158.
[36] *ibid*.
[37] *ibid*.
[38] Mirzayev, *supra* note 33, p. 192.
[39] Cornell, *supra* note 35, p. 159.
[40] "Chronology: Accord Georgia," *Conciliation Resources*, 1999, (available at www.c-r.org/our-work/accord/georgia-abkhazia/chronology.php).

ment of the majority of Georgians.[41] In a final attempt at appeasing the sides, international negotiation efforts, mediated by the UN, the OSCE and Russia, eventually lead to a brokered agreement (the Moscow Agreement) in spring 1994.[42] In addition to ceasefire, the agreement set forth a framework for internally displaced persons' (hereinafter 'IDPs') repatriation, a security zone restricted of heavy weapons separating the Abkhazian and the Georgian populations, and a CIS (Commonwealth of Independence States) peacekeeping force and UN observer mission monitoring the compliance of the settlement.[43]

The 1992-1994 war is estimated to have taken 10,000 lives.[44] Abkhazian allegations suggest that Georgian troops entering the republic committed "a pattern of vicious, ethnically based pillage, looting assault, and murder".[45] Before the war, Abkhazians made up less than 20 % of the region's population, while less than 50 % was Georgian.[46] Georgian sources indicate that Abkhazian forces recapturing the region carried out "widespread atrocities against the Georgian civilian population, killing many women, children and elderly, capturing some as hostages and torturing others",[47] and further committing ethnic cleansing in the Gali district.[48] According to UN estimates, the conflict resulted in approximately 250,000 to 300,000 IDPs fleeing Abkhazia, most of which were Georgians.[49]

Despite the international community's relative success in putting an end to the war, the Moscow Agreement turned the situation into a frozen conflict with sporadic armed clashes and violations of human rights on both sides continuing throughout the post-war years.[50] By November 1994, the Supreme Council of the self-proclaimed Republic of Abkhazia continued its state-building process by adopting a new constitution emphasis-

[41] *ibid*.
[42] Mirzayev, *supra* note 33, pp. 193-194.
[43] UN Security Council resolution 934, *Adopted by the Security Council at its 3398th meeting, on 30 June 1994*, S/RES/934 (30 June 1994); UN Security Council resolution 937, *Adopted by the Security Council at its 3407th meeting, on 21 July 1994* (21 July 1994).
[44] Cornell, *supra* note 35, p. 162.
[45] Human Rights Watch, *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict*, vol. 7, no. 7 (March 1995) (available at www.hrw.org/reports/1995/Georgia2.htm#P390_81874).
[46] "Population censuses in Abkhazia: 1886, 1926, 1939, 1959, 1970, 1979, 1989, 2003," *Ethno-Caucasus*, 2014 (available at www.ethno-kavkaz.narod.ru).
[47] MacFarlane et. al., *supra* note 16, p. 26.
[48] Cornell, *supra* note 35, p. 162.
[49] MacFarlane et. al., *supra* note 16, pp. 11, 21-22.
[50] MacFarlane et. al., *supra* note 16, p. 26.

ing its "right (…) to self-determination".[51] This right was further accentuated in a 1999 referendum and the subsequently adopted Act of Independence, retroactively re-establishing the *de jure* independence since the 1992–1993 war, and appealing to the international community to recognise Abkhazia "on the basis of the right of nations to free self-determination".[52] Following the Russo-Georgian War in 2008, this appeal was answered by Russia and Nicaragua, who, as the first states, recognised Abkhazia as an independent state.

2.1.2. Republic of South Ossetia

Unlike the Abkhazians, the South Ossetians, the southern group of the indigenous people to Russo-Georgian divided Ossetia, did not enjoy the same degree of autonomy within the Georgian SSR. Therefore, as a result of the resurgent nationalism during the perestroika years, in 1989 semi-autonomous South Ossetia demanded greater self-governance. In response, Georgian authorities banned political parties calling for *internal* self-determination and degraded South Ossetia's already limited political status, leading to protests in the region,[53] and a declaration of independence as the South Ossetian Democratic Republic within the Soviet Union in 1990. Following Georgia's independence and renewed Ossetian attempts at obtaining wider autonomy, in December 1991 South Ossetia declared its independence from Georgia. Yet, its inability to determine its position as to whether to become independent or to become part of a third state, however, became obvious a few months later, when the self-proclaimed republic held a referendum on unification with Russia, largely supported by the majority of the Ossetian population.[54] However, Moscow's reluctance to incorporate South Ossetia, the Georgian authorities' final abolishment of the limited regional autonomy in response to the declaration, and demonstrations of both Georgian and Ossetian nationalists triggered violence with military operations in the region.[55]

By June 1992 the Sochi Accord paved the way for ceasefire and a process for political resolution, entrusting Ossetian authorities *de facto* control over the region. The

[51] *Constitution of the Republic of Abkhazia*, Sukhumi, 26 November 1994 (available at www.mfaapsny.org/en/constitution), art. 1.
[52] *Act of State Independence of the Republic of Abkhazia*, Sukhumi, 12 October 1999 (available at www.abkhazia.narod.ru/act_Nezavisim.htm).
[53] Waters, *supra* note 15, pp. 176-177.
[54] Farhad Mirzayev, *Uti Possidetis v. Self-Determination: The Lessons of the Post-Soviet Practice*, 2014, pp. 13-14.
[55] MacFarlane et. al., *supra* note 16, p. 8.

peace accord established a tripartite peacekeeping force consisting of Russian, Georgian and Ossetian military units and of mediation efforts lead by the OSCE. Despite the international efforts' lack of success in reconciling the parties, they still provided over ten to fifteen years of relative peace before the Five-Day War in 2008.[56] Nevertheless, during the war South Ossetia's infrastructure had been destroyed, and the economy, law and order had collapsed. Absence of central control made areas outside the regional capital Tskhinvali deteriorate into armed banditry and organised crime.[57] The conflict had taken over 1,000 lives and had seen 40,000 and 100,000 refugees fleeing to respectively Georgia and Russia.[58]

The situation appeared to change in the years after Georgia's 'Rose Revolution' in 2003, when newly appointed president Saakashvili, in an attempt to reintegrate the region, promised the Ossetians a high degree of autonomy,[59] including a free and directly elected local self-government and a voice in the national structures of the national government.[60] South Ossetia's *de facto* independence since 1992 had, however, given it sufficient time to establish statal institutions and to develop a confident popular determination not to return to Georgia.[61] This perception was clearly established in its 2001 constitution, stating that "The Republic of South Ossetia is a sovereign (…) state which has been founded by the virtue of self-determination of [its] people".[62]

Tensions over the status of the region between Russian-supported South Ossetian and Georgian forces escalated when Saakashvili initiated a military campaign against separatist units in August 2008. The campaign lead to a full-scale conflict known as the Five-Day War, including Russian intervention in Georgia, eventual Georgian defeat, and the establishment of *de facto* control over South Ossetia by separatist authorities.[63] During the conflict violations of human rights and international humanitarian law occurred on all sides. Estimates suggest that over 400 ethnic Georgians, half of which were civilians, were killed, while up to 18,500 IDPs were displaced in an anti-Georgian campaign

[56] Waters, *supra* note 15, pp. 176-177.
[57] MacFarlane et. al., *supra* note 16, p. 8.
[58] Waters, *supra* note 15, pp. 176-177.
[59] *ibid*.
[60] "Address by Mikheil Saakashvili on the occasion of the first of the 2005 Ordinary Session of the Council of Europe Parliamentary Assembly," Council of Europe, 26 January 2005 (available at www.coe.int/T/E/Com/Files/PA-Sessions/janv-2005/saakashvili.pdf).
[61] Waters, *supra* note 15, pp. 177-178, 181.
[62] *Constitution of the Republic of South Ossetia*, Tskhinvali, 8 April 2001 (available at www.sojcc.ru/zakoniruo/196.html), art. 1.
[63] Mirzayev, *supra* note 54, p. 15.

conducted by South Ossetian authorities, reducing the Georgian population by at least 75 %.[64] South Ossetian authorities reported a total of 365 deaths of both civilians and members of South Ossetian forces, while Russia provided information stipulating that 162 ethnic Ossetian civilians had died.[65]

In a similar manner as in the case of Abkhazia, following the war, Russia's President Medvedev recognised the independence of South Ossetia, turning the unresolved situation between Georgia and South Ossetia into another frozen conflict.[66]

2.1.3. People's Republics of Donetsk and Lugansk

Following the Euromaidan movement, president Yanukovych's dismissal and the formation of an interim government in Ukraine in February 2014, rallies in support of respectively federalisation and of wider EU integration of Ukraine, with occasional clashes between the demonstrators, began occurring throughout the country. The most intense clashes appeared in Ukraine's south-eastern cities, including Donetsk, Lugansk, Kharkov and Odessa, where a Russian-speaking and substantially large Kremlin-supporting population constitutes the majority of the inhabitants.[67]

By April pro-Russian activist in various cities in the Donbas region seized government buildings, expressing discontent with the new government in Kiev, demanding amnesty for previously arrested protesters, the enshrinement of Russian as a co-official language of Ukraine, and either federalisation of the country or incorporation into the Russian Federation.[68] On April 7 and April 27, activists in Donetsk and Lugansk proclaimed the creation of the sovereign states of the People's Republic of Donetsk (hereinafter 'the DPR') and the People's Republic of Lugansk (hereinafter 'the LPR'), appointing 'people's governors', and searching legitimacy for the proclamations by calling for Crimea-styled referenda on secession from Ukraine, simultaneously undermining the up-

[64] International Criminal Court, Office of the Prosecutor, *Situation in Georgia Summary of the Prosecution's Request for authorisation of an investigation pursuant to article 15* (13 October 2015) (available at www.icc-cpi.int/iccdocs/otp/Art_15_Application_Summary-ENG.pdf).
[65] *ibid.*
[66] Waters, *supra* note 15, p. 179.
[67] "Donetsk activists proclaim region's independence from Ukraine," *Russia Today*, 7 April 2014 (available at www.rt.com/news/donetsk-republic-protestukraine-841/).
[68] Shaun Walter, "Ukraine crisis escalates as pro-Russia activists declare independence in Donetsk," *The Guardian* (available at www.theguardian.com/world/2014/apr/07/ukraine-crisis-pro-russia-activists-declare-independence-donetsk).

coming May 25 presidential election in the country.[69]

Despite no international observers present to validate the voting, both referenda were held on 11 May 2014. With an asserted turnout at over 80 % and more than 90 % of voters said to have voted in favour of secession or a future incorporation into Russia, the people's governors of the republics declared the entities independent states on May 12.[70] In connection with the declarations, Lugansk people's governor, Valery Bolotov, stated that both republics had chosen their "own path of independence from tyranny and bloody dictatorship by the Kiev junta".[71] The argument of seeking an alternative to the newly-established pro-Western Ukrainian government by seceding was similarly justified by the ousted president Yanukovych, who blamed Kiev for violently suppressing thousands of demonstrators in rallies in support of federalisation, and for being "responsible for the killing of activists in Odessa, Kharkov, Mariupol, Slavyansk and Kramatorsk".[72] Similarly, Moscow stated that the results of the vote convincingly showed the real determination of the people in the regions to have a right to make their own decisions on issues concerning their vital interests.[73] Both republics soon begun establishing state institutions and military units and signed an agreement on a merger into the Federal State of Novorossiya, classified by Ukraine's government as a terrorist organisation. Due to disagreements between the leadership, the project was terminated in May 2015.[74]

In the following months, military clashes over the control of the region between units of the republics and the Armed Forces of Ukraine began to intensify,[75] and viola-

[69]"Federalization supporters in Luhansk proclaim people's republic," *TASS*, 28 April 2014 (available at www.tass.ru/en/world/729768).
[70]Kashmira Gander, "Ukraine crisis: Russia backs results of Sunday's referendums in Donetsk and Luhansk," *Independent*, 12 May 2014 (available at www.independent.co.uk/news/world/europe/ukraine-crisis-russia-backs-results-of-sundays-referendums-in-donetsk-and-luhansk-9354683.html).
[71]"Ukraine's Lugansk Declares Itself Sovereign State, Donetsk Seek Union with Russia," *Independent.mk*, 12 May 2014 (available at www.independent.mk/articles/4944/Ukraine's+Lugansk+Declares+Itself+Sovereign+State,+Donetsk+Seek+Union+with+Russia).
[72]"Donetsk residents came to referendum because people had reached their wits' end – Yanukovych," *Sputnik* News, 12 May 2014 (available at www.sputniknews.com/voiceofrussia/news/2014_05_12/People-of-Donetsk-region-came-to-referendum-because-people-had-reached-their-wits-end-Yanukovych-8765/).
[73]"Comment by the Russian Ministry of Foreign Affairs regarding referendums in the Donetsk and Lugansk Regions of Ukraine," *Ministry of Foreign Affairs of the Russian Federation*, 12 May 2014 (available at www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/61202).
[74]"Russian-backed 'Novorossiya' breakaway movement collapses," *Ukraine Today*, 20 May 2015 (available at www.uatoday.tv/politics/russian-backed-novorossiya-breakaway-movement-collapses-428372.html).
[75]Gander, *supra* note 70.

tions of international humanitarian law were committed on both sides.[76] The September 2014 Minsk Protocol signed by the leaders of the republics and representatives of Russia, Ukraine and the OSCE, among other intended to ensure more decentralisation of Ukraine, collapsed with the ceasefire immediately broken.[77] A renewed agreement, the Minsk II, initiated by the leaders of Ukraine, Russia, Germany and France, was signed by the parties in February 2015. In addition to ceasefire, an OSCE monitoring mission and humanitarian assistance, the package of measures required the seceded territories to be reintegrated into Ukraine in exchange for constitutional reforms, including the assurance of decentralisation and adoption of legislation on autonomous status of the Donetsk and Lugansk regions, the right of language self-determination, local elections and representatives of the eastern regions in Ukraine's government.[78]

Despite the deadline of the implementation of the Minsk II Agreement at the end of December 2015, as of summer 2016 its conditions have not been met.[79] With the ceasefire holding intermittently and the parties routinely accusing each other for violating the agreement, local elections in eastern Ukraine have been deemed impossible or unsafe. The legislation on decentralisation and autonomous status of the Donetsk and Lugansk regions have been approved by Ukraine's government, but their implementation is pending until local elections have been held.[80]

The people's republics of Donetsk and Lugansk have only been recognised by the self-proclaimed Republic of South Ossetia.[81]

2.2. Russian Influence

Although not always obvious, allegations of Russia's military, political and economic influence in the pursuit of self-determination in the cases of Abkhazia, South Ossetia and

[76] Human Rights Watch, *World Report 2015: Events in 2014* (available at www.hrw.org/world-report/2015/country-chapters/ukraine).
[77] "Ukraine forces admit loss of Donetsk airport to rebels," *The Guardian*, 21 January 2015 (available at www.theguardian.com/world/2015/jan/21/russia-ukraine-war-fighting-east).
[78] "Full text of the Minsk agreement," *Financial Times*, 12 February 2015 (available at www.ft.com/intl/cms/s/0/21b8f98e-b2a5-11e4-b234-00144feab7de.htmull text of the Minsk agreementl#axzz44a9pJft0).
[79] Gwendolyn Sasse, "To Be or Not to Be? Ukraine's Minsk Process," *Carnegie Europe* (available at www.carnegieeurope.eu/strategiceurope/?fa=62939).
[80] *ibid*.
[81] "South Ossetia recognizes independence of Donetsk People's Republic," *TASS*, 27 June 2014 (available at www.tass.ru/en/world/738110).

the regions of Donetsk and Lugansk have been raised by both Western states and by leaders of the states in which the aforementioned crises took place.[82]

The 1992 Sochi Accord and the 1994 Moscow Agreement in respectively South Ossetia and Abkhazia, paving the way for ceasefire, also established certain mediation mechanisms and CIS peacekeeping forces, almost unilaterally controlled by Russia.[83] While these efforts may have been successful in the early stages of the conflict by decreasing the death toll of civilians and the return of a few thousand IDPs,[84] later years suggest that the forces were largely used to support Abkhazian and Ossetian separatism and added little to the actual reconciliation of the conflicting parties.[85] Georgia has pre and post the 2008 Five-Days War in Ossetia considered this support as aggression against its territorial integrity and has opposed Russia's presence in the regions by urging the replacement of the peacekeeping forces.[86] Similarly, president Saakashvili has portrayed the regions as stooges of Moscow, referring to Russia's effective control over Abkhazia and South Ossetia's state institutions, economic spheres and military.[87]

During the 1992-1994 war in Abkhazia Russia's military presence became clear as unmarked fighter planes, despite the Abkhazians not possessing any air force, began bombarding the regional capital of Sukhumi. Nevertheless, and notwithstanding growing involvement, Russia's presence was not internationally condemned and its rhetoric during the war, although criticising the deployment of heavy arms against the Abkhazians, portrayed a Russia desiring to preserve Georgia's integrity.[88] Following the Moscow Agreement, which as a result of the establishment of the security zone physically separated Abkhazia from Georgia and thus excluded the latter from influence in the region, Russian political support paved the way for an autocratic regime headed by Abkhazia's president Ardzinba.[89] After Moscow's recognition of Abkhazia in 2008, Russia formally established military bases in the republic and has been guarding Abkhazia's borders.[90] In 2014 president Putin and Abkhazia's president Khajimba signed a treaty creating a joint Russian-Abkhazian military force, further formalising Russia's direct involvement

[82] Waters, *supra* note 15, pp. 177-178.
[83] MacFarlane et. al., *supra* note 16, p. 16.
[84] Mirzayev, *supra* note 33, p. 204.
[85] Mirzayev, *supra* note 54, p. 190.
[86] Giorgi Sepashvili, "Resolution on Peacekeepers Leaves Room for More Diplomacy," *Civil Georgia*, 16 February 2006 (available at www.civil.ge/eng/article.php?id=11833).
[87] Waters, *supra* note 15, pp. 177-178.
[88] Cornell, *supra* note 35, pp. 159-160, 162.
[89] *ibid.*
[90] Mirzayev, *supra* note 54, pp. 191-192.

in the separation from Georgia.[91] In addition to its increasing effective control of the political and military spheres, Russia strongly influenced Abkhazia's post-war economy through economic support, including the introduction of the rouble as the *de facto* currency of the republic.[92]

These factors are correspondingly applicable to South Ossetia, where peacekeeping forces' lack of neutrality, support for separatists and Russia's control over political and economic institutions and military units has been present. During the Five-Day War in 2008, Russian forces not only supported separatist units in pushing Georgian troops out of the region, but also helped capturing Ossetian and Abkhazian-claimed territories, previously controlled by Georgia.[93] Prior to the war, Russian troops and separatist forces had granted Russian passports to Ossetian and Abkhazian inhabitants of the self-proclaimed republics. Russia justified its actions by referring to self-defence and the vague doctrine of *protection of nationals abroad*, claiming that Georgia had conducted human rights violations against their citizens.[94]

The direct assistance might seem less apparent in Eastern Ukraine, where the proclamation of the two republics took place only after the internationally condemned annexation of Crimea in March 2014. Nevertheless, its influence in the region appears to be present in all spheres. Russian political strategist are said to be embedded in the separatist governments, while servicemen, volunteers and mercenaries have taken up arms to fight in the separatist units.[95] Simultaneously, there have been signs of money, arms and other military equipment crossing the border into the region.[96] In fall 2014, NATO claimed that there were 3,000 Russian servicemen present in the region, while Ukraine's government put the number as high as 10,000 and moreover alleged that a convoy of 32 Russian tanks and 30 trucks of Russian soldiers had crossed the border.[97] Western leaders have similarly been criticising and warning Moscow against sending humanitarian convoys, alleging that the aid mission was nothing but a pretext for a military interven-

[91] "Georgians protest against Russia-Abkhazia agreement," *BBC*, 15 November 2014 (available at www.bbc.com/news/world-europe-30071915).
[92] "Regions and territories: Abkhazia," *BBC*, 12 March 2012 (available at www.news.bbc.co.uk/2/hi/europe/3261059.stm).
[93] Mirzayev, *supra* note 33, p. 204.
[94] Paul A. Goble, "Russian 'Passportization'," *The New York Times*, 9 September 2008 (available at www. www.topics.blogs.nytimes.com/2008/09/09/russian-passportization/?_r=0).
[95] Courtney Weaver, "Ukraine's rebel republics," *Financial Times*, 5 December 2015 (available at www.ft.com/intl/cms/s/2/9f27da90-7b3f-11e4-87d4-00144feabdc0.html).
[96] *ibid.*
[97] *ibid.*

tion in the conflict.[98] Most of these allegations have been denied by Moscow, which claims that it has little influence on the separatists and has not been deploying arms and fighters in the region.[99] Nevertheless, Russia's role in the Minsk Agreements has given it tangible political benefits. It has, since the beginning of the conflict and in connection with its endorsement of the May 2014 referenda and the peace agreements, pushed Kiev and the West for an extensive right to *internal* self-determination for Donetsk and Lugansk.[100] A stable and integrated Ukraine would undoubtedly require dialogue between Kiev and the separatist, which would give Russia an indirect instrument to influence political change in Ukraine.[101]

3. Identification and discussion of a right to *external* self-determination

In its identification and discussion of a *right* to self-determination, the study considers three different approaches on the matter: the *classical*, the *remedial* and the *romantic* theory, presented by Koskenniemi and Buchanan. Although these approaches and their justifications for a right to self-determination are based on different and in part contradictory assumptions, they can be considered to constitute a theoretical continuum. On the one side of this continuum, the *classical* approach favours the principles of sovereignty and territorial integrity. On the other, the *romantic* approach advocates for an unconditional right of *external* self-determination for all peoples. In between these, the *remedial* approach sets forth certain criteria to be met before a right of *external* self-determination might be exercised.

After comparing and discussing the main arguments of each approach, the study will trace the relevance and presence of the assumptions in various legal sources, including UN documents, soft law and cases reflecting international custom, general principles of law and the opinion of law set forth in judicial decisions and advisory opinions.[102] The purpose of the chapter is to identify the circumstances in which the right of *external* self-determination justified by *classical*, *remedial* and *romantic* arguments can be exercised in accordance with international law.

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[98] Alec Luhn, "Russia to send humanitarian convoy into Ukraine in spite of warnings," *The Guardian*, 11 August 2014 (available at www.theguardian.com/world/2014/aug/11/russia-humanitarian-convoy-ukraine).

[99] James Marson, "Putin Meeting Leaves Ukraine With Tough Choices," *The Wallstreet Journal*, 19 August 2014 (available at www.wsj.com/articles/ukraine-search-for-bodies-in-alleged-rocket-attack-halted-1408449887).

[100] Szymon Kardaś and Wojciech Konończuk, "Minsk 2 - a fragile truce," *Centre for Eastern Studies (OSW)*, 12 February 2015 (available at www.osw.waw.pl/en/publikacje/analyses/2015-02-12/minsk-2-a-fragile-truce).

[101] *ibid.*

[102] *Statute of the International Court of Justice*, *supra* note 18, art. 38.

3.1. Theory: the classical, romantic and remedial approach to *external* self-determination

Based on the Hobbesian assumption that the authentic expression of human nature is essentially negative in that it is driven by "men's ambition, avarice, anger, and other passions",[103] and that it, unless being channelled under a common power, results in a "war of every man against every man",[104] the *classical* approach to self-determination favours sovereignty and territorial integrity of existing states. According to this approach, nations are to be understood as artificial communities, collections of individuals linked exclusively by statal decisions, that is, procedures making it possible to individuals to participate in the conduct of their common affairs within politically and legally organised states. The standardised national identity and its rational spirit are based on a political system of equality of all members.[105] In other words, notions such as passion, nationalism, culture or ethnicity are not the drivers behind the emergence of states. Instead, for the *classical* approach such notions are to be seen as destructive and irrational, and the only and essential requirement for national self-determination is the presence and proper functioning of statal procedures.[106] As the preservation of territorial integrity is of crucial importance, claims of self-determination within the state borders are dealt with as claims for the entitlement of minority rights such as participation in public life on an equal footing with other individuals.[107] It could, however, be argued that the *classical* approach in its most radical form might allow for *internal* self-determination in the forms of decentralisation, federalisation or autonomy. By contrast, a right of *external* self-determination, clearly threatening the territorial integrity of the functioning state, is highly inapplicable under this school of thought. This argument will be addressed further in this chapter.

The underlying argument of the preservation of the state and hence the objection to external self-determination is twofold. On the one hand, states refer to the immoral arguments of the self-interest in ensuring their own survival, preservation of goods and their unwillingness to endanger their own territorial boundaries. On the other, however, it can be argued that the principle of territorial integrity sets forth certain morally important aims: first, the protection of individuals' security and rights, and second, the

[103] Thomas Hobbes of Malmesbury, *Leviathan or the Master, the Forme, and Power of a Common-Wealth Ecclesiastical and Civill*, 1651, p. 84.
[104] Hobbes, *supra* note 103, pp. 79, 84, 104.
[105] Koskenniemi, *supra* note 4, p. 252.
[106] Koskenniemi, *supra* note 4, p. 249.
[107] Ulrike Barten, *Minorities, Minority Rights and Internal Self- Determination*, 2015, pp. 199-200.

preservation of a structure in which it is reasonable for individuals to invest themselves in participating in government processes in a conscientious and cooperative fashion.[108] As to the former, individuals' rights, their physical security and the stability of their expectations towards the authorities and other members of the community all depend on functioning enforcement of the legal order, which, in turn, requires effective jurisdiction within a clearly bounded territory. Following this argument, territorial integrity carries with it the protection of the most essential interests of the individuals inhabiting the state. As to the latter aim, the popular support for territorial integrity implies an assumption that the inhabitants will be subject to laws, the character and quality of which they can influence through political participation.[109] This assumption gives individuals an incentive to support and invest themselves in the existing political processes, hence creating a sense of reciprocal maintenance of interest and cooperation between the citizens and a state's authorities.

The essential question to ask is what would happen if the presence and proper functioning of the statal procedures were absent or by some means insufficient for the inhabitants, and what such circumstances would entail for claims of *external* self-determination. The answer, obviously, depends on the extent to which the political procedures, among others established to meet the demands of the inhabitants, are failing. As a starting point, emphasising the importance of the preservation of the existing state, the *classical* approach would seek to reconcile claims for self-determination and territorial integrity *internally*. Various forms of *internal* self-determination, including higher degrees of effective participation in public affairs, economic progress and development, minority rights and the possibility of local or autonomous administrations,[110] might all serve as means implemented by states to remain integrated, simultaneously addressing groups' dissatisfaction with existing statal procedures.[111] However, if the proper functioning of these procedures is questionable and the existence of the state itself becomes uncertain, the principle of *external* self-determination becomes applicable to reconstitute the political normality of statehood.[112] This reconstitution might in turn, depending on existing self-determination claims and their character, result in the establishment of a new, or even various new, political communities replacing the former. Nevertheless, it

[108] Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs*, vol. 26, no. 1 (1997), pp. 46-47.
[109] Buchanan, *supra* note 108, p. 48.
[110] Barten, *supra* note 107, pp. 253-254.
[111] Buchanan, *supra* note 108, p. 53.
[112] Koskenniemi, *supra* note 4, p. 246.

must be emphasised that these newly established entities must be founded not on self-determination claims based on ethnical or cultural nationalism, but may only emerge as states if they, independent from any third-party interference,[113] are capable of ensuring more stability, effective authority and proper functioning of statal procedures over the respective territory. An important requirement of the *classical* approach is the maintenance of international stability and the prevention of sectarian struggles primarily fostered by irrational passions, including cultural nationalism.[114] Instances of questionable statehood, hereinafter referred to as the conception of *abnormality*,[115] appear in periods of revolutionary international transformation or in situations where the internal constitution of a state has been found unacceptable and does no longer represent the political demands or rights of the inhabitants.

This point, however, appears to pose a central criticism of the *classical* approach. First, the question of determining the exact meaning of *abnormality* in the post-modern era might itself be challenging. Even if the relationship between the individuals and the state ought to be legal, the same claims, expectations and approval of existing statal procedures might not be shared by all inhabitants. Hence, the threshold of *abnormality* might similarly be subject to groups' (or the international community's) different perception, which in turn makes it unclear when *external* self-determination is applicable. Second, despite the *classical* school's negligence and criticism of nationalism, culture or ethnicity in state-building processes, it would be wrong to assume that such claims of self-determination do not exist. The legal relationship between the individuals and the state does not necessarily constitute a bond based on loyalty, and might easily escape its civic form if groups, particularly national minorities not sharing equally in the positions of the state, perceive the authorities to be disregarding or suppressing their interests. Such sentiments might undoubtedly lead to a challenge to the structures of the artificial community,[116] which eventually might constitute a case of abnormality. The *remedial* and *romantic* approaches to self-determination, discussed in the following part of this chapter, seem to elaborate on these issues.

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[113] Natia Kalandarishvili-Mueller, "Guest Post: The Status of the Territory Unchanged: Russia's Treaties with Abkhazia and South Ossetia, Georgia," *Opinio Juris*, 20 April 2015 (available at www.opiniojuris.org/2015/04/20/guest-post-the-status-of-the-territory-unchanged-russias-treaties-with-abkhazia-and-south-ossetia-georgia/).

[114] Barten, *supra* note 107, p. 200.

[115] Koskenniemi, *supra* note 4, pp. 246-247.

[116] Koskenniemi, *supra* note 4, pp. 252, 258.

The question of a state's legitimacy, understood as the extent of the fulfilment of its obligations towards all inhabitants to its jurisdiction, is central to the *remedial* approach to self-determination. According to this school of thought, the assumption that territorial integrity is not to be violated by internal actors applies only to legitimate states[117]. The approach assumes that the primary condition for states to be considered legitimate, and hence to preserve their sovereignty, lies in their respect of human rights. If this condition is met, there is no right of *external* self-determination. However, if a group has been subject to certain injustices conducted by state authorities, such a right might be considered a remedy of last resort.[118]

The *remedial* approach can be understood as an extension of Locke's theory of revolution, setting forth that a people has a right to overthrow their government if their fundamental rights are being violated, and if all peaceful means for settlement have been exhausted. Yet, where the theory of revolution applies to circumstances where authorities perpetrate injustices against "the people" rather than a particular group, the *remedial* theory only focuses on a portion of the population concentrated in a part of the state. Moreover, while the object of a revolution is to overthrow the government, the aim of *remedial* self-determination is to separate the respective territory from the parental state in order to establish a new entity.[119] Similarly to the *classical* school's condition that new states shall ensure functioning of statal procedures, it must be expected that the primary goal of groups referring to *remedial* self-determination is to ensure respect of human rights within the boundaries of the new entity.[120] Guarantees would moreover include protection of minority rights and a set of treaties and agreements for the determination of the new boundaries. These points are crucial. Despite the fact that injustices are likely to be perpetrated against a national minority, claims of self-determination based on ethnic or cultural affiliation, rather than human rights, might intensify and renew the ethnic conflict. The risk here is that the newly established state, founded on the basis of ethnicity, might easily suppress a new ethnic minority, which formerly constituted the majority in the parental state and unwillingly found itself within the seceding territory.[121]

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[117]Buchanan, *supra* note 108, p. 50.

[118]Michael Freeman, "The Right to Self-Determination in International Politics: Six Theories in Search of a Policy," *Review of International Studies*, vol. 25, no. 3 (1999), pp. 359-360.

[119]Buchanan, *supra* note 108, p. 35.

[120]Harry Beran, "A Liberal Theory of Secession," *Political Studies*, vol. 32, no. 1 (1984), pp. 24, 30-31.

[121]Donald Horowitz, *Self-Determination: Politics, Philosophy, and Law*, in: Margaret Moore, National Self-

To overcome this issue, the *remedial* approach sets forth a high threshold of serious grievances as a condition for self-determination. A state is no longer considered to be legitimate and *external* self-determination is applicable when the authorities threaten the lives of significant portions of a group by policies of ethnic or religious persecutions or exhibits institutional racism that deprives it of basic political and economic rights.[122] The right moreover applies to situations in which a group's previously sovereign territory was unjustly taken and was subject to alien subjugation, domination and exploitation by an occupying state.[123]

Considering these high requirements, the *remedial* approach may be seen as advocating sovereignty and territorial integrity on the one hand, and the importance of human rights on the other. As the preservation of territorial integrity is conditional, states would have an incentive to improve their human rights records and remain or become legitimate in order to avoid dismemberment justified by *remedial* arguments.[124]

The last theory considered in this chapter, which seriously challenges the *classical* school and might be seen as its counterpole, is the *romantic* approach to self-determination.[125] According to this approach, basing its assumptions on a rousseauesque liberal argument, self-determination is expressed through an authentic communal feeling, a sense of togetherness and being 'us' among a group. If the fulfilment of this feeling only can appear by seceding from the parental state, then the principle of self-determination becomes a right.[126] For this view, nationhood, understood as passion, ethnicity, culture or simply the *will of the people*, is central. The legal relationship between individuals and the classical state, which, as already discussed in this chapter, does not necessarily ensure a bound of loyalty, might easily prove to be fragile and give rise to a pursuit of an authentic sense of belonging. Therefore, rather than decision processes and functioning statal procedures, national sentiments, often lost in political struggles organised into artificial states, must be resuscitated to escape existing states and be channelled into the foundation of new entities.[127] Asserting that there is a general right to *external* self-determination primarily conditioned by the requirement of a

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Determination and Secession, 1998, pp. 186-188.
[122] Buchanan, *supra* note 108, pp. 37, 50.
[123] Koskenniemi, *supra* note 4, pp. 247-248.
[124] Buchanan, *supra* note 108, p. 52.
[125] Barten, *supra* note 107, p. 200.
[126] *ibid.*
[127] Koskenniemi, *supra* note 4, pp. 250-251.

people's will to form a new state, even in the absence of injustices or the presence of a functioning state, the *romantic* approach directly challenges both the *classical* and the *remedial* approaches to self-determination.[128]

Nevertheless, it is important to elaborate on the aforementioned notion of the *will of the people* in order to determine when a right of *external* self-determination is applicable and which groups are entitled to enjoy it. First, individuals whose membership of a group is defined by *ascriptive* characteristics, that is, characteristics of non-political nature such as ethnicity, language or other culturally affiliating features distinct from those of the parental state, have a right to *external* self-determination. If such a group has a collective *will* and decides to secede in order to create a new state, it is entitled to do so.[129] Second, the *will of the people* does not necessarily have to be expressed by an ascriptive group, but might similarly be claimed by individuals connected by *associative* characteristics. Instead of cultural features, these groups define themselves by their members' shared political ideas. However, if these ideas are to form an independent or autonomous political unit, self-determination as an end must first be subject to a referendum. Only if the result of the referendum would illustrate a majority in favour of secession, and hence would express the true *will of the people* within a limited territory, self-determination as a principle would turn into a right.[130]

The *romantic* approach may be criticised on several grounds. First, a principle justifying a general right to self-determination conditioned only by a groups ascriptive or associative characteristics would not have much chance of being recognised, as it would threaten even well-performing and legitimate states' territorial integrity and authorise their own dismemberment. Consequently, it is easy to imagine that existing states, in an attempt to preserve their sovereignty rather than support cultural pluralism, would be tempted to implement nation- and state-building programs intended to suppress minority identities and political organisations.[131] Moreover, many modern states are already multi-ethnic, culturally divided or politically split. The application of self-determination would not only dismember modern states as we know them, but might further create violent tensions between groups triggered by competing and overlapping claims. Second, claims of an *ascriptive* or *associative* identity's uniqueness emphasised to the ex-

[128] Buchanan, *supra* note 108, pp. 35, 40.
[129] Buchanan, *supra* note 108, p. 38.
[130] Freeman, *supra* note 118, p. 360; Buchanan, *supra* note 108, pp. 38-39.
[131] Buchanan, *supra* note 108, pp. 54-55.

treme extent that it denies the claims of other groups is likely to result in perverse initiatives,[132] including the implementation of discriminative rights or the commitment of atrocities by the new authorities. Finally, the requirement of the presence of the abstract notion of the *will of the people* is itself fragile. In connection with an ascriptive group's claim of self-determination, it would be necessary not only to determine what constitutes a *people* (or a nation), but also whether this people in fact is culturally, ethnically or historically distinct from the titular nation of the parent state. Moreover, the basis of the group's will to secede ought to be independent from any direct external influence. This requirement is even more important in regards to *associative* groups, the will of whom must be expressed through fair and transparent referenda. The presence of impartial international observers to validate the legitimacy of the result, including the absence of external interference, would therefore be expected as a baseline criterion.

3.2. United Nations documents

The following chapter discusses UN documents reflecting the historical and legal development of the right of *external* self-determination. The statements in these documents will be compared to the assumptions of the *classical*, *remedial* and *romantic* approach. In addition to the UN Charter, the instruments examined are primarily UNGA resolutions and other declaratory documents. Despite these instruments' non-binding character, it must be emphasised that they reflect state propositions of general law and are often assented to by a large majority of member states. They may, therefore, be evidence of either existing law or formative of *opinio juris* or state practice that generates new international custom.[133] Consequently, it is easy to confer such documents with the authority of binding instruments and to consider nothing more than the instrument itself in the examination of the existence of the right.[134]

Art. 1(2) of the UN Charter cites one of the purposes of the organisation as the "development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples", while art. 55 emphasises the principle as one of the bases for achieving goals in the spheres of economics, education, culture, and human rights.[135] Moreover, articles 73 and 76 (Chapters XI and XII) refer to the

[132] Koskenniemi, *supra* note 4, pp. 259-260.
[133] Boyle, *supra* note 21, p. 119.
[134] Thirlway, *supra* note 22, p. 113.
[135] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, arts. 1, 55.

aforementioned purposes in the context of colonies, affirming that states having responsibilities for the administration of dependent territories ought to promote the well-being of the inhabitants and shall, under the trusteeship system and taking into account the freely expressed wishes of the peoples, promote the development of these territories toward independence.[136]

Despite the provisions' seemingly obvious wording, it is doubtful that the notion of "self-determination of peoples" was intended to emerge as a legally binding principle of international law by the sole fact of its incorporation into the UN Charter[137]. Considering the decision to conceive the principle under art. 1 as one of the possible measures to strengthen international security and peace, it rather appears that the UN initially regarded its purposes to be of a highly flexible nature.[138] This argument can be supported by the fact that the Charter provides no answer as to what constitutes a "people" or what the principle entails, hence making it difficult to interpret, apply or implement as a legal norm. The absence of a definition therefore suggests that the principle's purpose in the post-war years primarily was to serve as moral and political guidance for the UN.[139] Similarly, notwithstanding the obligating formulations of articles 73 and 76, the promotion of well-being of the peoples by meeting their wishes and by initiating independence seem too abstract and complex to be interpreted as fostering specific rights and obligations.

Despite the Charter not specifying the "peoples" entitled to self-determination, in practise, the UN first adopted these formulations for the process of decolonisation.[140] This was made clear in a series of declarations initiated by UNGA res. 1514 of 1960, which stated that "alien subjugation, domination and exploitation constitutes a denial of fundamental human rights" and that "all peoples have the right to self-determination", understood as the freedom to "determine their political status and freely pursue their economic, social and cultural development".[141] In order to achieve this goal, it further reads that all powers in non-self-governing territories or colonies, "in accordance with [the peoples'] freely expressed will and desire", shall be transferred to the peoples of

[136] Charter of the UN, *supra* note 135, arts. 73, 76.
[137] Daniel Thürer and Thomas Burr, "Self-Determination," *Max Planck Encyclopedia of Public International Law*, 2008, (available at www.opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873).
[138] *ibid*
[139] *ibid.*
[140] Barten, *supra* note 107, p. 190.
[141] United Nations General Assembly resolution 1514(XV), *Declaration on the Granting of Independence to Colonial Countries and Peoples*, A/RES/1514(XV) (14 December 1960), paras. 1-2.

those territories "in order to enable them to enjoy complete independence and freedom".[142] Finally, in the application of the aforementioned provisions, any attempts at disrupting "the national unity and territorial integrity of a country" will be regarded as violating the purposes of the Charter.[143]

In referring to "the peoples" entitled to what was now identified as a *right* comparable to other human rights, the resolution asserts that the applicants were those in non-self-governing territories and other dependencies, which had not yet attained complete independence. In this sense, Wilson's self-determination of protection and self-governance of minorities gained a new meaning and was to be applied to the relationship between old European empires and their overseas colonies.[144]

Nevertheless, just as it provides an explanation of the principle, the document also creates new complications. The commitment to the principle of territorial integrity and the proclamation of self-determination leaves the two principles in an inevitable tension.[145] On the one hand, it seems obvious that the prohibition of disrupting "the national unity and territorial integrity" refers to the political integrity of the new states,[146] hence merely safeguarding the application of self-determination. On the other, however, the *right* to self-determination poses a threat to existing states,[147] as it contradicts the legal injunctions affirmed in articles 2(4) and 2(7) of the UN Charter. These prohibitions are, of course, stipulated as not to be "inconsistent with the Purposes of the UN" or, in the latter provision, to "prejudice the application of enforcement measures under Chapter VII". Nevertheless, the resolution does not resolve the issue as to how, and on what basis, a colony, understood as a political unit, and not the peoples compromising it, is entitled to enjoy the right of self-determination. Moreover, the exact circumstances in which this right is to be prioritised over territorial integrity of states' are unclear.

As to the former issue, one argument explaining the preference of the political unit over claims based on ethnicity may be the international community's prioritisation of self-determination as a principle associated with republican governance in this period.[148] This prioritisation, being in line with the *classical* approach to self-determination,

[142] UN General Assembly resolution 1514(XV), *supra* note 141, para. 5.
[143] UN General Assembly resolution 1514(XV), *supra* note 141, para. 7.
[144] Koskenniemi, *supra* note 4, p. 241.
[145] Craven, *supra* note 1, p. 228.
[146] *ibid.*
[147] McWhinney, *supra* note 9, p. 5.
[148] Freeman, *supra* note 118, pp. 357-358; Craven, *supra* note 1, p. 229.

is clearly manifested in the fact that the boundaries of new states were often artificial. First, practice soon demonstrated that colonies emerging as states had their borders established based on the principle of *uti possidetis iuris* recognising their former colonial borders.[149] Despite other ethnic groups invoking their right based on *romantic* arguments, these claims were largely overseen. Second, it should be noted that self-determination, which materialised into a *right* with the establishment of the UN, had changed its prefix: the principle of self-determination of the *nations*, promoted by president Wilson and socialist leaders,[150] had been replaced by self-determination of the *peoples* as its subjects of the right. The emphasis on *peoples* meant that communities basing their identification on ethnicity or culture increasingly became subjects of minority rights rather than applicants of a right ensuring political independence.[151] Finally, the separation of *external* and *internal* self-determination became evident in the post-war decades with the emergence of various legal sources. While res. 1514 assigns the *external* form to *peoples* of colonies, the rights embedded in the *internal* form apply to individuals and groups and are reflected in legal instruments such as the Universal Declaration of Human Rights (hereinafter 'the UDHR') or the International Covenant on Civil and Political Rights (hereinafter 'the ICCPR'). These instruments not only provide rights for both *ascriptive* and *associative* groups, arguably making *internal* self-determination applicable under the *romantic* approach, but also protect these actors from their own governments.

As to the circumstances in which self-determination is to be prioritised over territorial integrity, UNGA res. 1541 of 1960 affirmed that this was a matter of geographical distance and ethnical and/or cultural distinctiveness of a colony,[152] as well as of elements of political, juridical, economic or historical nature negatively affecting the relationship between the colony and the administrating state.[153] If such circumstances were present, there was a right to external self-determination, the outcome of which might take the form of a sovereign independent state or free association, or integration, with

[149] Waters, *supra* note 15, p. 181.
[150] McWhinney, *supra* note 9, p. 3.
[151] Craven, *supra* note 1, p. 229.
[152] United Nations General Assembly resolution 1541(XV), *Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, A/RES/1541(XV) (15 December 1960), Principle III.
[153] UN General Assembly resolution 1541(XV), *supra* note 152, Principle IV.

an independent state.[154] The resolution further obligated states possessing colonies to transmit information relating to economic, social, and educational conditions in colonies in order to determine whether these were to obtain independence.[155] It can be argued that by transmitting this information, the administrating states, obligated to support decolonisation, had to prioritise the principle of self-determination over their own territorial integrity.

Despite the fact that ethnical and/or cultural distinctiveness suddenly became a central criterion in determining whether a colony had a right to self-determination, it must be observed that the goal of this right was independence, implying economic, social and educational conditions in the territories. Therefore, in as much as the resolution initially suggests that the right was based on a *romantic approach*, it must be argued that the *goal* of the independence of colonial territories was *classical*. Nevertheless, the *means* to obtain this goal, which should be a result of free and voluntary choice "expressed through informed and democratic processes",[156] supports the *romantic* approach in the context of *associative* groups. This voluntary choice, however, seems not to have been giving a right to further disintegration of states emerging from colonies, but rather served as a process to determine the people's will to obtain independence from the colonial powers.[157]

By including self-determination in art. 1 of the ICCPR and assigning the right to "all people",[158] the UNGA had given it the characteristic of a fundamental human right. All people now had the right to "dispose of their natural wealth and resources", and in no case might they be deprived of their "means of subsistence".[159] Self-determination was to be promoted not only by states having responsibilities for dependent territories, but also by "states parties to the (…) Covenant",[160] consequently obliging the whole international community. The question of the actors subject to the right remained controversial. On the one hand, taking into account the historical context, it might be argued that the

[154] UN General Assembly resolution 1541(XV), *supra* note 152, Principle V.
[155] Thürer and Burr, *supra* note 137.
[156] UN General Assembly resolution 1541(XV), *supra* note 152, Principle VI.
[157] Joshua Castellino, *International Law and Self-Determination,* in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, p. 37.
[158] United Nations General Assembly resolution 2200A(XXI), *International Covenant on Civil and Political Rights*, A/RES/2200A(XXI) (16 December 1966), art. 1(1).
[159] UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 1(2).
[160] UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 1(3).

ICCPR was restricted only to colonies.[161] On the other, the recognition that the obligation to promote the right lay with the international community and the emphasis on "all peoples" clearly suggest that self-determination was also a right of peoples outside the colonial context. This argument can be supported by the assumption that in "no case may a people be deprived of its own means of subsistence", suggesting that self-determination also applies to peoples under foreign domination.[162]

But does the reference to "all peoples" include ethnic and cultural groups, supporting the *romantic* approach to self-determination? According to art. 27, minorities should not be denied to enjoy their own culture, to practise their own religion and to use their own language[163]. Hence, just as the provision ensures certain freedoms, it simultaneously constitutes the disjuncture of the right to self-determination. In states where minorities exist, rights of *internal* self-determination may apply.[164] At the same time, the notion of "all peoples" is clearly not intended to contain any ethnic or cultural connotation other than these peoples' distinctiveness from the administrating state. It may therefore be argued that the peoples entitled to the *external* form of self-determination are the peoples not associating themselves with any ethnic or cultural group. This argument undermines the *romantic* and supports the *classical* approach, as it does not provide a right of *external* self-determination based on a group's ascriptive characteristics, but rather considers *peoples* to be an artificial community.

In 1970 the UNGA adopted The Friendly Relations Declaration,[165] affirming that colonialism, understood as "subjection of peoples to alien subjugation, domination and exploitation" was considered to constitute a violation of the right to self-determination and a denial of human rights.[166] Moreover, states had "a duty to refrain from any forcible action" depriving peoples of their right freely, and without external interference, to determine their political status and to pursue economic, social and cultural development. Peoples' resistance to such actions entitled them "to seek and receive support in accordance with (…) the Charter".[167] This assumption is in line with the *remedial* approach, holding that a group is entitled to the right when a state exhibits policies depriving it of

[161] Craven, *supra* note 1, p. 228.
[162] Barten, *supra* note 107, p. 192.
[163] UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 27.
[164] Castellino, *supra* note 157, p. 38.
[165] United Nations General Assembly resolution 2625(XXI), *The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*, A/RES/2526(XXV) (24 October 1970).
[166] UN General Assembly resolution 2625(XXI), *supra* note 165, Principle (e) and its elaboration.
[167] *ibid.*

basic political and economic rights. Therefore, if the document, the purpose of which was to enshrine the legal norm into a general guiding principle, was also to be understood as applying outside the context of decolonisation,[168] it may be assumed that The Friendly Relations Declaration fostered a right of *external* self-determination in circumstances of occupation by a state.

In line with a view which have been developing in the legal sources considered in this chapter, the 1993 Vienna Declaration and Programme of Action (hereinafter 'the VDPA') refers to self-determination as a right not only applying in the colonial context, but also in circumstances of "alien domination or foreign occupation".[169] One explanation for this extension may have developed in the light of the process of decolonisation largely being realised.[170] Additionally, recognitions of new states emerging after the dissolution of the USSR suggest that *external* self-determination as a response to alien domination or occupation, accounting for some of the claims for independence in these territories prior to their emergence as states,[171] was supported in this period. Moreover, cases such as East Timor's struggle for independence similarly seem to be supported by the VDPA, setting forth that legitimate actions against occupying powers are allowed as long as they do not impair the territorial or political unity of states respecting the principle of self-determination.[172] Hence, the VDPA and the aforementioned historical events once again support the *remedial* approach. This said, it should not be excluded that the newly emerging states in Eurasia might have provided better alternatives to the statal procedures of the collapsing USSR. Following this assumption, it can be argued that self-determination was a right based on the *classical* approach, justifying secession in cases of *abnormality*.

Second, the emphasis on the centrality of human rights[173] and the reaffirmation that the denial of self-determination constitutes a violation of such rights once again seem to create tensions between states' obligations towards individuals and their territorial in-

[168] Castellino, *supra* note 157, p. 30.
[169] United Nations General Assembly, *Vienna Declaration and Programme of Action (VDPA)*, 12 July 1993, A/CONF.157/23, Part I, para. 2.
[170] "United Nations and Decolonization: History," *United Nations* (available at www.un.org/en/decolonization/history.shtml).
[171] "May 4: Restoration of Independence of the Republic of Latvia," *Latvian Institute*, 4 May 2014, (available at www.latvia.eu/news/may-4-restoration-independence-republic-latvia); "Estonia's return to independence 1987–1991," *Estonia.eu*, accessed on 13 May 2016, (available at www.estonia.eu/about-estonia/history/estonias-return-to-independence-19871991.html).
[172] UN General Assembly, *VDPA*, *supra* note 169, Part I, para. 2.
[173] UN General Assembly, *VDPA*, *supra* note 169, Part I, para 1.

tegrity. On the one hand, the respect for human rights, including the right to self-determination, is the "first responsibility" of governments. [174] On the other, self-determination does not authorise actions impairing the territorial integrity of just states.[175] Therefore, since a *right* to self-determination does exist, but may not threaten the territorial integrity of legitimate states, it must be argued that the right to be respected by states is primarily the right of *internal* self-determination. Meanwhile, the right of *external* self-determination is only applicable in cases of human rights violations, that is, when a state no longer is considered to be legitimate.

Finally, and in support of the latter argument, paras. 26, 27 and 31 (Part II), urging states to promote and protect rights of minorities and indigenous peoples,[176] underline that these groups may enjoy the right of *internal* self-determination. The VDPA thus reaffirms the disjuncture of the right, implying that claims based on the *romantic* approach may take the *internal* form, but cannot serve as a justification for secession.

3.3. Soft law

The two instruments examined in this chapter, both being declarations of the CSCE, do not have the statuses of legally binding international treaties, but may be considered soft law.[177] As there is no OSCE treaty regime, the main instrument of the organisation is political negotiation, and decision-making is conducted by consensus, defined as the absence of objection.[178] Therefore, despite their non-binding and declaratory character, it might be argued that the examined instruments adopted by consensus and hence by widespread acceptance of their statements regarding international relations and human rights, including self-determination, reflect states parties' commitment to uphold and foster these principles. With the OSCE being an intergovernmental organisation covering Eurasia and North America, this commitment does, obviously, not reflect the opinion of the whole international community. Nor does it necessarily provide evidence of existing or emerging international norms. Nevertheless, as the three cases of *external* self-determination examined in chapter four of this study relate to states parties to the organisation (Georgia and Ukraine), the CSCE instruments are considered to be highly relevant and are believed to serve as a contribution to the identification of the right.

[174] *ibid*.
[175] UN General Assembly, *VDPA*, *supra* note 169, Part I, para. 2.
[176] UN General Assembly, *VDPA*, *supra* note 169, Part II, paras. 26-27, 31.
[177] Manton, *supra* note 23, pp. 13-14, 16.
[178] Barten, *supra* note 107, pp. 61, 121.

The 1975 CSCE Final Act set forth ten Principles to guide the relations between the West and the Communist bloc. Principle I, reaffirming the principle of sovereignty, also stated that the states parties of the CSCE considered that their frontiers might be changed.[179] Yet, just as the wording of this provision suggests that changes of state boundaries might occur as long as such process is consistent with international law and is realised peacefully and by agreement, it does not elaborate on the means and outcome of these changes. In other words, the provision does not clarify whether the changes of frontiers of existing states shall be a result of intergovernmental agreements on redrawing state borders or whether it also implies the emergence of new states. It is, however, evident that the emphasis on "peaceful means and agreement"[180] does not authorise self-determination as an end when the means to accomplish this end are carried out violently. Moreover, states should not make "each other's territory the object of military occupation or other direct or indirect measures of force" (Principles III-IV),[181] and should refrain from "direct or indirect assistance to terrorist activities, or to subversive or other activities directed towards the violent overthrow of the regime of another participating State" (Principle VI).[182] Two points need to be raised in this context. First, it is obvious that few groups, even those taking up arms in their pursuit of self-determination, would consider themselves to be involved in terrorist activities. Nevertheless, it is not difficult to envisage that this perception would not be shared by the state authorities, who might describe the secessionist activities by exactly these characteristics. Assistance to secessionist groups might therefore result in accusations of violations of both the Final Act and the UN Charter.[183] Second, the object of *external* self-determination is not to overthrow a government, but to separate a territory from the parental state in order to establish a new entity.[184] This said, it is doubtful that the states signing the declaration only imagined a narrow interpretation of the provision and would allow any violent actions undermining their authority. It must therefore be assumed that any third-state assistance to measures threatening a state's control over its territory is to be considered a violation.

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[179] *Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki*, Helsinki, 1 August 1975, *Organization for Security and Co-operation in Europe (OSCE)* (available at www.osce.org/mc/39501?download=true), Part I, Principle I.

[180] *ibid*.

[181] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principles III-IV.

[182] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VI.

[183] Charter of the UN, *supra* note 135, arts. 2(4), 2(7).

[184] Buchanan, *supra* note 108, p. 35.

Principle VII, concerning national minorities' entitlement to human rights and the protection of their legitimate interests in this sphere, located the responsibility of safeguarding these rights on the state.[185] Consequently, it can be argued that national minorities raising claims of self-determination were entitled to such a right, but that this right was only to be understood as domestic implementation of minority or human rights. In other words, *romantic* claims of self-determination concerning *ascriptive* groups did not guarantee a right of *external* self-determination, but might only be enjoyed *internally*. By stressing the importance of the right of minorities "to equality before the law",[186] the principle may moreover be seen as supporting the *classical* approach to self-determination. This approach considers the relationship between the state and the individual to be exclusively legal,[187] and deals with claims of self-determination within state borders as claims for the entitlement of minority rights.[188]

Finally, by stressing that all peoples, without external interference, always have the right to determine their internal and external political status,[189] Principle VIII recognised that self-determination was applicable beyond the framework of decolonisation, as no situation of colonialism existed in Europe and North America at the time.[190] The Principle simultaneously reflected the seemingly inherent paradox of legal and political instruments dealing with self-determination. On the one hand, it suggested the existence of a right of all peoples to determine their internal and external political status. On the other, the states parties should act in conformity with the relevant norms of international law, including territorial integrity. The Act provided no elaboration regarding the hierarchy of the two opposite notions or any of its ten guiding Principles. The solution to this tension might instead be found in the document's preamble, which set forth that the states were committed to "peace, security, justice and continuing development of friendly relations and cooperation".[191] It must therefore be assumed that if the primary object of the CSCE was to improve the relations between the West and the Communist bloc, it seems highly implausible that a right of *external* self-determination, posing a threat to

[185] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VII.
[186] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VII.
[187] Koskenniemi, *supra* note 4, pp. 252, 258.
[188] Barten, supra note 107, p. 200.
[189] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VIII.
[190] Raič, *supra* note 2, p. 231
[191] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Preamble.

the international order,[192] would be prioritised over the principles of sovereignty and territorial integrity. But where does this leave the right to self-determination of all peoples? First, as already argued a minority is entitled to certain rights provided by a state's government and is hence a subject of a right of *internal* self-determination. Second, self-determination as defined in Principle VIII is limited to the determination of peoples' political status. Considering the realities of the Soviet domination of the Communist bloc at the time, the definition is more properly to be seen as reaffirming the right of the people of a state to be free from external influence in choosing its own form of government.[193] Bearing in mind these assumptions and the document's strong emphasis on the protection of territorial integrity, it must be argued that the CSCE Final Act does not authorise a right of *external* self-determination.

The 1990 CSCE Copenhagen Document reaffirmed the assumptions established in the Final Act. Notwithstanding the fact that the OSCE is a security organisation and that human rights are only one of the prerequisites for lasting peace and security, it is clear that the notion of sovereignty went beyond the pure idea of a state only being responsible for legal and political procedures. This is not only so due to the emphasis on human rights, but also, as affirmed in paras. 5-8, because governments should guarantee functional statal procedures and free elections ensuring both their own legitimacy and the expression of the will of the people,[194] including the freedom of assembly and political participation.[195] Elections were further to be observed by foreign and domestic observers, hence holding governments accountable for the obligations to be ensured.[196]

First, it can be argued that the obligations to ensure functional statal procedures, regular elections, equality before the law, political participation and the protection of citizens from terrorism or violence,[197] supports the *classical* approach. Second, it must be noted that the importance of human rights and the inclusion of election commitments to safeguard these rights are in line with the *remedial* approach. Finally, freedom of assembly and political participation, and elections being an expression of the "will of the

[192] Craven, *supra* note 1, p. 202.

[193] Hurst Hannum, "Legal Aspects of Self-Determination," *The Princeton Encyclopedia of Self-Determination*, accessed on 18 May 2016 (available at www.pesd.princeton.edu/?q=node/254).

[194] *Conference on Security and Cooperation in Europe (CSCE): Document of the Copenhagen Meeting of the Conference on the Human Dimension*, Copenhagen, 29 June 1990, *Organization for Security and Co-operation in Europe (OSCE)* (available at www.osce.org/odihr/elections/14304?download=true), Part I, paras. 5(1)-5(2), 5(5), 5(9).

[195] *CSCE: Copenhagen Document*, *supra* note 194, Part I, paras. 7-7(1), 7(4)-7(6).

[196] *CSCE: Copenhagen Document*, *supra* note 194, Part I, para. 8.

[197] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, paras. 5(5), 5(9), 6-7, 7(5).

people", can broadly be argued to follow the assumptions of the *romantic* approach concerning *associative* groups. Despite none of the provisions of the Document directly elaborating on the consequences of derogations from any of the commitments, it can only be assumed that the absence of functional procedures (or *abnormality*), violations of human rights or election fraud would lead to international condemnations. It would be too far-reaching to assume that these condemnations would authorise a right to *external* self-determination in line with any of the three approaches, but they would undoubtedly result in an international perception of the respective state as being illegitimate.

Belonging to a national minority was a matter of a person's individual choice.[198] Once a person decided to associate himself with a minority within a state's borders, this person, and the group he chose to belong to, had, free of attempts at assimilation, a right to express, preserve and develop its cultural identity.[199] Moreover, it was a state's responsibility to adopt measures to ensure the minority equality with other citizens in the exercise and enjoyment of these rights.[200] The Copenhagen Document clearly signals openness towards the issue of identity and hence what could be considered a *freedom* of self-determination, understood here as an individual's freedom to determine his ethnic or cultural affiliation. Once this *freedom* was enjoyed by more individuals, the *freedom* became a *right* and was to be protected by a government. On the one hand, these provisions are comparable to the assumptions of the *classical* approach, as they deal with minorities' claims of self-determination as claims for minority rights.[201] On the other, the notion of an "individual choice", the emphasis on the right of expression of identity, and the protection from attempts at assimilation with the majority, go against the *classical* view.[202] Instead, the openness towards these notions suggests compliance with the assumptions of the *romantic* school. The freedom to determine one's identity as a member of a national minority stipulated a right to use a minority language, to develop educational and cultural associations and to maintain cross-border contacts with related groups.[203] Furthermore, a minority was entitled to effective participation in public affairs, which, as a possible means, might include the establishment of appropriate auton-

[198] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 32.
[199] *ibid*.
[200] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 31.
[201] *ibid.*
[202] Koskenniemi, *supra* note 4, p. 249.
[203] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, paras. 31(1)-31(4), 31(6).

omous administrations in accordance with the policies of the state.[204] It must be emphasised that there was no initial right to establish autonomous administrations, but that these were only one possibility of ensuring the right of "effective participation" and that their establishment had to be "appropriate". Effective participation could be obtained by alternative means and the question of the appropriateness of such administrations was, besides the requirement of "correspondence with specific historical and territorial circumstances of such minorities",[205] strictly limited to the policies of the state. It might be expected that these policies are a result of a compromise between majority and minority wishes. Nevertheless, it may be argued that the final qualification of appropriateness of autonomous structures tilt the balance towards the state, since it is the ultimate decision-maker in regards to "state policies".[206] Finally, despite the fact that a minority has the legal entitlement to require that the state protects its identity and that this entitlement may include the establishment of autonomous administrations, self-government must not be understood as an independent entity. In other words, the Copenhagen Document provided no right for a group within a participating state to secede and constitute itself as a state. Instead, its provisions offered a right of *internal* self-determination for minorities to be exercised in various forms, the character and appropriateness of which were to be decided upon by a state's authorities.

3.4. Cases

The following part of the chapter examines the application of the principle of self-determination in the Åland Islands, Bangladesh and Kosovo, representing circumstances in which the principle was applied outside the context of decolonisation. The chapter assesses the relevant facts which eventually did or did not result in independence of the entities and discusses advisory opinions, judicial decisions and international reactions to the claims and outcomes of self-determination. By evaluating existing authoritative statements of international judicial institutions,[1] and further, in some of the cases, the presence of widespread and uniform state practice and *opinio juris*,[1] the chapter aims at identifying whether, and under which circumstances, the right has been established as an international custom.

[204] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 35.
[205] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 35.
[206] Barten, *supra* note 107, p. 251.

The Åland Islands, almost entirely inhabited by people of Swedish origin, form an archipelago situated between the Finnish and Swedish mainland. Until the end of WWI, Finland and Åland, whose territory was part of Finland, were incorporated into the Russian Empire. After Russia's 1917 revolution, Finland declared independence basing its declaration on the principle of self-determination.[207] The Islanders claimed the same right and demanded accession to Sweden.[208] While Sweden supported the separatist sentiments, Helsinki insisted on its sovereignty over the archipelago and dispatched troops on the Islands.[209] In 1920 the issue was submitted to the Council of the League of Nations (hereinafter 'the LN'), which appointed two commissions:[210] First, the Commission of Jurists, entrusted to give an advisory opinion upon the legal aspects of the question,[211] and second, the Commission of Rapporteurs, to advise the Council on the resolution of the dispute.[212]

The Commission of Jurists asserted the international nature of the dispute and regarded the Council as competent of dealing with the matter.[213] It further considered the role of the principle of self-determination, which, despite playing "an important part in political thought", was not mentioned in the Covenant of the LN and could not be considered a positive rule of international law. Therefore, the Commission affirmed, "positive law does not recognise the right of national groups (…) to separate themselves from the State (…) by the simple expression of a wish".[214] It did, however, only do so in regards to states definitively constituted.[215] It elaborated that the "formation, transformation and dismemberment of States as a result of revolutions and wars create situations [which] cannot be met by the application of the normal rules of positive law".[216] Therefore, if territorial sovereignty is lacking, as in the case of Finland, "either because

[207] Oliver Diggelmann, "The Aaland Case and the Sociological Approach to International Law," *The European Journal of International Law*, vol. 18, no. 1 (2007), p. 136.
[208] Raič, *supra* note 2, pp. 198-199.
[209] Diggelmann, *supra* note 207, pp. 136-137.
[210] Sia Spiliopoulou Åkermark, "The Åland Islands Question in the League of Nations: The Ideal Minority Case?," *Redescriptions Yearbook of Political Thought, Conceptual History and Feminist Theory*, vol. 13 (2009), p. 201.
[211] Council of the League of Nations, Commission of Jurists, *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*, LN Official Journal, Suppl. no. 3 (1920).
[212] Council of the League of Nations, Commission of Rapporteurs, *The Aaland Islands Question – Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs*, LN Council Doc. B7 21/68/106 (1921).
[213] Report of the International Committee of Jurists, *supra* note 211, p. 16, paras. 3-4.
[214] Report of the International Committee of Jurists, *supra* note 211, p. 5.
[215] Valerie Epps, "The new dynamics of self-determination," *ILSA Journal of International & Comparative Law,* vol. 3, no. 2 (1997), p. 434.
[216] Report of the International Committee of Jurists, *supra* note 211, p. 6.

the State is not yet fully formed or because it is undergoing transformation or dissolution", "the principle of self-determination of peoples may be called into play".[217]

Unlike the Jurists, the Commission of Rapporteurs asserted that Finland was definitely constituted.[218] By referring to the Islanders as a *minority* rather than a *people*, the Commission stated that a right to *external* self-determination based on a minority's wish would "destroy order and stability within States and (…) inaugurate anarchy in international life".[219] Therefore, separation of a minority from a state of which it forms part and its incorporation in another state should only be considered a last resort when a state "lacks either the will or the power to enact and apply just and effective guarantees".[220] Convinced that Finland was prepared to grant the Islanders satisfactory guarantees,[221] including autonomy, protection of their ethnical heritage, education in the Swedish language, and rights of territorial property and politics,[222] the LN decided that the sovereignty of the Åland Islands belonged to Finland.[223] However, should Finland refuse to grant these guarantees, the interest of the Islanders would force the Commission to recommend a referendum on the separation of Åland.[224]

First, the criterion of indefinitely constituted statehood, which opened up for *external* self-determination as an exceptional means to reconstitute the political normality of the state, resemblances the assumptions of the Friendly Relations Declaration and other instruments concerning colonies,[225] similarly suggesting a correlation between misgovernance and self-determination. Moreover, the dissolutions of the USSR, Yugoslavia, East Germany and Czechoslovakia paved the way for new states reconstituting the political normality by taking over the state functions of their predecessors, which were no longer capable of fulfilling their duties and could not be regarded as definitively constituted.[226] Hence, the general acceptance of the aforementioned legal instruments demonstrates that the international community is supportive of the assumption that uncertain statehood opens up for exceptional means. As state practice further shows that *external* self-

[217] *ibid.*
[218] Commission of Rapporteurs, *supra* note 212, p. 4.
[219] *ibid.*
[220] *ibid.*
[221] Commission of Rapporteurs, *supra* note 212, p. 5.
[222] Commission of Rapporteurs, *supra* note 212, pp. 12-13.
[223] Council of the League of Nations, *Decision of the Council of the League of Nations on the Åland Islands including Sweden's Protest,* League of Nations Official Journal 697 (24 June 1921).
[224] Commission of Rapporteurs, *supra* note 212, p. 13.
[225] Karen Knop, *Diversity and Self-Determination in International Law*, 2008, p. 78.
[226] Koskenniemi, *supra* note 4, pp. 245-246.

determination may serve as such a means, it must be argued that the assumptions of the advisory opinion of the Commission of Jurists have since been reaffirmed in other legal instruments and have been established as customary international law.[227]

Second, the post-WWII decades saw several legal instruments reaffirming that minority groups should not be denied the right to enjoy their own culture,[228] and that these rights should be promoted and protected by states.[229] Since the means of the promotion of these *internal* rights are initially a matter of states' authorities, it is difficult to make a general assumption in regards to autonomy, as established in the Åland Islands. Nevertheless, as discussed in connection with the CSCE Copenhagen Document, the establishment of autonomous administrations constitute one possibility of ensuring effective participation in public affairs.[230] Thus, it must be argued that the relationship between self-determination and the protection of minorities is still relevant today. When satisfactory guarantees and rights of minorities are respected, demands for *external* self-determination do not seem justifiable or even necessary. The satisfaction, obviously, depends on the demands being raised by the minority and the guarantees being offered by the state, and can only be assessed on a case-by-case basis. It would therefore be too far-reaching to argue that autonomy as means of protection of minority rights is established in customary international law. This said, there is no doubt that protecting minorities by state authorities is regarded as consistent with international law and that state practice since the establishment of the UN has provided evidence that derogations from these obligations are to be considered as wrongdoings.

The statements of the Commissions can be seen as supporting the arguments of the *classical* approach. The assumption that questionable statehood may authorise self-determination corresponds to the *classical* view that *abnormality* permits the right for the restoration of order. The *classical* view is further upheld by the argument that a right to *external* self-determination based on a minority's wish would destroy order and stability within states.[231] These convictions simultaneously undermine the view of the *romantic* approach, which holds that the *will of the people* is a sufficient criterion for seces-

[227] "The Åland Islands Solution: A precedent for successful international disputes settlement. Remarks by Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel," United Nations, 12 January 2012 (available at www.legal.un.org/ola/media/info_from_lc/POB%20Aalands%20Islands%20Exhibition%20opening.pdf).
[228] UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 27.
[229] United Nations General Assembly, *VDPA*, *supra* note 169, Part II, paras. 26-27, 31.
[230] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 35.
[231] Commission of Rapporteurs, *supra* note 212, p. 4.

sion. This said, emphasising the importance of granting cultural and autonomous guarantees, the Rapporteurs clearly suggested a right of *internal* self-determination based on the Islanders' *romantic* characteristics. Lastly, should Finland refuse to grant these guarantees, the Commission would recommend a referendum on the secession,[232] suggesting the emergence of a right based on the *remedial* approach. Yet, as the absence of guarantees would not necessarily constitute gross human rights violations delegitimising the Finnish State, the support for the *remedial* school in this context must be seen as vague.

Contrary to the Åland Islands, such guarantees were not granted to the Bengali population of Pakistan. Pakistan was created in 1947 following the partition of India in which areas where Muslims were a majority emerged as an independent state. It consisted of two separate and culturally and economically distinct territorial units, which, due to political and economic disparities, resulted in a significantly poorer and less developed East Pakistan, where Bengalis constituted the majority.[233] As a way of resolving the uneven development, the dominant party of the Bengalis, the Awami League, demanded autonomy for East Pakistan. As these demands were refused by the Pakistani authorities, in 1971 the party's leadership called for civil disobedience, leading to a large-scale military operation in the region.[234] During the operation, gross human rights violations were committed and over one million ethnic Bengalis were killed, while some ten million were driven into exile in India.[235] In response, the Awami League proclaimed the independence of Bangladesh, justifying the secession as a last resort for safeguarding the Bengali people[236]. India recognised the independence and became directly involved in the conflict by supporting the separatist movement. It defended its military involvement as an act of self-defence,[237] additionally emphasising its intentions of rescuing the Bengalis from "the brutalities of the Pakistan Army, the denial of the rights of 75 million people" and "the total negation of everything that human life stands for".[238] Ac-

[232] Commission of Rapporteurs, *supra* note 212, p. 13.
[233] Raič, *supra* note 2, pp. 335-336.
[234] Raič, *supra* note 2, p. 337.
[235] Ved P. Nanda, *Self-determination Outside the Colonial Context: The Beginning of Bangladesh in Retrospect in Self-Determination*, in: Yonah Alexander and Robert A. Friedlander (eds.), Self-Determination, National, Regional and Global Dimensions, 1980, pp. 202-203; Lea Brilmayer, "Secession and Self-Determination: A Territorial Interpretation," *Faculty Scholarship Series*, Paper 2434 (1991), pp. 196-197.
[236] *Proclamation of Independence of Bangladesh*, Mujibnagar, 10 April 1971 (available at www.en.banglapedia.org/index.php?title=Proclamation_of_Independence).
[237] United Nations Security Council, *Official Records: 1606th Meeting*, UN Doc. S/PV. 1606 (4 November 1971), para. 97.
[238] UNSC 1606th Meeting, *supra* note 237, paras. 168-169, 185.

cording to India, the suffering of Bengalis entitled them to establish an independent state.[239]

The question of a right to self-determination was not considered by the UN, but the organisation instead condemned India's claims to be entitled to act unilaterally as the Bengalis' vindicator.[240] UNGA res. 2793 and UNSC res. 307, both adopted by majority votes,[241] called for immediate cease-fire and withdrawal of both Pakistani and Indian troops from each other's territory, as well as bringing about conditions necessary for the return of Bengali refugees.[242] It must be noted that these resolutions did not concern India's assertion that the Bengalis had a right to create a new state as a response to misgovernance and atrocities, but rather reaffirmed the principles of non-intervention and the prohibition of use of force. Following the resolutions, Bangladesh was recognised by over 70 states and was admitted as a member of the UN in 1974.[243]

The case of Bangladesh suggests that instances of misgovernance, particularly when resulting in gross human rights violations, undermine the legitimacy of a parent state and may authorise a right of a victimised people to secede and establish a new state. The Bengalis had suffered serious atrocities committed by the central authorities and had little prospect of a better life guaranteed by their government.[244] Prior to the declaration of independence, the Awami League had sought self-determination *internally* by demanding autonomy. As these demands were not met by the Pakistani government it must be assumed that the ultimate decision to claim *external* self-determination was a last resort. Considering that the UN resolutions did not question the independence and that Bangladesh was widely recognised, it can be argued that there had been a widespread international acceptance, or, a widespread absence of objection, of atrocities as a justification legitimising *external* self-determination. Moreover, the independence ap-

[239] UNSC 1606th Meeting, *supra* note 237, paras. 168-169.
[240] Raič, *supra* note 2, p. 339.
[241] United Nations Bibliographic Information System, *Voting Records: UNGA res. 2793,* A/RES/2793 (8 December 1971) (available at www.unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares2793); United Nations Bibliographic Information System, *Voting Records: UNSC res. 307*, S/RES/307 (21 December 1971) (available at www.unbisnet.un.org:8080/ipac20/ipac.jsp?session=1NU6611705892.11071&profile=voting&uri=full=3100023~!478764~!7&ri=3&aspect=power&menu=search&source=~!horizon).
[242] United Nations General Assembly resolution 2793, *Questions Considered by the Security Council at its 1606th, 1607th and 1608th meetings on 4, 5 and 6 of December 1971,* A/RES/2793 (8 December 1971), paras. 1-3; United Nations Security Council resolution 307, *The Situation in the India/Pakistan Subcontinent*, S/RES/307 (21 December 1971), paras. 1, 3-4.
[243] United Nations General Assembly resolution 3203, *Admission of the People's Republic of Bangladesh to membership in the United Nations,* A/RES/3203 (17 September 1974).
[244] Brilmayer, *supra* note 235, pp. 196-197.

peared shortly after the adoption of the Friendly Relations Declaration setting forth that states have "a duty to refrain from any forcible action" depriving peoples of their right "to determine (…) their political status and to pursue their economic, social and cultural development", and that violations of this right entitled peoples to support in accordance with the Charter.[245] Thus, it must be established that the UN resolutions and the Friendly Relations Declaration suggest the existence of a general opinion of the law that extreme cases of misgovernance and deprivation of fundamental human rights authorise a right of *external* self-determination,[246] particularly when attempts at *internal* solutions have been exhausted.

Despite the resolutions neither prohibiting nor directly authorising Bangladesh' declaration of independence, they do, however, clarify the international opinion in regards to third-state influence. The condemnations of India's unilateral military intervention[247] and calls for cease-fire and withdrawal of Indian troops[248] imply a strong disapproval of external assistance for a people's pursuit of independence. This disapproval is affirmed by articles 2(4) and 2(7) of the UN Charter,[249] both indisputably being part of customary international law,[250] as well as UNGA res. 1541 on decolonisation or the Friendly Relations Declaration, affirming that self-determination shall be exercised without external interference.[251] Consequently, it must be argued that there is widespread international acceptance that direct third-state support for secessionist movements is to be considered as violation of both positive and customary international law.

Finally, the case of Bangladesh supports the *remedial* approach, as it reflects a correlation between atrocities committed against a *people* and the international acceptance of this *people's* right to secede. The presence of gross human rights violations is essential. Prior to the military operation in East Pakistan and the killing of some one million Bengalis,[252] the disparity between the two territorial units may have been resolved through

[245] UN General Assembly resolution 2625(XXI), *supra* note 165, Principle (e) and its elaboration.
[246] Yuval Shany, "Does International Law Grant the People of Crimea and Donetsk a Right to Secede? Revisiting Self-Determination in Light of the 2014 Events in Ukraine," *The Hersch Lauterpacht Chair in Public International Law,* vol. 21, no. 1 (2014), p. 238.
[247] Raič, *supra* note 2, p. 339.
[248] UN General Assembly resolution 2793, *supra* note 242, paras. 1-3; UNSC resolution 307, *supra* note 242, paras. 1, 3-4.
[249] Charter of the UN, *supra* note 135, arts. 2(4), 2(7).
[250] International Law Association (ILA), *Washington Conference: Report by the Committee on the Use of Force* (12 April 2014) (available at www.ila-hq.org/en/committees/index.cfm/cid/1036), pp. 1-3.
[251] UN General Assembly resolution 1541(XV), *supra* note 152, Principle VI; UN General Assembly resolution 2625(XXI), *supra* note 165, Principle (e) and its elaboration.
[252] Brilmayer, *supra* note 235, pp. 196-197.

the granting of cultural and linguistic rights,[253] decentralisation or autonomy, as demanded by the Awami League. This hypothetical outcome would support the *classical* approach favouring the preservation of territorial integrity and would not authorise *external* self-determination. Nevertheless, as such rights were not granted and the threshold of serious grievances was exceeded, the initial demands for *internal* self-determination became, as a last resort, an internationally justified act of *external* self-determination.

Kosovo, inhabited by ethnic Albanians and a small Serbian minority, lost its status as an autonomous province of Serbia within Yugoslavia in 1989. With the fall of Yugoslavia, the territory found itself within the boundaries of Serbia, where the Albanian population sought to restore its autonomy or declare independence. As a response to rising secessionism, Serbian authorities initiated police and military actions in the province, resulting in widespread atrocities in 1998. The UNSC soon adopted res. 1244 calling for a solution to the "grave humanitarian situation", demanding an "immediate and verifiable end to violence and repression" and the cessation of military and paramilitary activities by all parties.[254] It further authorised the establishment of an international civil presence under the UN auspices to assist in an interim administration,[255] and in its Annexes, set forth a list of "general principles on the political solutions" to the crisis.[256] It is noteworthy that the resolution neither promoted nor prevented Kosovo's right to secession. Despite its para. 1 stating that a political solution must be based on the general principles of the annexes, these principles did not elaborate on the ultimate political form of the status of Kosovo. Instead, they stated that an interim political framework should afford substantial self-governance for the region while taking into account the sovereignty and territorial integrity of Serbia.[257] However, while the reference to the promotion of the establishment of self-government in Kosovo was mentioned in operational para. 11, the reference to "territorial integrity" only appeared in the preambular language of Annex 1.[258] Consequently, the ambiguous language of res. 1244 served as arguments both for and against an independent Kosovo, with among others Russia and Serbia emphasising

[253] Barten, *supra* note 107, pp. 199-200.
[254] United Nations Security Council resolution 1244, *The Situation in Kosovo*, S/RES/1244 (10 June 1999), preamble; paras. 3, 15.
[255] UNSC resolution 1244, *supra* note 254, paras. 5-11.
[256] UNSC resolution 1244, *supra* note 254, Annexes 1-2.
[257] UNSC resolution 1244, *supra* note 254, para. 1, Annex 1, preamble.
[258] UNSC resolution 1244, *supra* note 254, para. 11(a), Annex 1, preamble.

the reference to "territorial integrity"[259] as an argument undermining the right to secession.

In 2007 the issue was raised by UN Special Envoy Ahtisaari, who presented a comprehensive proposal (the Ahtisaari Plan) envisioning Kosovo becoming independent following a period of international supervision.[260] By referring to the Plan, the Assembly of Kosovo declared the entity an "independent and sovereign state" in 2008.[261] The independence has been recognised by 108 UN member states, including the U.S., the U.K., France and various EU member states,[262] but has been opposed by others, including Serbia, Russia and China.[263] When recognising the independence, the U.S. Department of State explained that "the unusual combination of factors found in the Kosovo situation - including the context of Yugoslavia's breakup, the history of ethnic cleansing and crimes against civilians in Kosovo, and the extended period of UN administration - are not found elsewhere and therefore make Kosovo a special case, [which] cannot be seen as precedent for any other situation in the world today".[264] Russia, by contrast, stated that a right to "self-determination cannot justify the recognition of Kosovo's independence along with the simultaneous refusal to discuss similar acts by other self-proclaimed states".[265] It is worth noting that the opposition to the Kosovar independence, often based on arguments regarding the preservation of Serbia's territorial integrity,[266] have been raised by states which might have had reasons to be concerned about their national interests. Spain may fear for its own stability resulting from similar claims by the Basque population, and China's reluctance to recognise Kosovo is not surprising considering that it consists of 56 nations.[267]

In an International Court of Justice (hereinafter 'the ICJ') advisory opinion requested by the UNGA, the Court held that international law did not prohibit declarations of inde-

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[259] Christopher J. Borgen, "Kosovo's Declaration of Independence: Self-Determination, Secession and Recognition," *American Society of International Law (ASIL)*, vol. 12, no. 1 (2008).

[260] "Summary of the Comprehensive Proposal for the Kosovo Status Settlement," *U.S. Department of State*, 20 January 2009 (available at www.state.gov/p/eur/rls/fs/101244.htm).

[261] *Kosova Declaration of Independence*, Pristina, 17 February 2008 (available at www.assembly-kosova.org/?cid=2,128,1635), para. 1.

[262] Nicholas Kulish and C. J. Chivers, "Kosovo Is Recognized but Rebuked by Others," *The New York Times*, 19 February 2008 (available at www.nytimes.com/2008/02/19/world/europe/19kosovo.html?pagewanted=2&hp&_r=0).

[263] Borgen, *supra* note 259.

[264] "U.S. Recognizes Kosovo as Independent State," *U.S. Department of State Archive*, 18 February 2008 (available at www.2001-2009.state.gov/secretary/rm/2008/02/100973.htm).

[265] Kulish and Chivers, *supra* note 262.

[266] Borgen, *supra* note 259.

[267] Barten, *supra* note 107, p. 107.

pendence,[268] but it refused to pass judgement on the legality of remedial secession.[269] By referring to earlier UNSC condemnations of declarations of independence, the ICJ noted that the illegality of these declarations stemmed not from their unilateral character, but from the fact that they were, or would have been, connected with the unlawful use of force or other violations of norms of international law, in particular those of a peremptory character. The prohibition of the "use of force" against the territorial integrity or political independence of a state was, however, "confined to the sphere of relations between States".[270] Thus, the advisory opinion neither prohibited nor authorised a right to secession. Nevertheless, while not settling the issue itself, the judicial minimalism of the Court contributed to the development of a solution by strengthening the factual and political position of the Kosovars and their claim for independence.[271] At the same time, it did not press the further development of international law into a secession-friendly direction by avoiding any pronouncement on the legality of remedial arguments.[272] Finally, the Court reaffirmed that states shall refrain from acts violating the principle of territorial integrity of any state, suggesting that third-state assistance to secessionist movements is to be regarded as a violation of a peremptory norm.

Due to the absence of widespread and uniform acceptance of its right to secede, it would be incorrect to argue that the case indisputably fostered or provided evidence of customary international law. This said, a significant portion of the international community has nevertheless recognised the independence by referring to a right resulting from the breakup of Yugoslavia and the atrocities committed against the ethnic Albanian population.[273] It might therefore be argued that as long as *external* self-determination is left on the abstract level, that is, free from national interests, states have been willing to support it.[274] Moreover, it must be noted that the initial reason for the establishment of the international presence was the "grave humanitarian situation".[275] Finally, although the ICJ advisory opinion cannot be said to reflect customary international law as it neither demonstrates state practice or *opinio juris* of a state, and despite its rejection of

[268] International Court of Justice, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*, ICJ Reports 2010, p. 39, para. 79.
[269] ICJ Advisory Opinion, *supra* note 268, p. 40, para. 83.
[270] ICJ Advisory Opinion, *supra* note 268, p. 38, paras. 80-81.
[271] Christian Walter, *The Kosovo Advisory Opinion,* in: Christian Walter, Antje von Ungern-Sternberg, and Kavus Abushov (eds.), Self-Determination and Secession in International Law, 2014, pp. 13, 25.
[272] *ibid.*
[273] Shany, *supra* note 247, pp. 238-289.
[274] Barten, *supra* note 107, p. 107.
[275] UNSC resolution 1244, *supra* note 254, preamble; paras. 3, 15.

passing judgement on the legality of remedial secession, the Court authoritatively affirmed that declarations of independence were not prohibited under international law.

First, it must be assumed that the break-up of Yugoslavia in the early 1990's constituted a situation of *abnormality*. Whether the sovereignty of the newly emergent states, including Serbia, immediately was definitively constituted might be subject to debate. It might, however, be argued that the fact that the Albanian population constituted a majority in Kosovo entitled them to have an influence on the reconstitution of the political normality of Serbia. This influence could, in line with the *classical* approach, have taken the forms of either minority rights or autonomy for the province (*internal* self-determination), or, if such rights would not have guaranteed Serbia definitively constituted sovereignty, the establishment of an independent Kosovo (*external* self-determination). Yet, as neither claim was accepted and the Serbian authorities initiated operations resulting in atrocities against the Albanians, the options under the *classical* approach were substituted by a right to *remedial* secession. Although this right did not immediately lead to an independent Kosovo, the international presence, established due to the humanitarian crisis, indicates that the situation could not have been solved domestically.[276]

3.5. Findings

Based on the identification and discussion of relevant legal instruments and cases in connection with an *external* right to self-determination, it is possible to delimit the circumstances in which the right justified by *classical*, *remedial* and *romantic* arguments can be exercised in accordance with international law. Once these circumstances are identified, they will, in Chapter 4, serve to determine whether the claims of secession in the cases of Abkhazia, South Ossetia, Donetsk and Lugansk can be regarded as legal.

First, concerning the *classical* approach, despite the school's preference for the preservation of the existing state, it must be established that the conception of *abnormality* is supported by international law as a justification for the *external* right to self-determination for the purpose of reconstituting the political normality of statehood.[277] This was initially evident in the case of the Åland Islands and was moreover emphasised with the breakup of former communist states, where new independent political entities

[276] Borgen, *supra* note 259.
[277] Koskenniemi, *supra* note 4, pp. 246-247.

taking over the functions of their predecessors were recognised by the international community.[278] The importance of properly functioning statal procedures, a *classical* criterion for the preservation of the territorial integrity of the existing state, is further upheld in UNGA res. 1541 and the CSCE Copenhagen Document.[279] If these procedures, including regular elections, equality before the law and the freedom of political participation[280] are not guaranteed by the state, this state must, consequently, provide room for new political entities capable of ensuring such procedures. The assumption that a state is an artificial community based on equality of all members[281] is affirmed by state practise[282] following early UNGA resolutions on decolonisation[283] and in the two CSCE instruments,[284] which do not authorise a right to *external* self-determination in regards to ethnic or cultural groups, but emphasise the importance of equality of all citizens.[285] Finally, the importance of protecting the territorial integrity of the existing state and hence the *classical* presumption that claims of ethnic and cultural groups are to be dealt with as claims for *internal* rights is maintained in the two CSCE documents, which, on the one hand, suggest that minorities must be granted guarantees of cultural freedoms, and on the other, that the exact formulation and implementation of such guarantees are ultimately to be decided upon by the central government.[286]

Second, the proposition of the *remedial* approach that a group subject to serious human rights violations committed by state authorities is entitled to *external* self-determination as a last resort to protect its members[287] is supported by the Friendly Relations Declaration,[288] the CSCE Copenhagen Document,[289] the VDPA[290] and the cases of the Åland Islands, Bangladesh and partly by Kosovo.[291] It must hence be established that

[278] Koskenniemi, *supra* note 4, pp. 245-246.
[279] UN General Assembly resolution 1541(XV), *supra* note 152, Principle IV*; CSCE: Copenhagen Document*, *supra* note 194, Part IV, paras. 5(5), 5(9), 6-7, 7(5).
[280] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, paras. 5(5), 5(9), 6-7, 7(5).
[281] Koskenniemi, *supra* note 4, p. 252.
[282] Waters, *supra* note 15, p. 181; Castellino, *supra* note 157, p. 37.
[283] UN General Assembly resolution 1514(XV), *supra* note 141; UN General Assembly resolution 1541(XV), *supra* note 152; Castellino, *supra* note 157, p. 38; UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 1(1).
[284] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VII; *CSCE: Copenhagen Document*, *supra* note 194, Part IV, Paras. 31-33.
[285] *ibid.*
[286] *ibid.;* Barten, *supra* note 107, p. 251.
[287] Freeman, *supra* note 188, pp. 359-360; Buchanan, *supra* note 108, pp. 37, 50.
[288] UN General Assembly resolution 2625(XXI), *supra* note 165, Principle (e) and its elaboration.
[289] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, paras. 5(5), 5(9), 6-7, 7(5).
[290] UN General Assembly, *VDPA*, *supra* note 169, Part I, para. 2.
[291] Commission of Rapporteurs, *supra* note 212, p. 13.

to be considered legitimate and preserve its territorial integrity, a state must refrain from international crimes or the implementation of policies depriving a group of basic political, economic and human rights.[292] Moreover, several UNGA resolutions, both during and post-decolonisation, have affirmed that a *remedial* right similarly applies in situations of foreign occupation, domination and exploitation.[293]

Third, the assumption of the *romantic* approach that the *will of the people*, whether of an *ascriptive* or an *associative* character, is a sufficient criterion for the exercise of a right to *external* self-determination,[294] is not supported by international law. Nevertheless, the approach is upheld in regards to rights of *internal* self-determination, which is evident in various post-colonial instruments,[295] including the ICCPR,[296] the CSCE documents[297] and the VDPA.[298] These instruments emphasise the importance of state guarantees concerning rights and freedoms to national minorities and political groups within a state's boundaries. The means ought to be a result of a compromise between majority and minority wishes[299] and may include measures such as political, cultural, religious and linguistic rights or autonomy.

Finally, third-state actors' interference in the exercise of the right to *internal* and *external* self-determination is considered a violation of international law. This prohibition, initially considering the safeguarding of the right,[300] soon also served the protection of the territorial integrity and political independence of states in which secessionist movements appeared. The latter is not only emphasised in the UN Charter,[301] but was also affirmed in the CSCE Final Act, the case of Bangladesh[302] and the ICJ Advisory Opin-

[292] Buchanan, *supra* note 108, pp. 37, 50.
[293] UN General Assembly resolution 1514(XV), *supra* note 141, paras. 1-2; UN General Assembly resolution 2625(XXI), *supra* note 165, Principle (e) and its elaboration; UN General Assembly, *VDPA*, *supra* note 169, Part I, para. 2.
[294] Barten, *supra* note 107, p. 200.
[295] UN General Assembly resolution 1514(XV), *supra* note 141, paras. 1-2; UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 27; *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VII; UN General Assembly, *VDPA*, *supra* note 169, Part II, paras. 26; 27; 31; Commission of Rapporteurs, *supra* note 212, p. 4.
[296] UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 27.
[297] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VII; *CSCE: Copenhagen Document*, *supra* note 194, Part IV.
[298] UN General Assembly, *VDOA*, *supra* note 169, Part II, paras. 26-27, 31.
[299] Barten, *supra* note 107, p. 251.
[300] UN General Assembly resolution 2625(XXI), *supra* note 165, Principle (e) and its elaboration; *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VIII;
[301] Charter of the UN, *supra* note 135, arts. 2(4), 2(7).
[302] UN General Assembly resolution 2793, *supra* note 242, paras. 1-3; UNSC resolution 307, *supra* note 242, paras. 1, 3-4.

ion on Kosovo,[303] setting forth that states must refrain from direct or indirect measures of force against another state.[304] Such measures include military occupation or assistance to secessionist groups through military, economic or political means.[305]

4. The right to *external* self-determination as applied to Abkhazia, South Ossetia, Donetsk and Lugansk

The following chapter aims at determining whether the claims of self-determination in the cases of Abkhazia, South Ossetia, Donetsk and Lugansk may be justified under the delimited circumstances in which the *classical*, *remedial* and *romantic* approach have been argued to be in accordance with international law. While the analysis primarily considers whether the self-proclaimed republics have a right to *external* self-determination, the question of an *internal* right, particularly when secession is not an option, will similarly be discussed. For each of the cases, the chapter moreover examines the legality of Russia's involvement.

4.1 Republic of Abkhazia

4.1.1. The *classical* approach

Since the initial Abkhazian claims of self-determination were raised prior to the dissolution of the USSR,[306] it must be considered whether Abkhazia was entitled to *external* self-determination at the time of the breakup of the Union. It is beyond debate that the period preceding the dissolution represented a case of *abnormality*, which, due to the increasingly obvious power vacuum,[307] opened up for the creation of new states.[308] Based on the internationally recognised[309] principle of *uti possidetis iuris*, the Soviet constitution limited the right to secede to the fifteen union republics.[310] Changes of the boundaries of these republics could only appear with their consent and through referenda organised by the authorities of the new states.[311] This procedure is comparable to

[303] ICJ Advisory Opinion, *supra* note 268, p. 38, paras. 80-81.
[304] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle III-IV.
[305] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VI.
[306] MacFarlane et. al., *supra* note 16, p. 9.
[307] MacFarlane et. al., *supra* note 16, pp. 14-15.
[308] Koskenniemi, *supra* note 4, pp. 245-246.
[309] Waters, *supra* note 15, p. 181; Marc Weller, "Settling Self-determination Conflicts: Recent Developments," *European Journal of International Law*, vol. 20, no. 1 (2009), pp. 111, 113, 155.
[310] Aryeh L. Unger, *Constitutional Development in the USSR: A Guide to the Soviet Constitutions*, 1981, p. 60.
[311] *Constitution of the Union of Soviet Socialist Republics*, Moscow, 7 October 1977 (available at www.departments.bucknell.edu/russian/const/77cons03.html#chap08), arts. 76, 78.

the process of decolonisation, in which the right to *external* self-determination entitled colonies to secede from the administrating states, but did not automatically provide a right to further disintegration of the new entities.[312] Hence, by 1991 the former administrative boundaries of the Georgian SSR had been transformed into the internationally recognised boundaries of independent Georgia. Since the primary right to *external* self-determination had been given to the Georgian SSR, a right to further disintegration, including the possibility of an independent Abkhazia, could only be exercised through the consent of the former. It must therefore be argued that the Abkhaz Autonomous Republic's claims to secede were domestically and internationally groundless and constituted a violation of both Soviet and Georgian legislation.[313]

Nevertheless, it cannot be excluded that the statehood of independent Georgia at this time was indefinitely constituted and that failures to ensure functional statal procedures amounted to a situation of *abnormality*. This perception was particularly held by the Abkhazian authorities when the Georgian government in 1991 decided to abolish the Soviet constitution and restored the constitution of the 1921 Democratic Republic. At this time, the Abkhazians erroneously interpreted the constitution as a move towards the abortion of the regions' autonomous status[314] and hence as a failure of Georgia to fulfil its responsibility to guarantee minorities their *internal* rights of self-determination. In fact, the fulfilment of such responsibilities was neither failed nor denied, and the constitution clearly granted Abkhazia and other similar regions extensive rights of autonomous governance in the spheres of politics, law, economy and culture.[315] It further emphasised the importance of the formation of a unified and democratic state based on a system of parliamentary governance, political and human rights and the equality of all citizens.[316] It must hence be established that the declaration of independence by the members of the regional Abkhazian Supreme Council in 1992[317] was improper, or, considering Georgia's short period of existence, premature. Consequently, as the circumstances did not amount to a situation of *abnormality*, understood as revolutionary transformation or a situation in which the constitution have been found unacceptable, and

[312] Castellino, *supra* note 157, p. 37; Freeman, *supra* note 118, pp. 357-358; Craven, *supra* note 1, p. 229.
[313] Mirzayev, *supra* note 33, pp. 199-201; Weller, *supra* note 309, pp. 113, 155.
[314] Cornell, *supra* note 35, p. 158; Mirzayev, *supra* note 33, pp. 191-192.
[315] George Papuashvili, "The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years," *European Public Law*, vol. 18, no. 2 (2012), pp. 333, 345.
[316] Papuashvili, *supra* note 315, p. 324.
[317] Cornell, *supra* note 35, p. 158

the Georgian state intended to ensure various rights and freedoms to its citizens and *internal* rights to the inhabitants of Abkhazia, it must be argued that the region had no right of *external* self-determination as justified by the *classical* approach.

Finally, despite the assertion that no right to secession from neither the USSR nor Georgia existed and before considering a right to *external* self-determination under the *remedial* approach, it is worth considering whether a *de facto* independent Republic of Abkhazia nevertheless would constitute a better alternative to the Georgian state. As previously argued, the creation of a new state may only take place if it, independent from any third-party interference,[318] is capable of ensuring more stability, effective authority and proper functioning of statal procedures over its territory.[319] First, the Abkhazian Supreme Council's declaration of independence was accompanied by anti-Georgian rhetoric,[320] a campaign of ousting Georgian officials from their offices and violence against ethnic Georgian civilians.[321] Second, the 1993 retaking of Abkhazia by separatist units resulted in coercive displacements of the majority of the region's Georgian population.[322] Third, the state-building process initiated after the 1992-1994 war was primarily possible due to the Moscow Agreement, physically separating Abkhazia from Georgia and excluding the latter from political, legal and economic influence in the region.[323] This process moreover paved the way for an autocratic regime headed by Abkhazia's *de facto* president Ardzinba.[324] Finally, the *classical* criterion of effective authority has been highly dependent on Russia, which since the war has been guarding Abkhazia's borders and has influenced the appointment of the republic's high officials.[325] Accordingly, it must be argued that the discriminatory practises against the Georgian population, the installation of an undemocratic regime and the dependence on a third state do not meet the requirements of stability, equality of all citizens, proper functioning of statal procedures and effective authority. It is hence highly improbable that Abkhazia's *de facto* independence constituted a better alternative to Georgia's state-building initiatives in the region.

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[318] Kalandarishvili-Mueller, *supra* note 113.
[319] Barten, *supra* note 107, p. 200.
[320] Cornell, *supra* note 35, p. 158.
[321] Mirzayev, *supra* note 33, p. 192.
[322] "Chronology: Accord Georgia," *supra* note 40.
[323] Cornell, *supra* note 35, pp. 159-160, 162.
[324] *ibid.;* Svante E. Cornell, *Cooperation and Conflict in the North Caucasus*, in: Tunç Aybak, Politics of the Black Sea: Dynamics of Cooperation and Conflict, 2001, p. 193.
[325] Mirzayev, *supra* note 33, p. 198.

4.1.2. The *remedial* approach

Prior to the dissolution of the USSR, Abkhazian intellectuals sent a letter to the central authorities in Moscow expressing concerns regarding the Georgian SSR's suppression of Abkhazian culture through coercive assimilation of the region, consequently petitioning for secession from the union republic.[326] The underlying argument of the intellectuals lay in the Georgian authorities' announcement of its intention to make the Georgian section of the Abkhaz State University a branch of the State University in Tbilisi.[327] Considering the *remedial* school's criteria of the presence of international crimes or policies depriving a group of basic political, economic and human rights,[328] it must be argued that the announcement of the Georgian authorities, the gravity of which did not exceed the high threshold of these criteria, did not amount for a sufficient justification for the exercise of the right to *external* self-determination.

The question of the presence of international crimes appears more significant in connection with the 1992-1994 war. Abkhazian allegations suggest that Georgia's military operation in the region in 1992 resulted in genocide[329] and "a pattern of vicious ethnically based pillage, looting assault, and murder".[330] Russia has moreover condemned Georgia's deployment of heavy arms and has compared the case of Abkhazia with that of Kosovo.[331] However, unlike in the case of Kosovo,[332] there are no proven facts providing grounds to argue that the Georgian authorities intended to destroy, in whole or in part, the Abkhazian population[333] or that they systematically and extensively violated the human rights of the civilians[334] of this group. It must hence be established that the allegations of genocide, ethnic cleansing or crimes against humanity committed by the Georgian authorities in this period are highly unsupported.[335] In addition, it must, as previously argued, be brought to attention that the Abkhazian declaration of independence was followed by discriminatory practises and violence against the Georgian

[326] MacFarlane et. al., *supra* note 16, p. 9.
[327] *ibid.*
[328] Buchanan, *supra* note 108, pp. 37, 50.
[329] "Chronology: Accord Georgia," *supra* note 40.
[330] Human Rights Watch, *supra* note 45.
[331] Borgen, *supra* note 259; Cornell, *supra* note 35, pp. 159-160, 162; Mirzayev, *supra* note 33, pp. 195-196.
[332] UNSC resolution 1244, *supra* note 254, preamble.
[333] *Rome Statute of the International Criminal Court,* Rome, 17 July 1998, *United Nations Treaty Series*, vol. 2178, No. 38544, art. 6.
[334] *Rome Statute of the International Criminal Court, supra* note 333, art. 7; Mirzayev, *supra* note 33, pp. 195-196.
[335] Angelika Nußberger, "The War between Russia and Georgia— Consequences and Unresolved Questions," *Göttingen Journal of International Law,* vol. 1, no. 2 (2009), pp. 360-363.

population of the region.[336] Georgian sources, supported by UN estimates,[337] suggest that Abkhazian separatist forces carried out widespread atrocities against Georgian civilians[338] and committed ethnic cleansing, including large-scale deportations, in Abkhazia's Gali district.[339] Finally, both during and after the war separatist units discriminatorily forced all inhabitants of Abkhazia to accept either Abkhazian or Russian citizenship in order to enjoy the full scope of rights and freedoms of the *de facto* republic.[340] Inhabitants who were unwilling to accept the citizenships were either expelled from the region or lost their basic rights, including the right to vote.[341] Considering that the primary goal of groups justifying secession by *remedial* arguments is to ensure respect of human rights within the boundaries of their newly established state,[342] the aforementioned evidence appears highly controversial. The Abkhazian authorities did not ensure such rights to the whole population but, by contrast, based on a perception of ethnic uniqueness emphasised to the extreme extent,[343] committed atrocities and implemented discriminatory policies depriving the non-Abkhazian population of its fundamental political, economic and human rights. It must therefore be asserted that in addition to the unproven accusations of serious grievances committed by Georgia against the Abkhazian population, the acts of the Abkhazian authorities and separatist units undermine any support for a justification for *external* self-determination under the *remedial* approach.

4.1.3. The *romantic* approach

The distinctiveness of the population of the region became evident when the Abkhazians in 1991 did not support an independent Georgia and instead, by a majority vote, expressed their wish to preserve the Soviet state and argued for secession from the Georgian SSR.[344] The independence was initially declared by the Abkhazian Supreme Council in 1992[345] and was further emphasised in the 1994 constitution,[346] the 1999 referen-

[336] Cornell, *supra* note 35, p. 158; Mirzayev, *supra* note 33, p. 192.
[337] MacFarlane et. al., *supra* note 16, pp. 11, 21-22.
[338] MacFarlane et. al., *supra* note 16, p. 26.
[339] Cornell, *supra* note 35, p. 162; "Chronology: Accord Georgia," *supra* note 40.
[340] Council of the European Union, *Independent International Fact-Finding Mission on the Conflict in Georgia*, vol. 71 (September 2009) (available at www.news.bbc.co.uk/2/shared/bsp/hi/pdfs/30_09_09_iiffmgc_report.pdf), para. 12; Goble, supra *note* 94.
[341] *ibid.*
[342] Beran, *supra* note 120, pp. 24, 30-31.
[343] Horowitz, *supra* note 121, pp. 186-188.
[344] Cornell, *supra* note 35, p. 158.
[345] *ibid.*
[346] *Constitution of the Republic of Abkhazia*, *supra* note 51, art. 1.

dum and the subsequently adopted Act of Independence, justifying Abkhazia's secession on the basis of a right of nations to self-determination.[347] Since the *romantic* approach assumes that the *will of the people* is a sufficient criterion for the exercise of the right to self-determination, it must be established whether the Abkhazians constituted a *people* as defined by *ascriptive* or *associative* characteristics and whether the *will*, if present, was representative of, and corresponding to, the ultimate declaration of independence. First, the Abkhazians, inhabiting the contiguous territory of Abkhazia, were ethnically, historically, culturally and linguistically distinct from the Georgians. It can therefore be argued that the Abkhazian population constituted an *ascriptive* group within the borders of Georgia. Second, considering the results of the aforementioned referenda and the declarations of independence, there can be no doubt that the ethnic Abkhazians expressed a *will* to secede from the Georgian SSR and eventually from independent Georgia. This said, it must be emphasised that the Abkhazians constituted less than 20 % of the region's population prior to the war.[348] Hence, in as much as the majority of the Abkhazians expressed their will to secede from Georgia, this *will* was, at this time, not representative of the entire population of the Abkhazian Autonomous Republic. After the war, the Abkhazians exceeded the number of Georgians and other ethnic groups only as a result of violent ethnic cleansing and deportations.[349] Non-Abkhazian inhabitants who had not accepted either Abkhazian or Russian citizenship lost their right to participate in elections and referenda.[350] It must thus be argued that despite the persistent *will* of the Abkhazians to secede, as emphasised in the 1999 referendum, a majority vote in support of this *will* was solely achieved through atrocities and the denial of fundamental political rights. It is doubtful that any state established through such means would be regarded as legitimate by the international community.

Finally, even if the *will* to secede initially would have been expressed by the majority of the inhabitants of the region, the *romantic* approach is legally unsupported as a justification for *external* self-determination[351] and may only be enforced *internally* as the entitlement of minority or political rights. By restoring the constitution of the 1921

[347] *Act of State Independence of the Republic of Abkhazia*, *supra* note 52.
[348] "Population censuses in Abkhazia, *supra* note 46.
[349] Mirzayev, *supra* note 33, pp. 196-197.
[350] Council of the European Union, *supra* note 340, para. 12; Goble, supra *note* 94.
[351] UN General Assembly resolution 1514(XV), *supra* note 141, paras. 1-2; UN General Assembly resolution 2200A(XXI), *supra* note 158, art. 27; *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle VII; UN General Assembly, *VDPA*, *supra* note 169, Part II, paras. 26-27, 31; Commission of Rapporteurs, *supra* note 212, p. 4.

Democratic Republic, the Georgian state simultaneously granted Abkhazia extensive autonomy, including linguistic and cultural rights[352] and self-governance in the spheres of local finances and budget, education, local community and town governance, magistrate and court institutions, public order, public health, and infrastructure.[353] Arguably, it can be stated that Georgia did ensure satisfactory *internal* guarantees to the inhabitants of Abkhazia, including the ethnic Abkhazian population, at the time of its secession from the USSR. Allegations of the absence of such guarantees and of the suppression of Abkhazian culture are hence to be regarded as unfounded and cannot serve as a justification for the unlawful exercise of *external* self-determination.

4.2.4. Russian involvement in Abkhazia

Although it is not possible to establish whether Russia initially incited the regional Abkhazian authorities to declare independence, it is certain that its military forces both prior and post the 1992-1994 war assisted separatist units in granting Russian and Abkhazian citizenships to the inhabitants of the autonomous republic.[354] As a result, by indirectly supporting the delimitation of inhabitants entitled to vote in Abkhazian elections and referenda, it can be argued that Russia had an essential influence on shaping a false picture of the *will of the people*.

By directly supporting Abkhazian separatist units during its long-lasting CIS peacekeeping mission established in connection with the 1994 Moscow Agreement, [355] Russia clearly worked against the peace process and violated the cardinal principle of impartiality, understood as the implementation of a peacekeeping mandate without favour or prejudice to any party.[356] Moreover, it support in seizing Abkhazian-claimed territory during the 2008 Five-Day War[357] clearly constituted violations of respectively human rights and international humanitarian law,[358] Georgia's territorial integrity and Russia's obligations under the UN Charter[359] and particularly peremptory norms.[360]

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[352] *Constitution of Georgia*, Tbilisi, 24 August 1995 (available at www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf), art. 8.
[353] Papuashvili, *supra* note 315, p. 345.
[354] Council of the European Union, *supra* note 340, para. 12; Goble, *supra* note 94.
[355] Cornell, *supra* note 35, pp. 159-160; 162; Mirzayev, *supra* note 33, pp. 193-194.
[356] United Nations, Department of Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (18 January 2008) (available at www.un.org/en/peacekeeping/documents/capstone_eng.pdf), pp. 33-34.
[357] MacFarlane et. al., *supra* note 16, p. 16.
[358] Human Rights Watch, *supra* note 45; Council of the European Union, *supra* note 340, para. 10.
[359] Charter of the UN, *supra* note 135, arts. 2(4), 2(7).

Finally, Moscow's indirect control over the self-proclaimed republic's state institutions, its installation of an autocratic regime during its peacekeeping mission, the involvement in the political, economic and military spheres,[361] and the ultimate recognition of the Republic of Abkhazia in 2008 must be regarded as inconsistent with the prohibition of non-interference in internal affairs and a violation of the political independence of Georgia.

4.2 Republic of South Ossetia

4.2.1. The *classical* approach

Despite the initial South Ossetian claims of *internal* and ultimately *external* self-determination being raised prior to the dissolution of the USSR,[362] such rights, as argued in connection with the case of Abkhazia, were only granted to the fifteen republics, consequently leaving decisions regarding further disintegration or *internal* rights to the union republics and, eventually, the newly emergent states.[363] Considering that South Ossetia constituted and integral part of the Georgian SSR and that the right to secede had been granted to the latter, and moreover that the situation in post-Soviet Georgia, as argued in the case of Abkhazia, did not amount to a situation of *abnormality*, it must be established that the region was not entitled to the right of *external* self-determination in this period.[364]

Nevertheless, South Ossetian demands both within the borders of the Georgian SSR and independent Georgia had been largely suppressed through the exclusion of political parties calling for greater self-governance, [365] a degradation of the region's semi-autonomous status provided by the Soviet constitution[366] and finally the deployment of military forces as a response to the region's 1991 referendum on unification with Russia[367]. On the one hand, Georgia's acts may be justified under the *classical* assumption that sovereignty entails certain moral obligations, including the protection of individuals' rights and freedoms, their physical security and the stability of their expectations

[360] ICJ Advisory Opinion, *supra* note 268, p. 38, paras. 80-81.
[361] Waters, *supra* note 15, pp. 177-178.
[362] Waters, *supra* note 15, pp. 176-177.
[363] Unger, *supra* note 310, p. 60; *Constitution of the Union of Soviet Socialist Republics*, *supra* note 311, arts. 76, 78.
[364] Nußberger, *supra* note 335, pp. 355-356.
[365] Waters, *supra* note 15, pp. 176-177.
[366] *Constitution of the Union of Soviet Socialist Republics*, *supra* note 311, art. 87.
[367] MacFarlane et. al., *supra* note 16, p. 8.

towards the authorities and other members of the community.[368] Since the exercise of these obligations requires effective jurisdiction within a clearly bounded territory, it can be argued that Georgia's suppression of secessionist movements and the deployment of forces following the illegally held referendum in South Ossetia merely constituted an exercise of its sovereign duty to ensure effective control, political stability and security within its borders.[369] On the other, however, this assumption does not explain or justify Georgia's decision to degrade the region's administrative status. In fact, considering that this degradation eventually resulted in civil war,[370] consequently threatening the stability of the Georgian state, the persistent decision to suppress the South Ossetians' claims of self-determination appears to have been counterproductive. Rather, in order to preserve its territorial integrity, it might be reasoned that Georgia should have responded to the existing demands and regarded them as claims for the entitlement of rights to *internal* self-determination.[371] These rights might, as proposed in the 1990 CSCE Copenhagen Document to which Georgia was a state party[372], have included measures such as political, cultural and linguistic freedoms or, as initially demanded by the Ossetians, regional autonomy. Arguably, this necessary response was erroneously not addressed before 2003, when president Saakashvili, in an attempt to reintegrate the state, promised the South Ossetians a high degree of self-governance, including free and directly elected local representatives in the region and permanent seats in the national parliament.[373] As a result, the period between the 1991-1992 civil war and the president's proposal had provided the self-proclaimed republic with sufficient time to establish *de facto* effective control of the territory,[374] including the establishment of sovereign state institutions and a political determination not to return to Georgia.[375] Such effective control may, however, not be regarded as a lawful exercise of *external* self-determination. Bearing in mind that the 1992 Sochi Accords set forth an obligation on both parties to find a political solution to the conflict and that there was a chance of a diplomatic settlement without separation of the territories, it must be argued that a South Ossetian exercise of *external*

[368] Buchanan, *supra* note 108, pp. 46-47.
[369] *ibid.*; Barten, *supra* note 107, p. 200.
[370] MacFarlane et. al., *supra* note 16, p. 8.
[371] Barten, *supra* note 107, pp. 199-200.
[372] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 31.
[373] "Address by Mikheil Saakashvili on the occasion of the first of the 2005 Ordinary Session of the Council of Europe Parliamentary Assembly," *supra* note 60.
[374] Waters, *supra* note 15, pp. 177-178, 181.
[375] *ibid.*

self-determination was not to be considered a last resort.[376] However, negotiations intended to stabilise and reconcile the sides have proven to be ineffective, leaving the sides as far apart as ever and turning the situation into a frozen conflict.[377] Hence, as long as a satisfactory political solution will not be agreed upon by both parties, it is difficult to imagine any justifiable grounds for secession or, similarly, any possibility of reintegration of South Ossetia into the Georgian state.

4.2.2. The *remedial* approach

When the South Ossetians demanded either autonomy or secession from Georgia, the state authorities, rather than granting *internal* rights, responded with the exclusion of political parties promoting such demands[378] and the suppression of demonstrations in the region.[379] These actions initially suggest that Georgia deprived its citizens of certain fundamental rights, including the freedoms of association, expression and assembly. However, in as much as such discriminatory policies might constitute justifications for secession under the *remedial* approach,[380] two important points need to be raised in this context. First, the exclusion of political parties or suppression of demonstrations did not target the entire South Ossetian population as a group, but was rather aimed at preventing a limited number of actors from potentially threatening the state's territorial integrity.[381] Second, the restoration of the constitution of the 1921 Georgian Democratic Republic did, as previously emphasised, ensure political, economic and human rights and the equality of all Georgian citizens.[382] Consequently, although it would be incorrect to state that the restrictions on certain political parties as a means of preserving the territorial integrity did not constitute a wrongdoing, it simultaneously seems unlikely that such restrictions alone would amount for a sufficient justification for the exercise of the right to *external* self-determination.

Allegations of the commitment of international crimes, including genocide, ethnic cleansing,[383] violations of international humanitarian law and other series grievances[384]

[376] Nußberger, *supra* note 335, p. 358.
[377] Waters, *supra* note 15, p. 181.
[378] Waters, *supra* note 15, pp. 176-177.
[379] MacFarlane et. al., *supra* note 16, p. 8.
[380] Buchanan, *supra* note 108, pp. 37, 50.
[381] Waters, *supra* note 15, pp. 176-177; MacFarlane et. al., *supra* note 16, p. 8.
[382] *Constitution of Georgia*, *supra* note 352, preamble; Papuashvili, *supra* note 315, p. 324.
[383] Waters, *supra* note 15, pp. 176-177.
[384] ICC, Office of the Prosecutor, *supra* note 64.

were raised by both conflicting parties during the civil war and the 2008 Five-Day War. First, in regards to the former, during the short but intense period of violence the conflict had taken approximately 1,000 lives, primarily those of Georgian and separatist combatants, and had seen 40,000 and 100,000 refugees fleeing to respectively Georgia and Russia.[385] Nevertheless, as in the case of Abkhazia, reports suggest that the gravity of these crimes were highly exaggerated and that allegations of genocide or ethnic cleansing, due to the absence of intent on either side, are unsupported.[386] Moreover, refugees fleeing South Ossetia only left the unstable region when the separatists, supported by Russian forces and volunteers from North Ossetia, engaged in the conflict and pushed back Georgian troops.[387] Hence, although it must not be neglected that the increasing violence undoubtedly resulted in a power vacuum and a perception of absence of statal protection, physical security and stability ensured by the Georgian or the *de facto* South Ossetian authorities,[388] it can simultaneously not be established that the civil population was forcibly displaced[389] from their homes by any of the sides. Second, concerning the 2008 Five-Day War, independent estimates quoted by the Council of Europe suggest that 364 Georgians were killed, with the death toll on the South Ossetian side correspondingly amounting to approximately 300 persons.[390] Although the Georgian argument that South Ossetia was not attacked by Georgian forces during the war is disputable,[391] there are no facts providing grounds to believe that the authorities intended to commit genocide, ethnic cleansing or other international crimes against the inhabitants of the region.[392] By contrast, the South Ossetian authorities conducted an anti-Georgian campaign resulting in the displacement of 18,500 persons, consequently reducing the ethnic Georgian population in the region by at least 75 %.[393] These discriminatory practises, their gravity and systematic and widespread conduct, suggest the commitment of crimes against humanity, including ethnic cleansing in the form of deportation and forcible

[385] Waters, *supra* note 15, pp. 176-177.
[386] Nußberger, *supra* note 335, pp. 357, 359-360.
[387] *ibid.*
[388] Buchanan, *supra* note 108, pp. 46-47.
[389] *Rome Statute of the International Criminal Court, supra* note 333, art. 7(d).
[390] Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 14.
[391] Mirzayev, *supra* note 33, p. 196.
[392] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russia), Judgment, International Court of Justice, 15 October 2008, para. 6, Declaration of Judge ad hoc Gaja; Mirzayev, *supra* note 33, p. 196.
[393] ICC Office of the Prosecutor, *supra* note 64.

transfer of the population.[394] Considering the abovementioned facts, first, it must be argued that South Ossetia, due to the absence of series grievances committed by Georgia, did not have a right to *external* self-determination under the *remedial* approach. Second, the crimes committed by the separatist authorities clearly contradict the underlying assumption of the *remedial* theory setting forth that the primary goal of secession is to ensure respect of human rights within the boundaries of the new entity.[395] Since the majority of the Georgian population in the region was denied such rights, it is difficult to consider the *de facto* state as legitimate.

4.2.3. The *romantic* approach

First, the ethnically, culturally and linguistically distinct South Ossetians, the southern group of the indigenous people to Russo-Georgian divided Ossetia, definitively constituted a *people* defined by *ascriptive* characteristics within the boundaries of Georgia. Moreover, unlike the ethnic Abkhazians in the Abkhaz Autonomous Republic, the Ossetians amounted for a majority of the population in South Ossetia prior to the dissolution of the USSR.[396] Second, considering the initial demands for greater autonomy and the ultimate declaration of independence as a result of the degradation of the region's semi-autonomous status,[397] it must be argued the that Ossetians had developed a popular *will* supported by the majority of the region. This *will*, initially characterised by an inability to determine whether to become independent or to be incorporated into Russia,[398] was eventually channelled into the development of a *de facto* sovereign state. However, since a right of *external* self-determination under the *romantic* approach is not supported by international law,[399] it is instead necessary to consider the extent to which the *will* of the South Ossetians was guaranteed through *internal* rights. First, unlike in the case of Abkhazia and other regions of Georgia,[400] the post-Soviet constitution did not grant South Ossetia autonomous governance or other administrative privileges. Second, despite being a state party to respectively the ICCPR, the VDPA and the CSCE Copenhagen Docu-

[394] *Rome Statute of the International Criminal Court, supra* note 333, art. 7(d).
[395] Beran, *supra* note 120, pp. 24, 30-31.
[396] "Population censuses in South Ossetia: 1989," *Ethno-Caucasus*, 2014 (available at www.ethno-kavkaz.narod.ru/rnsossetia.html).
[397] *Constitution of the Union of Soviet Socialist Republics*, *supra* note 311, art. 87.
[398] Mirzayev, *supra* note 54, pp. 13-14.
[399] Barten, *supra* note 107, p. 200.
[400] *Constitution of Georgia*, *supra* note 352, art. 3; Papuashvili, *supra* note 315, pp. 333, 345.

ment containing both binding and non-binding commitments[401] in regards to rights of national minorities, Georgia did not guarantee such rights to the ethnic Ossetian population. This became evident shortly after Georgia's independence when the government promoted a nationalist policy suppressing minority rights.[402] Accordingly, there is no doubt that Georgia should have granted the South Ossetians *internal* rights, not only as a means of protecting its own territorial integrity as emphasised by the *classical* approach, but additionally to ensure rights corresponding to the *will* of a significant part of its inhabitants. This said, as argued previously in this study, such rights ought to be a result of a compromise between majority and minority wishes[403] and may, but do not necessarily have to, include appropriate autonomous administration as one possibility.[404] Hence, although it can be established that the ethnic Ossetians, constituting a majority within the boundaries of South Ossetia, were legally entitled to rights to *internal* self-determination, the guarantees to be ensured by Georgia may, in the first place, have included cultural and linguistic freedoms and, arguably, only autonomy as a last resort.[405] Finally, it must be acknowledged that Georgia did, prior to the Five-Day War, promise the region a high degree of self-governance and local representatives in the national parliament.[406] However, in as much as these promises initially might be expected to have met the early demands of the Ossetians, it must be noted that they were of a political character and did not directly recognise the distinctiveness of the people's culture or grant it specific minority rights.[407] Considering that the Ossetians are a group defining its affiliation by *ascriptive* characteristics, the prioritisation of such measures under the *romantic* approach appears improper and inevitably ought to be reconsidered in future negotiations on a peaceful solution and the region's reintegration into the Georgian state.

[401] Boyle, *supra* note 21, pp. 119-120; Thirlway, *supra* note 22, p. 113; Brownlie, *supra* note 20, p. 261.
[402] Nußberger, *supra* note 335, p. 357.
[403] Barten, *supra* note 107, p. 251.
[404] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 35.
[405] *ibid.*
[406] "Address by Mikheil Saakashvili on the occasion of the first of the 2005 Ordinary Session of the Council of Europe Parliamentary Assembly," *supra* note 60.
[407] *ibid.*

4.2.4. Russian involvement in South Ossetia

Russia's direct military assistance to the separatist units throughout the 1991-1992 civil war,[408] its lack of impartiality during its CIS peacekeeping operation in the region[409] and its support in seizing South Ossetian-claimed territories in 2008[410] have undermined the initial peace agreement and have constituted violations of Georgia's territorial integrity. Despite Georgian calls for the replacement of Russian forces,[411] Moscow has blocked any attempts at deploying observers from the EU and the OSCE.[412] In addition, both before and after the Five-Day War, the Russian mission failed to stop the conduct of anti-Georgian campaigns initiated by the *de facto* South Ossetian authorities[413] and acts of ethnic cleansing committed by irregular militia in ethnic Georgian villages.[414] Although the exercise of these discriminatory practises might not have been committed by Russian troops, the fact that Russia almost unilaterally controlled the peacekeeping mission,[415] its assistance to the South Ossetians in pushing back Georgian forces from the region[416] and its influence on the separatist units[417] arguably suggest indirect responsibility and violations of its obligations under international humanitarian law.[418]

Prior to the Five-Day War, Russian troops and separatist forces handed out Russian passports to the ethnic Ossetian inhabitants of the region.[419] Russia later justified its intervention by referring to its inherent right to self-defence and the vague doctrine of *protection of nationals abroad*, claiming that Georgia had conducted human rights violations against its citizens.[420] This doctrine, however, is neither supported by positive nor customary international law,[421] and has only been tolerated in limited circumstances when carried out as proportionate rescue missions for the purpose of evacuating na-

[408] Cornell, *supra* note 35, pp. 159-160, 162.
[409] MacFarlane et. al., *supra* note 16, p. 16.
[410] MacFarlane et. al., *supra* note 16, p. 16.
[411] Sepashvili, *supra* note 86.
[412] Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 20.
[413] ICC Office of the Prosecutor, *supra* note 64.
[414] Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 13.
[415] MacFarlane et. al., *supra* note 16, p. 16.
[416] Nußberger, *supra* note 335, pp. 357, 359-360.
[417] Waters, *supra* note 15, pp. 177-178.
[418] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, art. 86(1); Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 12.
[419] Goble, *supra* note 94.
[420] *ibid.*
[421] Tom Ruys, "The 'Protection of Nationals Abroad' Doctrine Revisited," *Journal of Conflict and Security Law,* vol. 13, no. 2 (2008), pp. 261-262; Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 7.

tionals without any use of force.[422] By contrast, Russia's intervention, including military assistance to separatist units,[423] the use of indiscriminate force and weapons in civilian areas and a large-scale military action beyond the boundaries of the region,[424]clearly failed to meet the principles of necessity and proportionality and must be regarded as violations of Georgia's territorial integrity[425] and international humanitarian law.[426]

Lastly, Russia not only helped securing *de facto* separatist control over the territory of South Ossetia after the 1991-1992 civil war and again after the Five-Day War,[427]but has moreover been involved in the development of the self-proclaimed republic's political, economic and military spheres.[428] As this involvement has weakened Georgia's influence in the region and eventually turned the situation into a frozen conflict,[429] it must be argued that Russia's actions and its decision to recognise South Ossetia in 2008 constituted violations of Georgia's political independence,[430] and its commitments under the CSCE Helsinki Final Act[431] and the 1992 Sochi Agreement.

4.3 People's Republics of Donetsk (DPR) and Lugansk (LPR)

4.3.1. The *classical* approach

Bearing in mind that the declarations of independence of the DPR and the LPR took place only after the Ukrainian civil unrest in 2013-2014, it must, before an assertion of the existence of a right to *external* self-determination, be considered whether this period amounted to a situation of *abnormality*. The Euromaidan movement, including mass riots and protests against the government in various Ukrainian cities, civil disobedience and clashes between the demonstrators and security forces, the adoption of laws restricting the freedoms of expression, assembly and association and ultimately the ousting of President Yanukovych and other government officials, resulting in a power vacu-

[422]Francis Grimal and Graham Melling, "The protection of nationals abroad: lawfulness or toleration? A commentary," *Journal of Conflict and Security Law*, vol16 no. 3 (2011), p. 544.
[423]Mirzayev, *supra* note 33, p. 204.
[424]Christine Gray, *The Use of Force and Internal Legal Order* in: Malcolm D. Evans (ed.), International Law, 2014, p. 627.
[425]Council of the European Union, *supra* note 340, p. 36; Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 6.
[426]Parliamentary Assembly of the Council of Europe, *supra* note 29, para. 11.
[427]Mirzayev, *supra* note 54, p. 15.
[428]Waters, *supra* note 15, pp. 177-178.
[429]Waters, *supra* note 15, p. 181.
[430]ICJ Advisory Opinion, *supra* note 268, p. 38, paras. 80-81.
[431]*CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principles III-IV and VI.

um,[432] clearly constituted a situation of revolutionary transformation in which the statehood of Ukraine was no longer definitively constituted.[433] Since the initial calls for independence in the Donbas region appeared in this period, it might be suggested that the establishment of the two new states was, following the assumptions of the *classical* approach, supported by international law. This said, it must be noted that a right to *external* self-determination only applies as a means of reconstituting the political normality of statehood, including properly functional statal procedures.[434] Nevertheless, the state institutions established following the DPR's and the LPR's referenda on secession do not seem to have met this requirement. First, reports of the Special Monitoring Mission (SMM) of the OSCE indicate that in areas outside Ukrainian control, parallel and non-transparent justice systems have been established.[435] Due to the removal of courts, prosecution offices and notary services by the Ukrainian government, access to justice remains limited.[436] Moreover, intentional destruction of case files by the separatist authorities has led to the suspension or complete termination of many pending legal proceedings.[437] Second, due to increasing violence and loss of control of the Donbass region, the Ukrainian government has stopped paying wages and pensions for the inhabitants of the republics, while various banks have suspended transactions and closed their branches, resulting in an unstable economic situation.[438] Finally, the war in the region, illegal border-crossings and flow of arms, funding and personnel to support the separatists[439] clearly suggest that the territorial integrity and effective control of the DPR and the LPR have not been fully established. Considering these facts, it must be argued that despite the presence of *abnormal* circumstances in the state creating the initial opportunity to secede, the two self-proclaimed republics have been unable to ensure prop-

[432] International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities 2014* (2 December 2014) (available at www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf), paras. 62-64.
[433] Koskenniemi, *supra* note 4, pp. 246-247.
[434] Commission of Rapporteurs, *supra* note 212, p. 4; Barten, *supra* note 107, p. 200.
[435] Organization for Security and Co-Operation in Europe (OSCE), Special Monitoring Mission to Ukraine (SMM), *Access to Justice and the Conflict in Ukraine* (December 2015) (available at www.osce.org/ukraine-smm/212311?download=true), pp. 4-5
[436] *ibid.*
[437] *ibid.*
[438] Philip Shishkin, "Rebel Stronghold in Ukraine Braces for Its Showdown," *The Wall Street Journal*, 9 July 2014 (available at www.wsj.com/articles/rebel-stronghold-in-ukraine-braces-for-its-showdown-1404865479); Adrian Karatnycky, "Putin's Ukraine Assault: In a Shambles but from far from over," *The Wall Street Journal*, 8 July 2014 (available at www.wsj.com/articles/putins-ukraine-assault-in-a-shambles-but-far-from-over-1404861429).
[439] Organization of Security and Co-Operation in Europe (OSCE) Decision 1172, *Extension of the Deployment of OSCE Observers to Two Russian Checkpoints on the Russian-Ukrainian Border,* PC.DEC/1172 (18 June 2015).

er measures for the reconstitution of the political normality in Eastern Ukraine. Furthermore, it must be added that the short period of *abnormality* was followed by the formation of an interim Ukrainian government and a restoration of the 2004 constitution[440] guaranteeing local self-governance,[441] development, use and protection of ethnic, cultural and religious identities of national minorities and the Russian language,[442] equality of all citizens, fundamental human rights[443] and the freedom to express the will of the people within the borders through democratic elections and referenda.[444] The government has moreover signed the Minsk II Agreement intended to reintegrate the separatist territories into Ukraine in exchange for constitutional reforms, including decentralization and adoption of legislation on autonomous status of the Donetsk and Lugansk regions, the right of language self-determination, local elections and seats in the national parliament.[445] As the DPR and the LPR have been unable to ensure functional statal procedures and the Ukrainian government has taken steps to guarantee *internal* rights, compromising to the demands of the population of the Donbas region, it must be established that the declarations of independence have not constituted a last resort and have been premature. Consequently, as the *classical* approach favours the preservation of the sovereignty and territorial integrity of the existing state,[446] it must be argued that the two self-proclaimed republics were no longer entitled to exercise their right to *external* self-determination and to become independent states.

4.3.2. The *remedial* approach

Allegations of the Ukrainian interim authorities' violent suppression and killings of protesters in support of federalisation or secession in the Donbas region have been raised by officials of the DPR and the LPR and by ousted president Yanukovych.[447] There is, however, no evidence to support these claims, and sporadic instances of violence followed by more intense clashes in which several people were killed and many more in-

[440] "Ukrainian parliament reinstates 2004 Constitution," *Interfax Ukraine*, 21 February 2014 (available at www.en.interfax.com.ua/news/general/191727.html).
[441] *Constitution of Ukraine*, Kiev, 13 March 2014 (available at www.legislationline.org/documents/section/constitutions/country/52), art. 7.
[442] *Constitution of Ukraine*, *supra* note 441, arts. 10-11, 53.
[443] *Constitution of Ukraine*, *supra* note 441, arts. 21, 24.
[444] *Constitution of Ukraine*, *supra* note 441, art. 69.
[445] "Full text of the Minsk agreement," *supra* note 78.
[446] Barten, *supra* note 107, pp. 199-200.
[447] "Donetsk residents came to referendum because people had reached their wits' end – Yanukovych," *supra* note 72.

jured, have predominantly appeared between pro-Euromaidan and pro-secession demonstrators.[448] Ukrainian police and special forces have primarily played a role in detentions of pro-secessionist in connection with the seizing of government buildings in various South and East Ukrainian cities.[449] It would therefore be improper to state that the Ukrainian government intentionally denied or violated the fundamental human rights and freedoms of the Russian-speaking population within its borders. Consequently, the separatists were not entitled to the right of *remedial* self-determination in this period.

As of 2015, more than 9,000 people had been killed and over 20,000 had been wounded as a result of the war in the Donbas.[450] It is estimated that 1.4 million people had been internally displaced in Ukraine and that over 600,000 had fled abroad, mostly to Russia.[451] Both sides violated laws of war by operating within or near densely populated areas and by indiscriminate use of weaponry, endangering civilians and civilian objects, including schools, hospitals and apartment buildings.[452] Collateral damage and the targeting of water installations have impacted the functionality of water systems, leading to lack of access to water and poor water quality threatening human health, sanitation, heating systems and food production and moreover impeding socio-economic development and political stability.[453] The introduction of travel restrictions and permit systems by both conflicting sides have limited the capacity of civilians in separatist-controlled areas to reach safety and access life-saving services located in Ukrainian-controlled territories, including humanitarian aid, causing a severe shortage of medicine and medical supplies.[454] Finally, as previously argued, the war has led to the complete

[448] Organization of Security and Co-Operation in Europe (OSCE), *Human Rights Assessment Mission in Ukraine: Human Rights and Minority Rights Situation* (12 May 2014) (available at www.osce.org/odihr/118476?download=true), paras. 4-5.
[449] Alec Luhn, "Military assaults against pro-Russian occupiers rumoured in eastern Ukraine," *The Guardian*, 10 April 2014 (available at www.theguardian.com/world/2014/apr/10/military-assaults-rumoured-eastern-ukraine-russian); "Russia warns Ukraine to avoid 'civil war' as Kyiv moves against protesters," *Euronews,* 8 April 2014 (available at www.euronews.com/2014/04/08/us-attempts-to-de-escalate-ukraine-tensions/).
[450] Human Rights Watch, *World Report 2016: Events in 2016* (available at www.hrw.org/world-report/2016/country-chapters/ukraine-0).
[451] *ibid.*
[452] *ibid.;* Human Rights Watch, *World Report 2015, supra* note 76.
[453] Organization of Security and Co-Operation in Europe (OSCE), *Access to water in conflict-affected areas of Donetsk and Luhansk regions* (September 2015) (available at www.osce.org/ukraine-smm/183151?download=true), pp. 3-4.
[454] Organization of Security and Co-Operation in Europe (OSCE), *Protection of Civilians and their Freedom of Movement in the Donetsk and Luhansk Regions* (6 May 2015) (available at www.osce.org/ukraine-smm/156791?download=true), p. 3; Human rights Watch, *World Report 2015, supra* note 76.

collapse of law, order and the economy in the region.[455] Although these consequences might not have been intentional, they nevertheless demonstrate that neither of the authorities have fulfilled their statal responsibilities and have failed to ensure basic means of subsistence to the civilian population. As these failures, due to attacks on both sides and the difficulty of establishing the territorial limits of *de facto* jurisdiction, are a responsibility of both the Ukrainian government and the authorities of the self-proclaimed republics, it would be incorrect to state that the DPR or the LPR had a right to *external* self-determination under the *remedial* approach.

Finally, regarding the guarantees to be ensured by the DPR and the LPR within the territories controlled by their units, reports reveal serious restrictions on the freedoms of expression, assembly, political thought and religion and violations of other human rights and laws of war.[456] Separatist forces have detained, attacked and threatened hundreds of people, including civilians, journalists, local officials and political and religious activists whom they have suspected of supporting the Ukrainian government.[457] Instances of summary executions, forcing detainees to labour and kidnappings of civilians and OSCE observers for ransom have similarly been registered.[458] Considering these facts and the absence of functioning and transparent state institutions ensuring basic means of subsistence, it is obvious that the two self-proclaimed republics have been unable to guarantee and have denied fundamental human rights within their boundaries. Consequently, the republics cannot be regarded as legitimate alternatives to the Ukrainian state, which, despite limited success, have launched constitutional initiatives attempting to improve the humanitarian situation in the region.[459] As the goal of groups referring to *remedial* self-determination is to ensure such rights,[460] it must be argued that the DPR's and the LPR's claims to secede are unsupported by international law.

[455] OSCE, *Access to Justice and the Conflict in Ukraine*, *supra* note 435; Human rights Watch, *World Report 2015, supra* note 76.
[456] Human rights Watch, *World Report 2015, supra* note 76.
[457] *ibid.*
[458] *ibid.*
[459] *Constitution of Ukraine*, *supra* note 441, arts. 21, 24; Full text of the Minsk agreement," *supra* note 78, art. 7.
[460] Beran, *supra* note 120, pp. 24, 30-31.

4.3.3. The *romantic* approach

Ukraine has historically been divided between a Ukrainian-speaking west and a Russian-speaking south and east.[461] In the Donetsk and Lugansk regions 75 % and 69 % of the inhabitants speak Russian, while 38 % and 39 % identify themselves as ethnic Russians.[462] This division is moreover reflected in political preferences. While regions with a significant Russian-speaking population vote for parties and politicians preferring co-operation with Russia, including ousted president Yanukovych, Western Ukraine has traditionally backed stronger ties with the EU and the West.[463] First, considering that a significant portion of the inhabitants of the Donetsk and Lugansk regions determine their affiliation by a common language and further that a minority identifies itself as a separate ethnic group, it must be established that this population constitutes a *people* defined by *ascriptive* characteristics.[464] These characteristics entitle them to rights of *internal* self-determination in the form of minority rights or, if necessary and appropriate, regional autonomy.[465] Second, the inhabitants' shared political ideas moreover define them as an *associative* group.[466] If these ideas are to form an autonomous unit, self-determination as an end must first be subject to a free and transparent referendum expressing the *will of the people*.[467] It is therefore necessary to consider whether the inhabitants of Eastern Ukraine, both as an *ascriptive* and as an *associative* group, had a *will* to obtain *internal* self-determination. Regarding the *will* based on *associative* characteristics, when president Yanukovych was dismissed, activists in the Donbas expressed discontent with the new government in Kiev and demanded the enshrinement of Russian as a co-official language[468] and either federalisation or incorporation into Russia.[469] The results of self-organised referenda held in May 2014 allegedly showed that these claims

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[461] Vladimir Fesenko, *Ukraine: Between Europe and Eurasia*, in: Piotr Dutkiewicz and Richard Sakwa (eds.), Eurasian Integration: The view from within, 2015, p. 127.

[462] "Ukrainians Who Identify As Ethnic Russians Or Say Russian Is Their First Language," *Radio Free Europe, Radio Liberty*, 15 July 2016 (available at www.rferl.org/contentinfographics/map-ukraine-percentage-who-identify-as-ethnic-russians-or-say-russian-is-their-first-language-/25323841.html).

[463] Fesenko, *supra* note 461, pp. 129-130; "Ukraine's sharp divisions," *BBC*, 23 April 2014 (available at www.bbc.com/news/world-europe-26387353); Walter, *supra* note 68.

[464] Buchanan, *supra* note 108, p. 38.

[465] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 35.

[466] Freeman, *supra* note 118, p. 360; Buchanan, *supra* note 108, pp. 38-39.

[467] *ibid.*

[468] Walter, *supra* note 68; Roland Oliphant, "Ukraine crisis: dozens killed in Odessa fire as violence spreads to country's south," *The Telegraph*, 2 May 2014 (available at www.telegraph.co.uk/news/worldnews/europe/ukraine/10805412/Ukraine-crisis-dozens-killed-in-Odessa-fire-as-violence-spreads-to-countrys-south.html).

[469] Walter, *supra* note 68.

where supported by the majority of the population.[470] Yet, reports of electoral fraud, incomplete electoral lists, the possibility of voting multiple times and a ballot question not clarifying whether the inhabitants voted for secession or autonomy suggest that the referenda were neither free nor transparent[471] and, consequently, might not have reflected the *will of the people*. The presence of impartial international observers to validate the legitimacy of the result would have been expected as a necessary criterion.[472] It must therefore be argued that the means to obtain a right to self-determination within the boundaries of Ukraine were exercised improperly. Nevertheless, since the *ascriptive* characteristics of the inhabitants already entitled them to *internal* rights,[473] it must be expected that Ukraine's government compromised to the existing claims and guaranteed the Russian-speaking and ethnic Russian population minority rights. As argued previously, the restored Ukrainian constitution guaranteed the population the right to use and protect the Russian language and their ethnic and cultural identity.[474] Additionally, the signature of the Minsk II Agreement obliged Ukraine to introduce constitutional reforms providing for decentralisation, permanent legislation on the special status of the Donetsk and Luhansk regions,[475] local elections monitored by the OSCE, language self-determination, seats in the national parliament and the right to cross-border contacts with regions of the Russian Federation.[476] However, in as much as the government has expressed intentions of *internal* guarantees, as of summer 2016, the provisions of the Minsk II Agreement have not been fulfilled.[477] The implementation of these provisions is a necessary step in the completion of Ukraine's obligation to grant the Russian-speaking population a right to *internal* self-determination and hence a possibly peaceful reintegration of the DPR and the LPR into Ukraine.

[470] Gander, *supra* note 70.

[471] Oksana Grytsenko et al., "Ukraine: pro-Russia separatists set for victory in eastern region referendum," *The Guardian*, 12 May 2014 (available at www.theguardian.com/world/2014/may/11/eastern-ukraine-referendum-donetsk-luhansk); "Ukraine rebels hold referendums in Donetsk and Luhansk," *BBC*, 11 May 2014 (available at www.bbc.com/news/world-europe-27360146); Matt Robinson and Alessandra Pretence, "Rebels declare victory in East Ukraine vote on self-rule," *Reuters*, 11 May 2014 (available at www.reuters.com/article/us-ukraine-crisis-idUSBREA400LI20140511).

[472] *CSCE: Copenhagen Document*, *supra* note 194, Part I, para. 8.

[473] *CSCE: Copenhagen Document*, *supra* note 194, Part IV, para. 35.

[474] *Constitution of Ukraine*, *supra* note 441, arts. 10-11, 53.

[475] "Full text of the Minsk agreement," *supra* note 78, para. 11.

[476] "Full text of the Minsk agreement," *supra* note 78, para. 12, footnote.

[477] Sasse, *supra* note 79.

4.3.4. Russian involvement in Eastern Ukraine

Russian authorities have persistently expressed their support to the separatists and have stated that the results of the self-organised referenda convincingly showed the real disposition of the nationals of the Donetsk and Lugansk regions to have a right to take independent decisions on issues concerning their vital interests.[478] However, in as much as a right of self-determination has been acknowledged by the Russian state, the existing statements suggest that any exercise of the right must take place within the framework of a dialogue between the authorities of two self-proclaimed republics and the Ukrainian government.[479] Arguably, the official position of Moscow has not been an endorsement of automatic secession, but rather an *internal* solution resulting from a compromise between the conflicting parties.

Western allegations, among others raised by NATO, suggest Russian influence in the DPR's and the LPR's political and economic spheres, the presence of Russian servicemen, volunteers and mercenaries supporting the separatist units,[480] and cross-border flow of money, arms and other military equipment.[481] However, unlike in the cases of Abkhazia and South Ossetia, Russia has not officially deployed its forces in the Ukraine and most allegations have been denied by Moscow, which claims that it has little influence on the separatists.[482] Accordingly, it can at this time not be established that any direct or indirect measures of force against Ukraine, including military occupation or assistance to secessionist groups through military, economic or political means, have appeared. This said, if the aforementioned accusations nevertheless would be confirmed in future investigations, it would be beyond debate that Russia used force and violated the territorial integrity of Ukraine and hence derogated from its obligations under the UN Charter[483] and the CSCE Helsinki Final Act.[484]

Finally, Russia's role in the Minsk II Agreement and its membership of the Trilateral Contact Group on Ukraine (with Ukraine and the OSCE)[485] has provided it with tangible

[478] "Comment by the Russian Ministry of Foreign Affairs regarding referendums in the Donetsk and Lugansk Regions of Ukraine," *supra* note 73.
[479] *ibid.*
[480] Weaver, *supra* note 95.
[481] *ibid.*
[482] Marson, *supra* note 99.
[483] Charter of the UN, *supra* note 135, arts. 2(4), 2(7).
[484] *CSCE: Final Act of Helsinki*, *supra* note 179, Part I, Principle III-IV
[485] "Full text of the Minsk agreement," *supra* note 78, para. 13.

political benefits.[486] Moscow has pushed the Ukrainian government for guarantees of a high degree of *internal* self-determination for Donetsk and Lugansk by emphasising the importance of constitutional reforms and the granting of special status for the regions.[487] Moreover, despite Kiev's success of ensuring that the regions controlled by the DPR and the LPR remain under Ukrainian jurisdiction,[488] provisions concerning their "special status" and their right to develop "cross-border cooperation" with Russian regions[489] might be subject to politicised interpretation, resulting in *de facto* economic and political integration into Russia. Similarly, the Ukrainian government's restoration of the control of its state border may only take place on the condition that the criteria of constitutional reforms and local elections will be fulfilled and when a political solution between the members of the Trilateral Contact Group and the separatists will be agreed upon.[490] It can, however, not be excluded that Russia will attempt to sabotage a potential settlement,[491] consequently preventing the Ukrainian government from controlling its frontiers. Therefore, the process intended to stabilise and integrate the state, which requires dialogue between Kiev and the separatist, undoubtedly provides Russia with indirect influence on Ukraine's political independence. Conclusively, it must be argued that the preservation of Ukraine's sovereignty and territorial integrity requires immediate implementation of the Minsk II Agreement, including guarantees of an extensive right to *internal* self-determination for the population of the Donetsk and Lugansk regions as well as a satisfactory political settlement between the conflicting parties. The risk of Russia's unwillingness to cooperate on these matters might, however, halt existing negotiation and reconciliation efforts, consequently leading to another frozen conflict.

[486] Naja Bentzen, "Ukraine and the Minsk II agreement On a frozen path to peace?," *European Parliamentary Research Service (EPRS),* January 2016 (available at www.europarl.europa.eu/thinktank/da/document.html?reference=EPRS_BRI(2016)573951).
[487] "Full text of the Minsk agreement," *supra* note 78, para. 11.
[488] Kardaś and Konończuk, *supra* note 100.
[489] "Full text of the Minsk agreement," *supra* note 78, para. 12, footnote.
[490] "Full text of the Minsk agreement," *supra* note 78, para. 11.
[491] Kardaś and Konończuk, *supra* note 100.

5. Conclusion

This study has examined two questions in regard to the tension between the principle of territorial integrity and the right to *external* self-determination. First, the study investigated whether, and under which circumstances, international law provides a right to *external* self-determination under the *classical*, the *remedial* and the *romantic* approach. Second, based on the findings, the study analysed whether the claims of *external* self-determination in the cases of the self-proclaimed republics of Abkhazia, South Ossetia, Donetsk and Lugansk might be legally justified, and whether Russia's influence in each of the cases was in accordance with international law.

Concerning the former question, first, with the initiation of the decolonisation, *external* self-determination became a right entitling all peoples in non-self-governing territories and other dependencies to secede from the states administrating them. This right, however, was not granted on the basis of peoples' *ascriptive* characteristics, but referred to the colonies as political and artificial communities. The objective of the right to *external* self-determination in this period was therefore in line with the *classical* approach, as it emphasised the importance of statal procedures rather than aligning the boundaries of the new states with those of the nations. The ICCPR affirmed that the right to self-determination constituted a fundamental human right, which applied outside the context of decolonisation and was to be promoted by the whole international community. The document simultaneously underlined the emerging disjuncture of the right. While the right to *external* self-determination applied to artificial communities, in states where minorities existed, rights of *internal* self-determination had to be guaranteed. The Friendly Relations Declaration and the VDPA both set forth that the denial of self-determination constituted a violation of human rights and that all states had a duty to refrain from forcible actions depriving peoples of the right. Peoples' resistance to actions violating these rights entitled them to seek and receive support in accordance with the UN Charter. This assumption is in line with the *remedial* approach.

Second, the two soft law instruments, the CSCE Final Act and the CSCE Copenhagen Document, provided no right for *ascriptive* groups to secede, but affirmed that minorities were entitled to *internal* rights to self-determination safeguarded by the state. On the one hand, these assumptions are comparable to the *classical* approach as they favour the preservation of territorial integrity and deal with claims of self-determination as claims for minority rights. On the other, the emphasis on minorities' right to express

their identity suggest compliance with the assumptions of the *romantic* school. *Internal* rights may include measures such as political, cultural, religious and linguistic rights or appropriate autonomous administrations. In addition, states must guarantee functional statal procedures and free elections ensuring both their own legitimacy and the expression of the will of the people, including the freedom of assembly, political participation and other human rights. While it may be argued that the obligation to ensure statal procedures supports the *classical* approach, the importance of human rights and the inclusion of election commitments to safeguard these rights are in line with the *remedial* approach. Moreover, the freedom of assembly, political participation and expression of the *will of the people* follow the assumptions of the *romantic* approach concerning *associative* groups. Finally, states should refrain from any direct or indirect measures of force, including acts of military occupation or assistance to activities threatening a state's control over its territory.

Third, in the Åland Islands case, the two Commissions set forth that although positive law did not recognise ethnic groups' right to *external* self-determination, such right might be called into play in situations of *abnormality,* understood as the absence of functioning statal procedures. As state practice in connection with the dissolutions of various Eastern European states since demonstrated that the international community was supportive of this view, it has been argued that the assumptions of the Commissions have been established as international custom. These statements can be seen as supporting the arguments of the *classical* approach, undermining a right to *external* self-determination under the *romantic* approach. Nevertheless, emphasising states' obligations to grant minority rights, the Commissions suggested a right of *internal* self-determination based on such groups' *romantic* characteristics. As the importance of the protection of minorities has been affirmed in various legal sources and as state practice has provided evidence that derogations from these obligations have been considered to constitute wrongdoings, it has been establish that the granting of rights to *internal* self-determination to minority groups has emerged as a duty under customary international law. The case of Bangladesh clearly reflected a correlation between atrocities committed by the central authorities against the Bengali population and the widespread and uniform international acceptance of the Bengalis' right to establish the State of Bangladesh as a last resort. Hence, the case illustrates international support for secession under the *remedial* approach. Furthermore, the UN's condemnations of India's intervention in the

region demonstrated international acceptance that direct third-state support for secessionist movements is to be considered a violation of international law. Finally, despite the absence of widespread acceptance of Kosovo's independence, a significant portion of the international community recognised the region's right to *external* self-determination by referring to the atrocities committed by the Serbian authorities against the ethnic Albanians. Consequently, although the question of whether the case fostered customary international law remains disputable, it must nevertheless be argued that the existing international recognitions supported a justification of a right to *remedial* secession.

The aforementioned finding served as guidelines in regards to the question of the legality of the secessionist claims of Abkhazia, South Ossetia, Donetsk and Lugansk. First, despite the fact that the dissolution of the USSR constituted a situation of *abnormality*, the right to *external* self-determination was granted to the union republics, leaving Abkhazia and South Ossetia with no right to secession from Georgia in this period. Similarly, as such situation was not present following Georgia's independence, it must be established that the regions did not have a right of *external* self-determination under the *classical* approach. By contrast, the Euromaidan movement in Ukraine constituted a situation of *abnormality*, suggesting that the establishment of the DPR and the LPR initially was in line with the assumptions of the *classical* approach. However, as the two republics were unable to ensure functional statal procedures and the Ukrainian government had taken steps to guarantee *internal* rights, it must be established that the declarations of independence had been premature and that the claims of secession could no longer be justified. Second, concerning the *remedial* approach, reports suggested that allegations of international crimes committed by state authorities both prior and during the conflicts in all three cases were highly exaggerated. In fact, in all cases the *de facto* authorities of the self-proclaimed republics were unable to guarantee and denied human rights within their boundaries. Moreover, in Abkhazia and South Ossetia, separatist forces and authorities carried out widespread atrocities against civilians, committed ethnic cleansing and implemented discriminatory policies depriving the Georgian population of its fundamental rights. Considering the *remedial* school's criteria of the presence of international crimes or policies depriving a group of basic rights, and further that the primary goal of secession under this approach is to ensure respect of human rights within the boundaries of the new entity, it must be established that neither Abkhazia, South Ossetia nor Donetsk and Lugansk were entitled to a right to *external* self-determination under

the *remedial* approach. Finally, in regard to the *romantic* approach, the study established that the Abkhazians and South Ossetians constituted *ascriptive* groups in Georgia, while the Russian-speaking population of the Donetsk and Lugansk regions constituted both an *ascriptive* and an *associative* group in Ukraine. In all cases, these groups expressed a *will* to obtain either *internal* or *external* self-determination. While this *will* was supported by the majority of the inhabitants of South Ossetia, in the case of Abkhazia it was initially not representative of the entire population of the region. Despite the persistent *will* to secede, a majority vote in support of this *will* was solely achieved through atrocities and the denial of political rights for non-Abkhazians. In the case of Ukraine, activists demanded the enshrinement of Russian as a co-official language and either federalisation or incorporation into Russia. Despite the results of referenda allegedly showing the *will of the people*, it must be argued that electoral fraud undermined the credibility of this *will*. Finally, the groups' *ascriptive* characteristics entitled them to *internal* rights. It can be established that Georgia did ensure satisfactory guarantees to the inhabitants of Abkhazia by granting the region extensive autonomy. It did, however, not provide *internal* guarantees to the ethnic Ossetian population. There is no doubt that Georgia ought to consider such rights in future negotiations on a solution and the region's reintegration into the Georgian state. In Ukraine, the constitution guaranteed the Russian-speaking population the right to use and protect the Russian language and their cultural identity. Moreover, the Minsk II Agreement obliged Ukraine to introduce constitutional reforms providing for *internal* rights of self-determination. However, as of summer 2016, the Minsk II Agreement has not been fulfilled. It must be argued that the implementation of the agreement is a necessary step in the process of guaranteeing *internal* rights and a peaceful reintegration of the regions into Ukraine.

Finally, the study examined whether Russia's influence in each of the cases was in accordance with international law. Russia's lack of impartiality during its CIS peacekeeping operations in Abkhazia and South Ossetia, its direct assistance to the regions' separatist units and its military intervention in 2008 constituted violations of Georgia's territorial integrity. In Ukraine, allegations of direct involvement were denied by the Russian authorities. However, if such accusations would be confirmed in future investigations, Russia would clearly have violated the territorial integrity of Ukraine. The indirect control over the self-proclaimed republics' state institutions and the recognition of both Abkhazia and South Ossetia must be regarded as a violation of Georgia's political inde-

pendence. By contrast, the official position of Moscow in Ukraine was not an endorsement of automatic secession, but rather an *internal* solution. This was especially evident in Russia's role in the Minsk II Agreement, where it pushed the Ukrainian government for a high degree of *internal* self-determination for the regions. The potential risk of Russia's unwillingness to cooperate on the implementation of the Minsk II Agreement might, however, halt existing negotiation and reconciliation efforts and consequently, as in the cases of Abkhazia and South Ossetia, lead to another frozen conflict.

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