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Separatist de Facto States and use of force: the Case of Georgia

Abstract

The so-called de facto states represent a specific category of state-like entities fulfilling most of the normative criteria for statehood. Despite the factual exercise of public authority over permanent population on a defined territory, the de facto states remain deprived of state recognition by the international community. One of the common reasons for such ostracization is a serious breach of peremptory rules of the general international law in connection to their creation. Since the existence of such de facto entities is frequently reached as a result of an armed conflict, the non-compliance with the customary prohibition of the use of force serves as a fitting subject of study. The article aims at answering the question of whether an unlawful use of force in the process of secession prevents a lawful creation of an independent state under international law. The normative analysis is illustrated by the example of Georgia, whose separatist regions of South Ossetia and Abkhazia are two emblematic archetypes of de facto states created with the support of a third (patron) state – the Russian Federation.

Keywords: De Facto States; Use of Force; Creation of States, Jus Cogens; Responsibility of States; Statehood; Self-determination; Secession.

Introduction

At the end of the first quarter of the 21st Century, the international community finds itself in a situation, when the process of decolonization is at its completion, while the United Nations (hereinafter - UN) membership encompasses the quasi-entirety of states on our planet. Nevertheless, there are still a number of entities fulfilling some of the basic criteria for statehood having difficulty establishing themselves on the international stage. The *de facto* states, a term preponderantly used in the contemporary international law discourse to incorporate such entities, will be employed throughout this article for the reason of its clear allusion to the factual character of their self-proclaimed statehood.²

With their historical and political backgrounds being quite diverse, there is, however, a frequent aspect of use of force in common to a larger part of these entities and their efforts towards assertion of independence, particularly in the post-soviet space.³ The reasons behind the lack of universal recognition often originate from a contravention of the

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² Caspersen N., Playing the Recognition Game: External Actors and De Facto States, *The International Spectator*, Vol. 44, No. 4, 2009, 47.

³ Caspersen N., Making Peace with De Facto States, Unrecognized States and Secession in the 21st Century, Riegl M., Doboš B. (eds.), Cham, 2017, 11.

peremptory rules of general international law.⁴ The present article will focus on this particular category. While the use of force by the separatist national liberation movement and/or by a third party (possibly a patron state) may lead to a victory on the battlefields, this may not have the expected outcome in form of the following legal battles taking place in conference rooms of international organizations and ministries of foreign affairs.

From a broader perspective, the legal use of force is reserved only to limited exceptions to the general prohibition under the UN Charter and customary international law. An infringement of rules having peremptory character gives rise to serious legal consequences *inter alia* in the form of additional obligations *erga omnes* concerning the recognition of the unlawful state of affairs.⁵ This may signify an aspect of utmost importance in perspective of the legality and potential legitimation of independence of some of the so-called *de facto* states. In light of all the above, the aim of this article is to resolve the following question: “Does an unlawful use of force in the process of secession prevent a lawful creation of an independent state under international law?”

Due to the latest developments in Eastern Europe, the *de facto* states reappear once again under the spotlight of attention of the international community. As some of the former representatives of this category perished under the pressure of military action or as a result of annexation of their territory, there are still few of those not losing on their importance. This article focuses on the cases of Abkhazia and South Ossetia, Georgia’s separatist regions, self-proclaimed as independent republics and recognized, yet occupied, by the Russian Federation. By virtue of their strategic position in the Caucasus region, their fate may soon gain significant topicality in context of the Euro-Atlantic cooperation and Russian aggrandizement ambitions.

Chapter 1. De Facto States and Use of Force

For the successful resolution of the question of elements restraining the potential states from achieving their desired independence and statehood, leaving them in the insecure category of *de facto* states, it is indispensable to elucidate the relationship between the contemporary legal regime concerning self-determination and secession with the larger *jus ad bello* regulation. The subsequent assessment of peremptory rules of international law will serve as a base for understanding of the ramifications of a serious breach of such norms in the independence struggles *ipso facto* resulting in a threat of invalidity of the entire independence process.

1.1. De Facto States

⁴ Milano E., The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with De-Facto Regimes, Proceedings of The Power of International Law at Times of European Integration, Budapest, 2007, 5.

⁵ Kolb R., Peremptory International Law - Jus Cogens: A General Inventory, Oxford, 2015, 106-108.

The so-called *de facto* states (sometimes referred to as *de facto* regimes)⁶ represent a specific category of quasi-state entities fulfilling some of the criteria of statehood generally accepted by the international law as fundamental prerequisites for the polity to be considered a state, i.e., the primary subject of international law.⁷ Their *de facto* character is apparent from the factual attainment of constitutive elements of a permanent population living on a defined territory under its effective government.⁸ However, the absence of capacity to enter into formal relations with other states, caused by a global political position or more importantly by the refusal of the large majority of international community to accept (and thereby legitimize) a certain factual state engendered by a previous unlawful act, constrain the entity from achieving the equal legal status of its peers. The question of statehood and recognition of states will be dealt with later in detail.

While many exemplars of what is now labeled as *de facto* states can be found in previous periods, this phenomenon underwent its renaissance after the end of the Cold War with the collapses of the great federations of the Eastern Bloc. Nationalist animosities long covered by the communist internationalistic ethos and repression erupted in brutal armed conflicts resulting in *de facto* separations of various secessionist regions proclaiming their independence.⁹ Abkhazia and South Ossetia are archetypal examples of such *de facto* states in the post-soviet space created and sustained with a forceful intervention by a third party (the Russian Federation).¹⁰

1.1.1. Self-Determination in the Contemporary International Law

The right to self-determination was proclaimed by the UN Charter as one of the leading principles of the post-war international system.¹¹ Accordingly, it was later explicitly granted to peoples in the common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights¹² as well as, *inter alia*, in the decolonization context and focus of the Declaration on the Granting of

⁶ Ondřej J., The Creation of New States and De Facto Regimes, and the Case of Crimea, Czech Yearbook of International Law, Vol. 6, 2015, 131-147.

⁷ For a general definition and further analysis of de facto states, see: Pegg S., International Society and the De Facto State, London, 2019, 36 et seq.

⁸ It is crucial to note that the degree of fulfillment of these criteria inherently varies from case to case. Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, Montevideo, 26 December 1933, League of Nations Treaty Series, Vol. 165, art. 1.

⁹ Pataraia D., The Principle of Self-Determination in the XXI Century and the Challenge of Separatism in the Post-Soviet Space, International Law: Selected Issues, Pataraia D. (ed.), Tbilisi, 2021, 15.

¹⁰ The designations of the analyzed territories officially used by Georgia are the Autonomous Republic of Abkhazia and the Tskhinvali Region.

¹¹ Charter of the United Nations, 24 October 1945, United Nations Conference on International Organization (UNCIO), Vol. XV, 335, art. 1(2).

¹² International Covenant on Civil and Political Rights, United Nations Treaty Series, Vol. 999, 171, 16 December 1966, art. 1; International Covenant on Economic, Social, and Cultural Rights, United Nations Treaty Series, Vol. 993, 3, 16 December 1966, art. 1.

Independence to Colonial Countries and Peoples (UN GA Resolution 1514 XV).¹³ The strong position of self-determination in this perspective was underlined by the International Court of Justice (hereinafter - ICJ) in its judgment concerning East Timor, declaring that the right to self-determination had *erga omnes* character and constituted one of the essential principles of contemporary international law.¹⁴

However, the approaches towards self-determination of peoples outside of the former colonial empires seem to vary a lot more. After the fall of the Iron Curtain, a boom of self-determination and secession movements led to the creation of a quantity of new states, resulting at the same time in a plethora of separatist conflicts eventually terminating frozen in a given *status quo*.¹⁵ As the reality of complicated local tensions in Eastern Europe resembled the perpetual domestic issues of national and ethnic minorities in the metropolises more than distant independence movements of colonized peoples, the existential anxiety of their Western and other counterparts may be, in author's view, read under the lines of their much more nuanced attitudes towards such processes.¹⁶

Parts of territory, natural resources, or other strategic elements being at stake, the initial UN member states, as well as the newly independent states, felt the need to foster the protection of their political unity and territorial integrity. The concepts of internal and external self-determination of peoples appeared to amply suit the necessity of a balance between these fundamental attributes of statehood and the concept of self-determination. In the well-known judgment concerning the independence of Québec, the Supreme Court of Canada ruled that Québec was not endowed with the right of self-determination in the form of unilateral secession as this applied exclusively to peoples under colonial rule or foreign occupation. The Québécois within the federation were not deprived of the possibility of economic, cultural, and social development, nor full political representation, nor anti-discriminatory protection, etc.¹⁷

The concept of internal self-determination therefore enabled to thwart the separatist struggles of peoples in democratic states granting them a platform of limited self-realization and development with varied levels of potential autonomy, in opposition to the external form aimed towards unilateral secession of oppressed peoples.

¹³ United Nations General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, Resolution 1514 (XV), 14 December 1960.

¹⁴ East Timor (Portugal v. Australia), Judgment, [1995] ICJ Reports, 90, para. 29; later confirmed in: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Reports, paras. 88 and 156.

¹⁵ *Peters A.*, Statehood after 1989: 'Effectivités' between Legality and Virtuality, Proceedings of the European Society of International Law, Vol. 3, 2010, 1.

¹⁶ In this perspective see further: *Roth B. R.*, Self-Determination as the Basis for a Right to Secession, The Routledge Handbook of Self-Determination and Secession, *Griffiths R. D., Pavković A. and Radan P. (eds.)*, 2023, 439.

¹⁷ Reference re Secession of Quebec, [1998] 2 SCR 217, para. 154.

1.1.2. A Right of Secession?

The issue of unilateral secession and its legal status is closely related to the right of self-determination. The latter being presented as a cornerstone of modern international architecture, this is clearly not perceived in the same way as the former. The opinion of scholarship as well as the states and intergovernmental organizations differ largely as to the legal quality and the mere existence of the right itself.¹⁸

In cases of states with a recognized right to secession (or devolution) of union republics or autonomous regions incorporated into their constitution, the issue remains rather procedural. Even though a larger part of the later self-proclaimed *de facto* states were subjects to a certain degree of autonomy, the right of secession was not recognized in their domestic legal system, or at least not at the level of autonomy of their region.¹⁹

The Arbitration Commission of the Conference on Yugoslavia (hereinafter - Badinter Arbitration Committee) adopted a set of opinions guiding the ECC in regard to the secession and recognition of newly proclaimed republics in then collapsing Yugoslavia.²⁰ One of the major principles, previously generally recognized in the decolonization context, *uti possidetis juris*, was to be applied correspondingly to the question of future borders of the secessionist republics. This principle, due to its significant practical advantages, is considered a general standard regarding the creation of states and with corresponding implications on occupation of their or else's territory respectively.²¹ The issue of territory and frontiers bear much significance for the secessionist entities, who strive to gain control over the entirety of the territory of the formerly dependent province, that being a key part of its claims for the overall statehood and independent existence.²²

As to the main issue of unilateral secession, neither the international community nor the scholarship are united as of its lawfulness.²³ None of general international instruments provide for a definition of secession or a set of rules forging its normative character. The right seems seriously underregulated by the positive international law.²⁴

¹⁸ Milano E., Zugliani N., Meaning(s) of Illegality in Secession Processes, Research Handbook On Secession, McGibbon S., et al. (eds), 2022, 353.

¹⁹ Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, 7 October 1977, art. 72.

The last 1974 Yugoslav Constitution did not recognize the right to secession of Republics. See: Radan P., Secession and Constitutional Law in Former Yugoslavia, University of Tasmania Law Review, Vol 20, No. 2, 195-199.

²⁰ Arbitration Commission of the Conference for Peace in Yugoslavia, Opinions No. 1 to 10, International Legal Materials, Vol. 31, 1992, 1497 et seq.

²¹ Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, [1986] ICJ Reports, para. 20.

²² It is not unusual that the secessionist entities do not control the entirety of the supposed constitutive territory of the new self-proclaimed state. That was *inter alia* the case of Luhansk and Donetsk People's Republics, that did not effectively govern over no more than a third of the territory of the corresponding administrative oblasts.

²³ Sterio M., Self-Determination and Secession Under International Law: The New Framework, ILSA Journal of International & Comparative Law, Vol. 21, No. 2, 2015, 293 et seq.

²⁴ Sterio M., Secession in International Law, Cheltenham, 2018, 46.

In the more recent international law practice, the ICJ advisory opinion on the legality of Kosovo's proclamation of independence stirred up the debate over the position of secession in contemporary international law. By limiting its analysis solely to the act of proclamation of independence, the world court missed a chance (as in its previous rulings)²⁵ to pronounce over the delicate and burning issue.²⁶ This approach together with the hasty recognition of Kosovo's statehood by the majority of the so-called like-minded states would have serious consequences for the following developments in the self-proclaimed entities in Eastern Europe, which will be discussed in the second chapter.

The case of Kosovo and its eventual independence in spite of arguments of *uti possidetis juris* as well as its lower constitutional degree of autonomy in comparison to all the other ex-Yugoslavian republics,²⁷ appeared to contradict the previous general stances towards the leading principles of intangibility of borders and territorial integrity of states.²⁸ The scholarship and political leaders of the Western states argued that Kosovo represented a *sui generis* case, given a long discontinuity of rule of its *de jure* sovereign hand in hand with the international presence and administration, while accenting the remedial character of the secession due to previous large-scale human right violations by the Milošević regime.²⁹

Nevertheless, it is otherwise widely accepted that the general international law does not contain a clear normative modality in the form of a prohibition nor permission of unilateral secession. However, there are situations in which the act of unilateral secession is significantly affected by a previous or simultaneous grave breach of international law resulting in undermining of the nature of the secession itself. In the Kosovo case, ICJ postulates that such illegality of declarations of independence stems from their connection to „*the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)*.”³⁰ This position is upheld by the practice of denouncements by the UN Security Council in its resolutions of unilateral

²⁵ East Timor (Portugal v. Australia), Judgment, [1995] ICJ Reports; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Reports; Western Sahara, Advisory Opinion, [1975] ICJ Reports; Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Advisory Opinion, [1971] ICJ Reports.

²⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Reports, 403.

²⁷ Kosovo, as well as Vojvodina, constituted autonomous provinces integral to the Socialist Republic of Serbia. See: Constitution of the Socialist Federal Republic of Yugoslavia, 1974, arts. 1-6.

²⁸ *Caspersen N.*, The Pursuit of International Recognition after Kosovo, *Global Governance*, Vol. 21, No. 3, 2015, 396.

²⁹ *Koh H. H.*, Reflections on the Law and Politics of the Kosovo Case, *The Law and Politics of the Kosovo Advisory Opinion*, *Wood M. C., Milanović M. (eds.)*, 2015, 350.

³⁰ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Reports, para. 81.

secessions by the self-proclaimed Turkish Republic of Northern Cyprus, Southern Rhodesia and the Republika Srpska.³¹

1.1.3. Statehood and Recognition

The crucial notions of sovereignty and statehood represent the final aim of all separatist movements, eminently of those establishing *de facto* state-like entities. While the sincerity of this intention can be subject to critique and doubt in cases like the Luhansk and Donetsk People's Republics, it is otherwise considered a legitimate ambition of a people.³² To reach this objective, the notorious Convention on Rights and Duties of States (hereinafter – Montevideo Convention) serves as a reference for the standard definition formulating clear qualifications of a permanent population, a defined territory, government, and capacity to enter into relations with the other states.³³ While some of the exemplars of *de facto* states do not even fulfill the first three vital conditions beyond a reasonable doubt, the quintessential missing element is the official recognition by a considerable segment of the international community.

The scholarly discourse over international recognition was for decades occupied by the constitutive and declaratory theories or concepts eclectically amalgamating some of their integral elements together. While the declaratory tendencies seem to prevail in the current legal debate, on the other hand, the constitutive effect of recognition towards *de facto* states is undisputedly acknowledgeable. Even though the Montevideo Convention itself is based on the declaratory theory, influential at the time of its conclusion, the subsequent practice has shown that the act of recognition can have serious implications over the future assertion of the new-born state in the international community.³⁴

The secession of Bangladesh from Pakistan in 1971 was accomplished with the help of the Indian army proving essential for the final separation of the eastern part of the state. While such deployment of armed forces could be considered an unlawful use of force, constituting a major interference into the internal sphere of Pakistan, the force of the actual state of affairs led to the ultimate solution of the conflict. Moreover, the acceptance of the consequent situation by a significant part of the international community in the form of state recognition eventuated in the establishment of Bangladesh on the international sphere. Eventually, not particularly long after the act of secession, Pakistan itself decided to accept the result as *fait accompli* and officially recognize Bangladesh as an independent state in spite of the precedent use of force by a third state – its archenemy, India.³⁵

³¹ United Nations Security Council, Resolutions 216 (1965) and 217 (1965) on Southern Rhodesia; Resolution 541 (1983) on Cyprus; and Resolution 787 (1992) on the Republika Srpska.

³² For more, see: *Miarka A.*, De Facto States in the Post-Soviet Area: Mechanisms of Formation, Operation and Survival, 2024, 217 et seq.

³³ Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, Montevideo, 26 December 1933, League of Nations Treaty Series, Vol. 165, art. 1.

³⁴ *Crawford J. R.*, The Creation of States in International Law, 2nd ed., Oxford, 2007, 93.

³⁵ *Sterio M.*, Secession in International Law, Cheltenham, 2018, 70-72; *Pegg S.*, International Society and the De Facto State, London, 2019, 49.

The process of secession and creation of an independent state in the case of Bangladesh was achieved owing to the eventual recognition by its parent state Pakistan, while its position had been decisively affected by the approach of the majority of Western, socialist, as well as Muslim states. Without such an overwhelming (political) support to the separatist movement (with parameters of remedial secession because of the brutal force used by the Pakistani military), the entire issue of secession involving the recourse to force by a third state would probably not be regarded as unambiguously.³⁶

According to the declaratory theory, the recognition is, put simply, a gesture aiming at the potential establishment of diplomatic contacts with the existent state, whereas the constitutive theory holds the requirement of recognition for the legal attainment of the statehood of the state itself.³⁷ Nevertheless, it is apparent that the lack of recognition, symptomatic of the *de facto* states, represents a significant limitation to their development on the international stage. Concerning the issue of recognition, we have even witnessed the proliferation of recognition among themselves, which gives evidence of the fundamental importance of this aspect to such entities.³⁸

The reasons behind the reluctance to recognize the statehood of a pretendent secessionist entity may be diverse.³⁹ Apart from political or religious animosities resulting in rather symbolical non-recognition of even long-established states with no connection whatsoever to the character of statehood, such as in cases of the State of Israel or Pakistan's non-recognition of Armenia, there are reasons with more important legal perspective.

The focus of this article is laid on the non-recognition of the creation of a state based on an illegal situation, resulting in the perpetuation of the *de facto* character of some of the secessionist self-governing entities around the world. The dimension of the illegal use of force in connection to the process of secession and its legal effects on statehood will be dealt in detail in the following subchapter.

1.2. Use of Force

The legal regime of the use of force represents an essential constituent of the contemporary international law and of the universal security architecture. It emanates from the fundamental principle of non-intervention into internal affairs of states and embodies its

³⁶ For more, see: *Abhimanyu G. J.*, Bangladesh and the Right of Remedial Secession, Research Handbook on Secession, *McGibbon S., et al. (eds.)*, Cheltenham, 2022, 312-328; *O'Mahoney J.*, Making the Real: Rhetorical Adduction and the Bangladesh Liberation War, *International Organization*, Vol. 71, No. 2, 2017, 317-348.

³⁷ For more, see: *Crawford J. R.*, *The Creation of States in International Law*, 2nd ed., Oxford, 2007, 19 et seq.

³⁸ The post-soviet *de facto* states including South Ossetia and Abkhazia, as well as Transnistria and the former Republic of Artsakh, formally recognized each other and established the Community for Democracy and Rights of Nations in 2006.

³⁹ For more, see: *Caspersen N.*, Collective Non-Recognition of States, *Routledge Handbook on Recognition of States*, 2020, 231-240.

paramount manifestation. As the use of force is somewhat symptomatic of *de facto* states as a category, it is, therefore, indispensable to take a closer look at its normativity in this particular context.

1.2.1. Universal Prohibition and Exceptions

The use of force and the war of aggression remained a legitimate means of state action for most of the classical period of international law. After the Second World War, the universal prohibition of the use of force in the United Nations Charter became a cornerstone of the new collective security architecture. The principal Article 2(4) prescribes that: “[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.”⁴⁰

However, there are two explicit exemptions to the universal proscription. Firstly, the Chapter VII allows for the Security Council to adopt resolutions authorizing the recourse to measures including the use of force.⁴¹ Security Council may bestow the enforcement of such measures on regional organizations (arrangements) according to the Chapter VIII.⁴²

Secondly, the UN Charter does not exclude the concept of self-defense, constituting the further exemption to the prohibition codified in Article 51. Moreover, additional conditions are listed for the individual, as well as collective self-defense, to be effectuated in compliance with the international law.⁴³

Apart from the fundamental prohibition in the UN Charter, the legal regime of the normativity of the use of force was famously upheld by the ICJ as a customary norm of international law.⁴⁴ By contrast, self-defense is presented expressly as an inherent right of a state in the Charter and its legal quality of customary law was not contested.⁴⁵

1.2.2. Peremptory Character of the Prohibition

The question of the essence of peremptory character of norms of international law is subject to incessant scrutiny by the discipline. Similarly, the scope of *jus cogens* rules has been discussed by a multitude of scholars promoting concurrent approaches and ranges, partly

⁴⁰ Charter of the United Nations, 24 October 1945, United Nations Conference on International Organization (UNCIO), Vol. XV, 335, art. 2 (4).

⁴¹ Ibid., art. 42.

⁴² Ibid., art. 53(1).

⁴³ Ibid., art. 51.

⁴⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, [1986] ICJ Reports, para. 190; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, [2005] ICJ Reports, paras. 23-24, 28.

⁴⁵ Charter of the United Nations, 24 October 1945, United Nations Conference on International Organization (UNCIO), Vol. XV, 335, art. 51 in inicio.

also due the continual development of international law itself.⁴⁶ The focus of the present article not being doctrinal contemplation over *jus cogens*, we may pragmatically make use of the established definition contained in Article 53 of the Vienna Convention on the Law of Treaties stating that: “*a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.*”⁴⁷

Despite some speculations over whether the normativity of the use of force has the quality of peremptory international law are present, the overwhelming majority of academia, as well as the key international law organs such as the International Law Commission (hereinafter - ILC), consider the prohibition to be an archetype of *jus cogens*.⁴⁸ Judge Elaraby encapsulated this in his Separate opinion to the ICJ *Wall* case as: “[t]he prohibition of the use of force [...] is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted.”⁴⁹ Hence, what is the significance of the peremptoriness of the prohibition of the use of force for the *de facto* states?

Firstly, it is indispensable to delve into the legal effects of the derogation from peremptory rules of international law. The paramount and systematically arranged source of norms concerning the field of responsibility in international law are the Draft articles on Responsibility of States for Internationally Unlawful Acts by the ILC (hereinafter - ARSIWA).⁵⁰ Despite its non-binding format, the present document represents the most authoritative composition of normativity in the field of State Responsibility.⁵¹ Following the previous analysis and majority scholarly opinion, we can consider the legal regime of the use of force to fall under the peremptory rules of international law. That being said, Chapter III, as the relevant part of ARSIWA, lays out serious breaches of obligations under peremptory norms of general international law, while its Article 26 explicitly denies effect of circumstances precluding wrongfulness in the case of obligations arising under a peremptory norm.⁵² Needless to examine further in detail, the serious breaches of *jus cogens*

⁴⁶ Ex. regarding torture or refoulement. For an overview, see: *Kolb R.*, Peremptory International Law – Jus Cogens: A General Inventory, Oxford, 2015, 89 et seq.

⁴⁷ Vienna Convention on the Law of Treaties, United Nations Treaty Series, Vol. 1155, 331, 23 May 1969, art. 53.

⁴⁸ *Green J. A.*, Questioning the Peremptory Status of the Prohibition of the Use of Force, Michigan Journal of International Law, Vol. 32, 2011, 215–216.

Reports of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. No. 9, pt. II, U.N. Doc. A/6309/Rev.I, 1966.

⁴⁹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Reports, 136, at 254 (Separate Opinion of Judge Elaraby).

⁵⁰ Report of the International Law Commission on the Work of Its Fifty-Third Session, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, UN Doc. A/56/10, 26–30.

⁵¹ For more, see: *Arcari M.*, The Future of the Articles on State Responsibility: A matter of Form or of Substance?, QIL, Zoom-in 93, 2022, 3–21.

⁵² Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), annexed to UN General Assembly Resolution 56/83 (12 December 2001), UN Doc. A/RES/56/83, arts. 26, 40, 41.

obligations stand as special cases of the fundamental notion of internationally wrongful act.⁵³

Apart from regular effects of a breach of any international legal obligation, ARSIWA proclaims the increased effects of a serious breach of peremptory norms, that being: 1) a duty not to recognize as lawful a situation created by the breach;⁵⁴ 2) a duty not to render aid or assistance in maintaining that situation;⁵⁵ and finally 3) a duty to cooperate with other states to bring to an end through lawful means any such serious breach.⁵⁶ These particular consequences are not secondary obligations applying to the infringing state which stem from the primary obligations. Contrarily, it is all the other states that are bound by such emerging primary obligations.

This general framework covers various potential violations of *jus cogens*. Let's now focus further on those relating to situations in which the *de facto* states find themselves in the process of secession, as well as during their subsequent factual existence.

1.2.3. Act of Aggression

As key institutes of the entire concept of the recourse to force, aggression and the war of aggression stand in the frontline of the global security architecture. The unilateral use of force in an aggressive manner epitomizes the reasons behind the development of the modern international law towards a peaceful cooperation of states.⁵⁷ Aggression is considered the most serious and dangerous form of the illegal use of force.⁵⁸ *De facto* states, as a specific phenomenon with various anomalous characteristics concerning its population or territory, may serve as pretexts for aggressive use of force, especially as a part of its otherwise genuine independence struggles.

Regarding the case of *de facto* states, there are some aspects worth noting. The act of aggression can be carried out only by a state in relation to another state, irrespective of the recognition or UN membership of any of them.⁵⁹ Furthermore, from the preamble of the resolution and the text itself it is apparent, that the Definition applies in the international context only. Therefore, it does not involve force employed inside its territory against its

⁵³ For more, see: *Linderfalk U.*, Understanding Jus Cogens in International Law and International Legal Discourse, Cheltenham, 2020, 196 et seq.

⁵⁴ Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), annexed to UN General Assembly Resolution 56/83 (12 December 2001), UN Doc. A/RES/56/83, art. 41 (2).

⁵⁵ Ibid., in fine.

⁵⁶ Ibid., art. 41(1).

⁵⁷ The outlawing of acts of aggression was mentioned by the ICJ as an example of norm from which derive *erga omnes* obligations in the contemporary international law.

Case Concerning the Barcelona Traction, Light and Power Co. Ltd (Belgium v. Spain) (Second Phase), [1970] ICJ Reports, 3, paras. 33-34.

⁵⁸ United Nations General Assembly, Definition of Aggression, Resolution A/RES/3314 (XXIX), adopted 14 December 1974, UN Doc. A/RES/3314.

⁵⁹ Ibid., art. 1, Explanatory note.

own nationals. Additionally, there are multiple modalities of the use of forces listed in a non-exhaustive manner, which will be relevant for the case of Abkhazia and South Ossetia discussed in the following chapter. This includes art. 3 (g) of the Definition involving the potential perpetration by armed bands, groups, irregulars, mercenaries, which is not in line with ARSIWA and its subjectivity aspect of attribution, even though it was upheld by ICJ as a reflection of customary international law.⁶⁰ Generally, the use of armed force by a state in contravention of the UN Charter constitutes *prima facie* evidence of an act of aggression.⁶¹ Accordingly, this arguments for the peremptory character of a prohibition of aggression in the form of such use of force.

1.2.4. Illegal Invasion and Occupation

The acts proscribed by Article 3 (a) of the United Nations General Assembly (hereinafter - UN GA) Definition of Aggression include invasion, attack on the territory of another state, as well as occupation and annexation of the territory of the given state.⁶² Such acts are the most typical in the context of existence of *de facto* states, which may be carried out as a part of separatist secessionist struggles. The 1974 invasion of Cyprus by Turkish armed forces represents an emblematic operation involving unlawful recourse to force amounting to military occupation of a territory of the latter so-called Turkish Republic of Northern Cyprus. As proven above, any such act constitutes a serious breach of a peremptory prohibition of the use of force in the contemporary international law.

Furthermore, the UN GA Resolution on the Declaration on Principles of International Law in this context clearly notes that: “[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.”⁶³

1.2.5. The Principle of Non-recognition and Unlawful Use of Force

As stated above, the contemporary international law contains the imperative rule of non-recognition of a state attained due to a serious breach of peremptory norms of international law. Apart from the aforementioned Article 41 (2) of ARSIWA, the ICJ also pronounced on the universal obligation not to recognize the illegal situation resulting from such contravention, as well as not to render aid or assistance in maintaining the situation.⁶⁴

⁶⁰ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, [1986] ICJ Reports, para. 195; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, [2005] ICJ Reports, para. 146.

⁶¹ United Nations General Assembly, Definition of Aggression, Resolution A/RES/3314 (XXIX), adopted 14 December 1974, UN Doc. A/RES/3314. art. 2.

⁶² Ibid., art. 3 (a).

⁶³ United Nations General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Resolution A/RES/2625 (XXV), adopted 24 October 1970, UN Doc. A/RES/2625.

⁶⁴ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, [2004] ICJ Reports, para. 159.

Regarding the question of unlawful use of force constituting such serious breach of peremptory norms, there are specified provisions in connection to territorial integrity of states. The UN GA in its prominent resolutions specified that no territorial acquisition resulting from aggression shall be recognized as lawful⁶⁵ and that neither occupation, nor acquisition of territory will be recognized as legal if resulting from the threat or use of force.⁶⁶ Remarkably, the Montevideo Convention also forbids recognition of territorial acquisitions having been obtained by force.⁶⁷

Contrarily, the institution of international recognition of an independent state makes part of the regalian competences appertaining to states. This non-regulated attribute would seem fully arbitrary in regard to secessionist entities and their potential admission as members of the international community. Nevertheless, as alluded in sub-chapter 2.1.2, the ICJ in the *Kosovo* case made clear that some declarations of independence may be deemed illegal due to their connection to “*the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (jus cogens)*”.⁶⁸ In such case, it is apparent that recognition of independence of the “state” in question would collide with the principle of non-recognition involving the aggravated consequences of the unlawful use of force. Therefore, any derogation from the obligation stemming from such serious breach of peremptory norm of international law would constitute a failure to fulfill this additional obligation. The proclaimed independence of the Turkish Republic of Northern Cyprus (a *de facto* state) is one of the embodiments of such legally unrecognizable situations.⁶⁹

1.3. Resolution of the Research Question

In the previous sub-chapters, the author presented an analysis of the contemporary normative character of various aspects of the *de facto* statehood in connection to the use of force legal regime. To conclude this analysis, it is indispensable to deal with the hitherto non-resolved question of the legality of creation of an independent state under international law subsequent to an unlawful use of force. As previously documented, a breach of the peremptory prohibition of the use of force in international relations engenders serious legal consequences in terms of state responsibility, such as the obligation of non-recognition of the produced state. Moreover, these effects have been bolstered especially in the context of territorial acquisitions.

⁶⁵ United Nations General Assembly, Definition of Aggression, Resolution A/RES/3314 (XXIX), adopted 14 December 1974, UN Doc. A/RES/3314. art. 4 (3).

⁶⁶ United Nations General Assembly, Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, Resolution A/RES/42/22, art. 10.

⁶⁷ Convention on Rights and Duties of States, adopted by the Seventh International Conference of American States, Montevideo, 26 December 1933, League of Nations Treaty Series, Vol. 165, art. 11.

⁶⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Reports, para. 81.

⁶⁹ United Nations Security Council, Resolution S/RES/541541, On Declaration by the Turkish Cypriot Community of Its Secession from Cyprus, 1983, para. 7.

While the issue of secession remains largely underregulated and “*the existence or disappearance of the state is a question of fact*”,⁷⁰ there are limits to what can be considered lawful under public international law. The ancient roman maxim *ex inuria ius non oritur* denotes a symbolical value of its principial stance in opposition to the legality of outcomes of serious contraventions to its imperative rules. Notably, this becomes apparent especially in opposition to the creation of a state *via facti* as in the principle *ex factis ius oritur*.⁷¹

Even if the character of recognition of secessionist entities and its necessity for the creation of an independent state may be considered controversial or ambiguous, there is, nevertheless, a more substantial obstacle in the way. The obligation of non-recognition of legality of a situation created by a serious breach of an obligation arising under a peremptory norm of general international law prevents any state from the recognition of the creation of such entity itself. Accordingly, the ICJ established that some declarations of independence were illegal as a result of their connection to the unlawful use of force as an egregious violation of *jus cogens*.⁷² Therefore, some state-like entities, whose secession was brought about due to an unlawful use of force, shall remain in this factual state of *de facto* states, non-recognized by the international community until any legal resolution of the unlawful situation. Following all the previously presented research, it is inevitable to answer the analyzed question in the positive. It was, in author's view, established that an unlawful use of force in the process of secession in fact does prevent a lawful creation of an independent state under international law.

Chapter 2. The Case of Georgia: Abkhazia and South Ossetia

The overall instability connected to the process of dissolution of the Union of Soviet Socialist Republics (hereinafter - USSR), culminated into a series of regional conflicts some of which terminated in *de facto* separations of the autonomous parts of the newly independent ex-soviet states. In the case of Georgia, the separatist entities, backed by the Russian Federation, continue to play a key role in its development and international relations. Having been a subject of twofold use of force by a duo of such long-lasting *de facto* entities, Georgia represents a unique case in the contemporary world.

2.1. Abkhazia and South Ossetia in the USSR

Since the legal position and ethnic situation of these two territories prior to the separatist conflicts substantially differed, let's briefly present some of the key facts. Under the last

⁷⁰ Arbitration Commission of the Conference for Peace in Yugoslavia, Opinion No. 1, International Legal Materials, Vol. 31, 1991, 1488, 1494, para. 1(a).

⁷¹ *Leonaite E., Žalimas D.*, The Annexation of Crimea and Attempts to Justify It in the Context of International Law, Lithuanian Annual Strategic Review, 2015-2016, Vol. 14, 27.

⁷² Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Reports, para. 81.

Soviet Constitution of 1977, Abkhazia constituted one of Georgia's two Autonomous Soviet Socialist Republics (the other being Adzharia),⁷³ whereas South Ossetia resided on a lower position of an Autonomous Oblast (Region).⁷⁴ The Autonomous Oblasts in comparison to Autonomous Republics did not have their own separate constitution and were subject to a lesser degree of autonomy. In contrast to the Georgian Soviet Socialist Republic and other Union Republics, none of the autonomous entities were formally granted a right of secession under the Soviet Constitution.⁷⁵

According to the last Soviet Census of 1989, the ethnic Abkhaz people constituted 17.8% of the population of the Abkhazian ASSR (of the 525,061),⁷⁶ while the population of South Ossetian Autonomous Oblast consisted by 66% of ethnic Ossetians (of the 98,527).⁷⁷ Apart from this, a substantial part of Abkhazians and especially Ossetians lived elsewhere within the Georgian Soviet Socialist Republic, as on the other hand, ethnic Georgians constituted the largest minority in both of the autonomous territories. The heterogeneous ethnic composition was to be altered during the following independence conflicts with a significant role of ethnic cleansing, which allowed for an increase of the share of the titular nations in the population and a great number of internally displaced persons.⁷⁸

2.2. Independence Struggles of the Abkhazian and (South) Ossetian Peoples

As in other parts of the Soviet Union, the outbreak of nationalist and separatist tendencies hand in hand with the uncertainty of an impending new state order had devastating implications in such ethnically complex regions,⁷⁹ naturally not excluding Abkhazia and South Ossetia. The idea of independence at any price (or at least a more preferential position within the Soviet Union and later the Russian Federation) led to an eruption of violence in both of the regions concerned.

Following previous political disputes, including the unilaterally declared South Ossetian independence, unsuccessfully seeking separate USSR association,⁸⁰ and consequent abolition of the South Ossetian autonomous status in 1990, the hostilities became drastic. From January 1991 to mid-1992, an armed conflict between South Ossetian insurgents and newly formed Georgian forces took place in the territory of the former Autonomous Oblast. In the midst of the war South Ossetia declared again its independence, this time as an

⁷³ Constitution (Fundamental Law) of the Union of Soviet Socialist Republics, 7 October 1977, art. 85.

⁷⁴ Ibid., art. 87.

⁷⁵ Ibid., art. 72.

⁷⁶ *Sammur D.*, The Birth of the Georgian State: Giving Georgia a Second Chance, Confidence Building Matters, No. 3, London, 1994, appendix A, 13.

⁷⁷ *Sammur D.*, *Cvetkovski N.*, The Georgia—South Ossetia Conflict, Confidence Building Matters, No. 6, London, 1996, 5.

⁷⁸ OSCE, The Lisbon Document, DOC.S/1/96, 3 December 1996, 8, para. 20.

⁷⁹ Notably in the Moldavian Soviet Socialist Republic and Nagorno-Karabakh Autonomous Oblast.

⁸⁰ The Declaration on State Sovereignty of the South Ossetian Soviet Democratic Republic, 20 September 1990. A similar act had already been adopted in Abkhazia. The Declaration of the State Sovereignty of the Abkhaz Soviet Socialist Republic, 25 August 1990.

independent state.⁸¹ Eventually, a ceasefire was concluded and later observed by the Joint peacekeeping force (JPKF), who's impartiality has been contested due to the clear majority of Russian and Ossetian peacekeepers.⁸²

Similarly, in line with the intensifying ethnic and political tensions, an even larger-scale armed conflict broke out in Abkhazia. During the period of 1992 - 1994 most of the territory of the Autonomous Republic was captured by the Abkhaz insurgents, while approximately a half of the initial population left to seek refuge in other parts of Georgia.⁸³ The ultimate act of state independence of Abkhazia was unilaterally proclaimed in October 1999.⁸⁴

As Georgia *in statu nascendi* was largely unstable due to a simultaneous civil war, it was not able to militarily recapture and effectively reintegrate the separatist regions. Nevertheless, one of the key aspects, having a decisive impact on the military actions, remains the involvement of third parties, prominently of the Russian armed forces and paramilitary groups from the Russian Federation.⁸⁵ The significance of their engagement is of utmost importance in terms of its legal consequences for the legality of the creation of the two separatist states.

After the end of the 1990s separatist wars, the situation eventuated into a factual stabilization of South Ossetia and Abkhazia in the form of separate *de facto* states. As years went by, the relations somewhat normalized, while direct and indirect negotiations concerning possible reintegration and arrangement of statehood were held under the auspices of international organizations including UN, Organization for Security and Co-operation in Europe (OSCE), Commonwealth of Independent States (CIS) and on other platforms. However, the situation worsened with the new developments including the groundbreaking unilateral declaration of independence by Kosovo and the "thread" of Georgia's possible future integration to the Euro-Atlantic structures.⁸⁶

The second conflict between Georgia and its separatist regions broke out in South Ossetia in August 2008. This time, however, the Russian Federation overtly assisted in capturing the rest of the territories claimed by Abkhazia and South Ossetia. Moreover, it waged a full-fledged military invasion into the undisputed inner Georgian territory.⁸⁷ Shortly after a ceasefire was brokered, the Russian Federation officially recognized the Republic of

⁸¹ Declaration of Independence of South Ossetia, 21 December 1991; Act of Declaration of Independence of the Republic of South Ossetia, 29 May 1992.

⁸² Agreement on Principles of Settlement of the Georgian - Ossetian Conflict (Sochi Agreement), 24 June 1992. For more on the peacekeeping actions, see: *Facon I.*, Integration or Retrenchment? Russian Approaches to Peacekeeping, Major Powers and Peacekeeping: Perspectives, Priorities and the Challenges of Military Intervention, *Utey R. E. (ed.)*, 2006, 32.

⁸³ *Alexidze L.*, International Law and Georgia – From Antiquity to Present, 2021, 506-507.

⁸⁴ Act of State Independence of the Republic of Abkhazia, Sukhumi, 12 October 1999.

⁸⁵ The other belligerent forces included e.g. the Confederation of Mountain Peoples of the Caucasus, a militarized group from North Caucasus commanded by the infamous Chechen terrorist Shamil Basayev.

⁸⁶ Declaration of Independence of the Republic of Kosovo, Priština, 17 February 2008;

North Atlantic Council Summit Declaration, Bucharest, 3 April 2008, para. 23.

⁸⁷ Accompanied by an innovative smoke screen of cyberattacks. See: *White S. P.*, Understanding Cyberwarfare: Lessons from the Russia-Georgia War, 2018, 1-17.

Abkhazia and the Republic of South Ossetia (Alania) as independent states.⁸⁸ From the end of the Five-Day War, the *status quo* remained unchanged up until this day. Nonetheless, due to the previous overall attainment of objective criteria of statehood and formal expressions of their aspirations for independence, the illicit recourse to force in 2008 (after approx. 15 years of their factual existence) is no longer, in authors perspective, relevant for the legality of creation of South Ossetia and Abkhazia as independent states.

2.3. Third-Party Involvement

Although the secessionist conflicts in early 1990's were primarily fought by Abkhazian and Ossetian separatists, the role of Russian armed forces and paramilitary groups cannot be disregarded. The question of a serious breach of the peremptory prohibition of the use of force by the Russian Federation is largely dependent on the qualification of the perpetrated acts and their attribution to the Russian state. For the purpose of this article, the classification will be carried out through the apparatus of ARSIWA due to the long-established customary character of its codified rules.

Let's commence with the category of conduct of organs of a state.⁸⁹ It was reported that the Russian military overtly entered the combat. The example of aerial bombardment and subsequent embroilment in land offensive against Georgian-held Sukhumi in 1993 constitutes evidence of the direct involvement in the form of military violence by the Russian armed forces.⁹⁰ Such conduct can be easily attributed to the third (patron) state. However, apart from this well-documented case, there are not many registered significant operations by the Russian army personnel. Especially in the case of the independence war in South Ossetia, the Russian involvement seemed to be less overt.⁹¹

Nevertheless, some degree of direct military action taken together with the other forms of aid to the local insurgents,⁹² could possibly cumulatively amount to violation of the prohibition of the use of force. Having resided in the former soviet military bases within the Georgian territory, Russian soldiers reportedly distributed weaponry, ammunition, and other military equipment, needful for effective combat with the weightier Georgian army.⁹³ As ICJ ruled in the influential *Nicaragua* case regarding of assistance to insurgents by a third state: "(...) [T]he arming and training (...) can certainly be said to involve the threat or use of force (...)." ⁹⁴ Owing to numerous reports of arms supplies and further accusations of

⁸⁸ Russian presidential decree No. 1260, On Recognition of the Republic of Abkhazia, 26 August 2008; Russian presidential decree No. 1261, On Recognition of the Republic of South Ossetia, 26 August 2008.

⁸⁹ Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), annexed to UN General Assembly Resolution 56/83 (12 December 2001), UN Doc. A/RES/56/83, art. 4.

⁹⁰ *Cornell S. E.*, Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus, London, 2001, 339-340.

⁹¹ *Ibid.*, 336.

⁹² Human Rights Watch Arms Project/Helsinki, Vol. 7, No.7, 1995, 52-53, 38.

⁹³ *Zürcher C.*, The Post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus, New York, 2007, 141; *König M.*, The Georgian-South Ossetian Conflict, OSCE Yearbook 2004, ISFH, 2005, 241.

⁹⁴ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment, [1986] ICJ Reports, para. 228.

instigating and organizing the conduct of the organized groups, this, in author's perspective, leads to the conclusion of an unlawful use of force by the Russian Federation.⁹⁵

Remarkably, it is vital to mention that the Russia at the same time supplied also the Georgian side which certainly makes its impact on the outcome of the conflict less one-sided and less dominant.⁹⁶

Additionally, the question of conduct of groups of persons potentially attributable to a patron state⁹⁷ bears great importance in the *de facto* state context and in ex-USSR separatist conflicts in particular. The military advances of South Ossetian and Abkhazian insurgents (and the other organized military groups)⁹⁸ were the primary basis for the subsequent *de facto* separation of the secessionist regions. The effective control test, elaborated by ICJ in the aforementioned *Nicaragua* case and confirmed in its subsequent case-law, serves as a base for attribution in the context of the recourse to force.⁹⁹

The threshold required for such attribution is relatively demanding since it requires evidence of effective control by the state over specific operations carried out under its command or instructions by the groups (particular instances of control). In the case of secessionist insurgents, it is particularly challenging to prove that the force used in order to gain independence would not be used without the control by the third state.¹⁰⁰ Even though there are reports of equipping, supplying or even organizing of the insurgents in connection to military campaigns,¹⁰¹ the evidence of effective control from the side of Russian Federation over the organized groups are not even of the same level of USA's relationship to Contras, that itself being rejected by the court as insufficient.¹⁰²

In conclusion, the Russian engagement in the 1990's separatist wars in the form of direct military violence and arming of organized military groups amount to the recourse to force prohibited under art. 2 (4) of the UN Charter. Conversely, the conduct of insurgent groups is attributable to these groups only.

2.4. Existence of Egregious Violations of Peremptory Rules of General International Law

Most importantly, it is indispensable to deduce whether the unlawful Russian military involvement had decisive impact on the creation of South Ossetia and Abkhazia as (*de facto*)

⁹⁵ Kozhokin E. M., 'Georgia-Abkhazia', US and Russian Policymaking with Respect to the Use of Force, *Azrael J. R., Payin E. A. (eds.)*, 1996, 80.

⁹⁶ Cornell S. E., *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus*, London, 2001, 336, 339.

⁹⁷ Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), annexed to UN General Assembly Resolution 56/83 (12 December 2001), UN Doc. A/RES/56/83, art. 8.

⁹⁸ Such forces consisted of a manifold mixture of mujahedeens, mercenaries and volunteers mostly with some Soviet or Russian background.

⁹⁹ Talmon S., *The Responsibility of Outside Powers for the Acts of Secessionist Entities*, *International and Comparative Law Quarterly*, Vol. 58, 2009, 517.

¹⁰⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, [1986] ICJ Reports, para. 115.

¹⁰¹ Cornell S. E., *Small Nations and Great Powers: A Study of Ethnopolitical Conflict in the Caucasus*, London, 2001, 340 - 341.

¹⁰² Ibid.; Compare to *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, [1986] ICJ Reports, paras. 110, 115.

independent states. The above-stated acts do not, in author's view, show a sufficiently direct and certain causal nexus¹⁰³ between Russia's breach of the prohibition of use of force and the creation of South Ossetia and Abkhazia. However, this also does not necessarily lead to conclusion that the process of secession of the two separatist republics was free from other serious breaches of general international law. Beyond the primary focus of this article concerning the recourse to force, a non-compliance with the fundamental customary principles of non-intervention and the equal sovereignty of states deserves to be examined in a wider perspective.

The conduct of Russian Federation involving providing of various forms of assistance to the separatist insurrectionist movements in Georgia may be considered an illegitimate involvement in the internal affairs of another sovereign state. In the longer term, the Russian Federation further significantly partook in maintaining the *status quo*.¹⁰⁴ While on one hand direct military operations and indirect military support may not reach the necessary level of use of force, it may on the other hand comfortably fulfill criteria of breaches of the peremptory rules of sovereignty of Georgia and non-intervention to its internal sphere including the inner disputes and conflicts with its autonomous regions.¹⁰⁵ The Russian Federation with its military, financial, political and diplomatic support to the separatist movements has, in author's perspective, proven to be one of the leading elements in the secession process and imperative for creation of South Ossetia and Abkhazia in their factual independence on Georgia.

Moreover, as the UN Security Council decided in a similar case of Republika Srpska, acts of ethnic cleansing conducted in order to accomplish alternation of the basic statehood criteria of population and territory shall be considered unlawful and unacceptable (unrecognizable).¹⁰⁶

2.5. Subsumption of the Situation

With the dismemberment of the USSR a wave of separatism hit the newly independent states with a series of violent secessionist conflicts. In case of Georgia, the groups of Abkhaz and Ossetian insurgents were supported by the Russian Federation with supplies of weapons, ammunition and other equipment. The insurgents were also joined by Russian

¹⁰³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Merits), [2007] ICJ Reports, 43, para. 462.

¹⁰⁴ *Gerrits A. W. M., Bader M.*, Russian Patronage over Abkhazia and South Ossetia: Implications for Conflict Resolution, East European Politics, Vol. 32, No. 3, 2016, 298, 302.

¹⁰⁵ Clearly, there is no such thing as a right of intervention by invitation from a rebel group as confirmed by the Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, [1986] ICJ Reports, 209, 246.

¹⁰⁶ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Reports, para. 81; United Nations Security Council Resolution 787 (1992), paras. 2 and 3.

troops in their campaign against the central Georgian government. This conduct amounted to an unlawful use of force by a third state.¹⁰⁷

Despite the violent activities attributable to the armed forces of the Russian Federation, it was not proved that the present acts lead to the creation of South Ossetia and Abkhazia as (*de facto*) states. Nevertheless, the recourse to force hand in hand with other forms of intervention to the inner sphere of the state (Georgia) significantly violated its sovereignty. As a result of the egregious breach of obligations under peremptory norms of general international law, the lawful creation of the independent states of the Republic of Abkhazia and the Republic of South Ossetia (Alania) were thwarted.

Conclusion

The customary prohibition of the recourse to force represents a fundamental norm of the general international law. It allows the international community to co-exist without the scourge of war threatening its peaceful existence. As vital as it is for the modern international law system, the non-conformity with such rule, amounting to a serious breach of an obligation under a peremptory norm of general international law, engenders grave legal consequences.

In the context of statehood, secession and creation of states this translates into a far-reaching issue of whether an unlawful use of force in the process of secession prevents a lawful creation of an independent state under international law. Following to the presented analysis, this article answers the research question in the positive. Accordingly, a declaration of independence of a state in process of creation shall be deemed illegal due to its connection to such unlawful use of force.¹⁰⁸

De facto states, as entities fulfilling some of the normative criteria of statehood, largely lack the element of state recognition. This article examined the interconnection between the use of force, somewhat symptomatic of creation and existence of those entities, and the obligation not to recognize an unlawful situation stemming from a breach of *jus cogens* norm.

In the case of Georgia, two separatist *de facto* states were formed on its territory in the end of the last century. South Ossetia and Abkhazia rest unrecognized by the vast majority of the international community ever since their violent secessions. According to the analysis presented in the second part of the article, the author is of the opinion that the level of use of force by the Russian Federation in the process of secession of these separatist regions was not sufficient to bring about the unlawfulness of a creation of a state.

Despite exceeding the delimitation of the focus of this article, the author is obliged to emphasize, that this conclusion does not indicate that South Ossetia and Abkhazia are lawfully created states. What precludes them from becoming legitimate members the international community is the illegality of their creation ostensibly stemming from the

¹⁰⁷ See: Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment, [1986] ICJ Reports, 228.

¹⁰⁸ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, [2010] ICJ Reports, para. 81.

other egregious violations of obligations to respect the sovereignty of Georgia and not to intervene into its internal affairs, and possibly also due to the grave human rights violations in the form of ethnic cleansing perpetrated in the conflicts of secession.

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