Università
Ca'Foscari
Venezia

Master's Degree
in Comparative International Relations

Final Thesis

Locus standi and *de facto* entities

The right to justice in the "self-proclaimed" authorities of the post-Soviet area

Supervisor
Ch. Prof. Sara de Vido

Assistant supervisor
Ch. Prof. Carlo Frappi

Graduand
Anna Zanetti
Matricolation number
857764

Academic Year
2019 / 2020

"A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection … Human rights have always existed with the human being. They existed independently of, and before, the State."

South West Africa (Second Phase), ICJ Reports 1966, Dissenting Opinion of Judge Tanaka, p. 297.

INDEX

ABSTRACT

1. Obiettivo

Lo scopo di questa tesi è di capire quale diritto abbiano gli abitanti dei territori contesi dell'area post-sovietica di accedere alla giustizia internazionale e di apparire davanti a tribunali che siano in grado di proteggerli da diversi tipi di soprusi e violazioni. In particolare, ci si chiederà in che modo i diritti umani di queste persone possono essere tutelati dalla Corte Europea dei Diritti dell'Uomo, davanti alla quale sono stati presentati la maggior parte dei ricorsi riguardanti i territori in questione.

2. Metodo

Nella stesura di tale tesi si è voluto partire dall'analisi di alcuni dei concetti principali che stanno alla base di tutto di lavoro, ossia i concetti di statualità, di riconoscimento degli stati e dell'autodeterminazione dei popoli. Come detto infatti, tale tesi prenderà in analisi i territori contesi dell'area post-sovietica ed ho quindi ritenuto necessario chiarire che cosa sia uno stato, prima di poter definire quali entità non possono essere dichiarate tali secondo il diritto internazionale. Inoltre, il concetto di stato assume ulteriore rilevanza all'interno del lavoro poiché, come emergerà dall'ultime capitolo, i ricorsi inter-statali sono di fondamentale importanza per la giurisprudenza relativa ai territori in questione. Tale primo capitolo potrebbe apparire molto teorico, ma ritengo che sia un prerequisito per l'intero lavoro capire che cosa sia uno stato poiché, oltre ad essere uno dei principali soggetti del diritto internazionale, rappresenta anche l'aspirazione massima per molte delle entità separatiste che verranno analizzate nel secondo capitolo e che mirano a diventare stati riconosciuti dall'intera comunità internazionale.

E' stato quindi mostrato come si è evoluto il concetto di "stato" nel corso della storia a partire dalla Pace di Westfalia del 1648 fino alla definizione proposta nella Convenzione di Montevideo del 1933 in cui sono contenuti i quattro pilastri che permettono ad uno stato di essere definito tale: ossia una popolazione permanente, un territorio definito, un governo effettivo e la capacità di entrare in relazione con altri stati. Questi quattro elementi sono stati analizzati uno per volta, cercando per ognuno di essi di capirne le criticità che hanno portato nel corso della storia a dubitare della loro effettività, soprattutto per quanto riguarda l'ultimo criterio che sembra essere per molti più un punto di arrivo, che un punto di partenza per decretare la "statualità" di un ente.

In questo frangente è stato necessario quindi introdurre il concetto di "riconoscimento" degli stati da parte della comunità internazionale, in quanto se uno stato non viene riconosciuto come tale

rischia di rimanere isolato e di non poter svolgere, di conseguenza, le funzioni proprie di uno stato. Le due principali teorie relative al riconoscimento degli stati, la costitutiva e la dichiarativa, sono state quindi analizzate mostrandone tutte le criticità. Se la prima sostiene che il riconoscimento sia una *conditio sine qua non* che uno stato deve possedere per essere considerato tale, la seconda – che è quella sottintesa dalla Convenzione di Montevideo e maggiormente diffusa oggigiorno – sostiene che il riconoscimento sia solo un atto formale che deve semplicemente accettare l'esistenza di uno stato già costituito, in modo tale da limitare il poter dei singoli stati nel giudicare chi o cosa possa possedere personalità giuridica. Anche se il dibattito tra le due teorie è ancora largamente aperto, la conclusione a cui si è arrivati è che il riconoscimento degli stati, nonostante tocchi molte sfere del diritto internazionale, sia in realtà un atto in gran parte politico.

Per concludere l'analisi sul riconoscimento degli stati si è reso poi necessario spiegarne le differenti sfaccettature e capire quanto il non-riconoscimento di un'entità (che si autoproclama uno stato) possa influire sulla sua personalità giuridica a livello internazionale, impedendone molto spesso l'instaurarsi di relazioni con parti terze. Il non-riconoscimento di uno stato potrebbe avvenire, oltre che per motivi meramente politici, anche come conseguenza di un riconoscimento prematuro o in seguito alla minaccia o all'uso della forza, in chiara violazione di uno dei principali concetti del diritto internazionale *"ex iniuria jus non oritur"* secondo cui nessuna nuova entità può essere creata a seguito dell'uso della forza.

Ho poi voluto mostrare come il concetto di "autodeterminazione dei popoli", emerso per la prima volta nei famosi 14 Punti del Presidente Statunitense Wilson, stia spesso alla base dei tentativi di auto-affermazione di queste nuove entità. Tuttavia, il più delle volte tale principio entra in conflitto con un altro caposaldo del diritto internazionale, quello dell'integrità territoriale, che spesso tende a prevalere sul primo: gli stati *de facto* sono difatti delle entità che si autoproclamano indipendenti da uno stato territoriale a cui appartenevano, ma che tuttavia non hanno ottenuto il riconoscimento dell'intera comunità internazionale o di parte di essa. È chiaro quindi che il fatto che possa essere solo una parte della comunità degli stati a non concedere il riconoscimento, ci ha condotto ad escludere dalla vasta gamma di termini impiegabili in questa circostanza quello di "stati non riconosciuti" poiché non è sempre vero che tali entità rimangono completamente non-riconosciute.

Questa analisi terminologica è stata svolta più precisamente nei primi paragrafi del secondo capitolo in cui un attento studio di tutta la platea di termini esistenti nel contesto del riconoscimento degli stati, mi ha condotto ad escludere l'espressione "stati de facto" in riferimento ai territori post-Sovietici al centro dell'analisi: questi ultimi infatti non presentano le caratteristiche proprie di uno stato e spesso non sono alla ricerca della piena indipendenza. Si

preferirà quindi utilizzare il termine non giuridico “territori contesi” o l’espressione utilizzata dalla Corte EDU “self-proclaimed authorities”.

Inoltre, è stato chiarito come sia erroneo definire le situazioni di stallo venutesi a creare in questi territori post-Sovietici come “conflitti congelati”, come spesso si usa fare. Gli scontri infatti sono avvenuti realmente in queste zone - e continuano ad avvenire - provocando centinaia di morti e sfollati. Inoltre, la situazione non può essere definita “congelata” poiché è molto diversa rispetto a trent’anni fa quando scoppiarono le prime insurrezioni subito dopo il crollo dell’Unione Sovietica

Dopo aver presentato in modo più teorico tutte le possibili sfaccettature della questione del riconoscimento degli stati e la terminologia corretta da usare in questo contesto, tutti i concetti incontrati sono stati poi messi in luce più chiaramente attraverso esempi storici di entità *de facto* che sono state riconosciute in minima o larga parte dalla comunità internazionale. Sono stati scelti precisamente i casi di Somaliland, della Repubblica Turca di Cipro Nord, di Taiwan, del Kosovo e della Palestina poiché riguardano aree geografiche differenti, differenti periodi storici, diversi gradi di riconoscimento e anche diverse implicazioni politiche e permettono quindi una più ampia riflessione sul tema.

Tali esempi storici ci hanno condotto poi all’analisi dei territori contesi post-sovietici dal punto di vista storico e geopolitico cercando di sottolineare anche le implicazioni del non-riconoscimento di queste entità da parte di stati terzi e il coinvolgimento in queste aree dell’intera comunità internazionale, in particolare dell’Unione Europea. Più precisamente, i territori in questione sono la Transnistria, il Nagorno-Karabakh, l’Ossezia del Sud, l’Abcasia e la Crimea, mentre la Cecenia non è stata presa in considerazione in questo studio poiché presenta caratteristiche molto diverse dagli stati essendo un conflitto già concluso ed originatosi direttamente all’interno della Federazione Russa. È stato per prima cosa necessario fornire delle adeguate definizioni che potessero chiarire in cosa queste entità si differenzino dagli esempi proposti precedentemente. Primo fra tutti, è stato preso in considerazione il fatto che in tutti i territori scelti, a partire dagli anni Novanta, si siano consumati (e si stiano ancora consumando) conflitti derivanti da politiche adottate in seno all’URSS; in secondo luogo è stato mostrato come tutti i territori in questione si siano auto-proclamati indipendenti rispetto ad uno stato territoriale (il cosiddetto *parent state),* ma che siano in realtà sostenuti economicamente, militarmente e politicamente da uno stato terzo senza il quale di fatto difficilmente riuscirebbero ad esistere (il cosiddetto *patron state*) rappresentato nella quasi totalità dei casi dalla Federazione Russia, con l’eccezione del Nagorno-Karabakh che è supportato dall’Armenia.

Dopo aver dedicato i primi due capitoli alla presentazione del concetto di stato e all'analisi di tutte le possibili sfaccettature riguardanti le entità *de facto* e dopo aver analizzato in modo adeguatamente approfondito i casi studio scelti per questo lavoro, è stato necessario in secondo luogo sviscerare la questione relativa all'accesso alla giustizia che rappresenta il secondo asse portante del lavoro. Come detto infatti, tale elaborato non vuole essere una classica analisi dei territori contesi post-Sovietici, ma vuole capire come sia possibile accedere alla giustizia abitando in questi territori e come la protezione dei diritti umani possa essere garantita anche in queste "zone grigie" del diritto internazionale. Se il primo capitolo ci ha introdotto ai concetti teorici alla base di tale tesi, il secondo ci ha condotto direttamente nelle aree di nostro interesse; il terzo capitolo verterà quindi sull'analisi del concetto generale di accesso alla giustizia, mentre il quarto concluderà l'analisi cercando di capire come il diritto di accedere alla giustizia possa essere applicato nelle aree post-Sovietiche prese in considerazione.

Nella terza parte dedicata al "diritto alla giustizia" si è voluto partire quindi dalla definizione dei concetti di *locus standi e jus standi*, espressioni latine che indicano rispettivamente il diritto di apparire di fronte ad una corte e il diritto di accedervi direttamente. Si è resa quindi necessaria l'analisi del concetto di "accesso alla giustizia", che sta appunto ad indicare il diritto di un individuo di cercare rimedio per le violazioni subite portando le proprie istanze davanti ad una corte che sia in grado di applicare la legge in modo equo ed imparziale. È stata proposta poi una panoramica di tutti gli strumenti che includono una definizione del concetto di "accesso alla giustizia", tra cui la Dichiarazione Universale dei Diritti Umani, la Convenzione sui Diritti Civili e Politici, la Convenzione Americana sui Diritti Umani, la Carta Africana dei Diritti dell'Uomo e dei Popoli ed infine, per quanto riguarda il territorio europeo su cui ci si concentrerà maggiormente per l'intero lavoro, sono state prese in considerazione la Convenzione Europea sui Diritti Umani, il Trattato sul Funzionamento dell'Unione Europea e la Carta dei Diritti Fondamentali dell'Unione Europea.

Attraverso l'analisi di alcuni articoli di queste Convenzioni è stato possibile capire come uno degli obiettivi principali del diritto internazionale sia diventato nel corso del tempo la protezione del singolo individuo. Tuttavia, attraverso una panoramica storica, si è arrivati a capire che la conquista del *locus standi* – e in generale la conquista dei diritti umani – da parte degli individui è relativamente recente: fino alla Seconda Guerra Mondiale, infatti, il diritto internazionale era sempre stato considerato come un diritto inter-nazionale o inter-statale, che non si occupava quindi dei diritti del singolo individuo. Attraverso le opere dei maggiori studiosi e giuristi che nel corso della storia si sono occupati di definire che cosa dovesse essere incluso nel diritto internazionale e in che misura gli stati che ne facevano parte dovessero prendere in considerazione l'individuo, si è potuto notare come una delle teorie maggiormente dominanti fosse quella

positivista di E. de Vattel che sottolineava la sovranità assoluta delle Nazioni. Tale convinzione iniziò a vacillare solamente dopo il secondo conflitto mondiale quando, dalla necessità di evitare il ripetersi di soprusi simili a quelli degli inizi del Novecento, nacque anche la possibilità per l'individuo di affermarsi come "soggetto" del diritto internazionale, di essere quindi detentore di diritti e doveri.

Il diritto di adire in modo individuale ad una corte è anch'esso una conquista dell'ultimo secolo. Anche in questo caso è stato proposto un breve excursus storico, attraverso il quale è stato possibile capire come e quando sono state poste le basi per i meccanismi più avanzati di protezione dei diritti umani, i quali contengono al loro interno anche il diritto al ricorso individuale. Lo strumento principale che è stato preso in considerazione, non solo nella prima parte, ma nel corso dell'intera tesi, è quello ideato dal Consiglio d'Europa, ossia la Convenzione Europea dei Diritti dell'Uomo (CEDU) che, oltre ad essere considerata uno dei meccanismi più avanzati ed efficaci a livello globale, permette inoltre lo *jus standi in judicio* per gli individui. Tale Convenzione, tuttavia, per arrivare ad ottenere la forma e l'efficacia attuale, ha subito numerose variazioni che sono state attuate attraverso l'introduzione di vari protocolli. Quello su cui si è concentrata maggiormente la mia analisi è il No. 11 che ha eliminato il sistema originale a due livelli composto da Commissione e Corte, permettendo agli individui di accedere direttamente alla Corte, senza più tra l'altro la necessità da parte degli Stati di dover accettare il ricorso individuale presentato. Questo nuovo sistema rischiò di danneggiare l'efficacia della Corte che si trovò nel 1998, dopo l'introduzione del Protocollo in quesitone, a dover gestire un numero esorbitante di casi. Questo portò ad una "riforma nella riforma" nel 2010 con l'introduzione del Protocollo No. 14 che mirava, tra le altre cose, ad adottare più stringenti criteri di ammissibilità.

Sono stati quindi analizzati in tal senso gli articoli 34 e 35 della CEDU i quali contengono rispettivamente le disposizioni per poter presentare ricorsi individuali di fronte alla Corte e i criteri di ammissibilità che devono essere rispettati affinché la Corte possa procedere con l'analisi dei meriti del caso.

L'efficiente sistema della Corte EDU è stato poi messo a paragone con gli altri sistemi del diritto internazionale che permettono sia la protezione dei diritti umani che il diritto al ricorso individuale, quali la Convenzione Americana sui Diritti Umani, la Carta Africana dei Diritti dell'Uomo e dei Popoli e i meccanismi di protezione stabiliti a livello delle Nazioni Unite, i cosiddetti *human rights treaty-based bodies*, i quali contengono specifici protocolli e disposizioni che nel momento in cui vengono ratificati dagli stati, permettono agli individui di presentare ricorsi individuali. È necessario sottolineare che in tale contesto non è stato preso in considerazione il sistema di protezione previsto dalla Corte Internazionale di Giustizia poichè permette solamente agli Stai, e non agli individui, di presentare ricorso.

Per concludere la parte dedicata al *locus standi*, è stato necessario concludere la prima parte dedicata al diritto di accedere alla giustizia con un'analisi dell'articolo 33 della CEDU che permette i ricorsi inter-statali. Nonostante tale analisi possa sembrare fuori fuoco rispetto all'intero capitolo, si è resa necessaria poiché molti dei più recenti e rilevanti ricorsi presentati davanti alla Corte EDU relativi ai territori contesi sono di tipo inter-statale.

Tale analisi ha dunque chiarito quali possibilità ci siano per accedere ai maggiori meccanismi di giustizia internazionale, soprattutto alla Corte EDU e ci ha condotto alla quarta ed ultima parte, in cui i due filoni principali del lavoro – il *locus standi* e i territori contesi – si fondono. In quest'ultimo capitolo infatti ci si è concentrati solamente sulla capacità di adire alla giustizia internazionale da parte degli individui che risiedono in quelle entità auto-proclamatesi indipendenti nel territorio dell'ex Unione Sovietica, ma che non hanno ancora ottenuto un riconoscimento a livello internazionale.

La gravità dei conflitti proposti si riflette sulle violazioni dei diritti umani che vengono perpetrate quotidianamente in questi territori come conseguenza dei conflitti armati, delle violazioni della proprietà privata o delle mal sopportate differenze etniche che sussistono ancora oggi in queste zone. Tuttavia, nonostante questi soprusi siano all'ordine del giorno, per gli abitanti di queste zone è difficile ottenere giustizia poichè le autorità locali sono per lo più corrotte o inefficienti ed anche i tribunali nazionali di solito negano di avere giurisdizione sull'area separatista.

Ed è qui che si giunge al fulcro dell'intero lavoro: non avendo altre possibilità, gli abitanti di queste aree si rivolgono alla Corte Europea dei Diritti Umani la quale, oltre ad essere come già detto un sistema molto efficiente, rappresenta la sola opportunità per queste persone di ottenere giustizia. A questo punto dell'analisi, viene spontaneo chiedersi come sia possibile per gli abitanti di queste zone rivolgersi alla Corte EDU, in quanto residenti in territori non riconosciuti che non possono essere dunque essere considerati "Stati parte" della Convenzione EDU. Tramite tale ragionamento si è giunti ad un altro punto fondamentale del lavoro: gli abitanti di questi territori possono usufruire dei diritti della Convenzione poiché tutti gli stati in questione, sia quelli territoriali che quelli "sostenitori", sono parte del Consiglio d'Europa ed hanno ratificato la Convenzione EDU.

Inoltre, essendo i rimedi interni di questi territori considerati inefficienti, la Corte in questi casi può fungere da Corte di prima istanza, a differenza della normalità dei casi in cui deve rispettare il principio di sussidiarietà. L'esaurimento dei rimedi interni rappresenta infatti uno dei principali criteri di ammissibilità del sistema EDU che, tuttavia, nei casi in questione, è stato messo in discussione più volte. Un breve paragrafo è stato quindi dedicato a capire come il già citato

Articolo 35 della Convenzione EDU sia stato riesaminato più volte nei casi derivanti da queste zone.

In tal senso, è stato necessario soprattutto indagare l'ambito di ammissibilità *ratione loci,* ossia capire se la presunta violazione del ricorso sia avvenuta all'interno della giurisdizione dello Stato imputato di averla commessa. Ed è proprio sulla questione della giurisdizione che ci si è concentrati nell'ultima parte del lavoro in cui, attraverso l'analisi della più rilevante giurisprudenza della Corte EDU, è stato mostrato come quest'ultima abbia deliberato in diversi casi sulla possibilità di ritenere responsabile di una violazione anche uno stato che l'abbia commessa all'infuori della propria giurisdizione territoriale. Questo avviene di solito in riferimento alle entità *de facto* in cui il responsabile delle violazioni può essere identificato con lo stato territoriale, con lo stato "sponsor" o addirittura con entrambi.

Ho scelto in tal senso di esaminare i casi più emblematici in riferimento ad ogni caso studio cercando di seguire ogni volta il ragionamento giuridico svolto dalla Corte per capire chi e quando stesse esercitando giurisdizione extra-territoriale sul suolo separatista. Molti casi, soprattutto quelli inter-statali, hanno una grossa rilevanza politica e la maggior parte di questi deve ancora essere analizzata dalla Corte. Tuttavia, l'importanza delle sentenze della Corte per chiarire i diversi gradi di responsabilità e per fornire adeguata protezione agli individui è risultata fondamentale nei ricorsi analizzati e risulterà fondamentale per quelli ancora pendenti.

3. Conclusioni

Infine, per concludere, lo scopo di questa tesi era fin dall'inizio quello di scoprire come gli abitanti delle entità *de facto* dell'area post-sovietica potessero ottenere giustizia per le violazioni dei diritti umani subite, soprattutto facendo riferimento alla Corte EDU. Le ricerche che ho condotto mi hanno portata a capire innanzitutto quanto sia stato difficile per l'individuo diventare un soggetto del diritto internazionale e a capire quanto l'aspetto politico del riconoscimento degli Stati sia predominante. Inoltre, è emerso quanto il sistema della Corte EDU sia ritenuto efficace e di fondamentale importanza per la risoluzione di casi riguardanti violazioni dei diritti umani, soprattutto in zone di conflitto come quelle di nostro interesse. Ebbene, alla fine di questo lavoro, sono arrivata alla conclusione che, nonostante la difficolta per gli abitanti di questi territori di ottenere giustizia a livello locale e nazionale, l'accesso diretto alla Corte istituita dal Consiglio d'Europa rappresenta e rappresenterà in futuro, una garanzia di protezione per queste persone, grazie anche all'adesione degli stati territoriali e "patrono" ai sistemi del CoE e della Corte EDU.

INTRODUCTION

The present dissertation aims at understanding which rights the people living in the contested territories of the post-Soviet area own to access to national and international justice in order to see their rights (and duties) protected and recognized. In particular, the focus will be on the capacity of the European Court of Human Rights (ECtHR) to protect the human rights of these people who are bringing an increasingly number of cases in front of this Court.

The starting point for this work has been the fact that these *de facto* entities are not internationally recognized by the majority of the states, but violations, especially of human rights, actually occur in these territories and, as a consequence, the victims must seek justice in front of courts and tribunals established by those states that do not recognize them. At first glance this line of reasoning could appear a bit intricate, and it is, but I have tried to clarify each element of the question in order to reach the appropriate conclusions, that however are in continuous evolution.

The first chapter will be dedicated to the some of the concepts at the basis of the entire analysis, namely statehood, recognition and self-determination. It could appear a bit theoretical, but I think this is prerequisite for the entire work: before explaining which authorities are not recognized as states and why, it will be necessary to understand which entities can instead be defined as states under international law. Moreover, the "state" is one of the main subjects of international law and represents one of the main aspirations for the separatist entities that will be taken into consideration. Another reason behind the choice to put this analysis at the beginning of the entire work, is the fact that a lot of inter-state cases will be studied in the last part and it is therefore important to understand which entities can bring these claims.

It will be therefore proposed an analysis of the evolution of the concept of statehood from the Peace of Westphalia until the Montevideo Convention of 1933 in which are contained the four elements that an entity must own in order to be considered a State, namely a permanent population, a defined territory, an effective government and the capacity to enter into relations with other states. It will be therefore introduced and fully explored the concept of "recognition" of States that will be one of the pillars of the entire work that, as we will see, is a highly politicized act. It will be shown how this concept is strictly related to the one of "self-determination" that is often used by the separatist entities in order to affirm their authority, but that often clashes with the one of "territorial integrity".

In the second chapter a terminological analysis will be proposed in order to understand which entities can be defined "de facto states". It will be interesting to note that with reference to the territories of the post-Soviet area, it is not very correct to utilize this expression because they do not act like real states and sometimes, they do not seek full independence. For the purpose of this

work will be preferred the expression “contested territories” or “self-proclaimed authorities”. other expressions often used in this context, such as “unrecognized states” or “frozen conflicts”, will be analysed in order to show how each term has to be chosen and used with attention for each peculiar situation.

All the theoretical concepts introduced will be then shown through the analysis of different “historical” case studies chosen for their emblematic role in the evolution of the jurisprudence and the legal reasoning related to the recognition of states. Precisely, I will focus on Somaliland, the Turkish Republic of Northern Cyprus (TRNC), Kosovo, Taiwan and Palestine.

These historical examples will led to a deep study of the post-Soviet contested territories at the basis of this work, namely Nagorno-Karabakh, South Ossetia, Abkhazia, Transnistria and Crimea. All the cases will be analysed in detail from an historical and juridical point of view in order to show some characteristics they have in common: the fact that all the conflicts erupted in these areas have their origin in policies adopted under the USSR or the fact that they are all seceding from a territorial state (the *parent* state), but that they can actually survive only thanks to the help they receive from a *patron* state, represented in the majority of the cases by the Russian Federation.

However, this work does not want to be a classical analysis of the post-Soviet contested territories: as already pointed out, this work aspires at analysing how the right to access to justice is exerted in these territories. After the appropriate analysis carried out in the first two chapters, it will be therefore necessary to move a step forward the real focus of the thesis. In the third chapter the broader concept of access to justice will be presented, while in the last one it will be shown how it is applicated in the territories of our interest.

In the third part of my dissertation, I will therefore concentrate on the difficult path carried out by individuals toward the “right to justice”. First of all, the concepts of *locus standi* and of *jus standi* will be analysed, namely the right or ability to bring a legal action to a court of law or to appear directly in front of a court. The *locus* and *jus standi* are the guiding principles of this work and they deserve the right explanation and attention before proceeding. It is important to understand how these concepts have developed during the centuries and how individuals have gained legal personality only after World War II, in a world that had always been state centric. The conquest of the right to individual petition is therefore quite recent and finds its best expression under the European Convention on Human Rights (ECHR). This instrument of protection will be deeply analysed, being the one on which almost the entire final analysis will concentrate. In particular, it will be highlighted the efficiency of this system developed during the years thanks to the introduction of different Protocols, such as Number 11 and 14 which have improved and eased the way through which individuals can bring cases in front of the ECtHR.

In this sense, Articles 34 and 35 of the Convention, that include respectively the provisions on the individual petition and on the admissibility criteria, will be studied. Finally, this "living instrument" of protection will be compared with other instruments that allow the *locus standi* of individuals, such as the American Convention on Human Rights, the African Charter of Human and People's Rights and the so-called UN treaty-based bodies. An additional paragraph will be dedicated to the analysis of Article 33 of the ECHR that enshrines the right to present inter-state cases in front of the Court: as a matter of fact, some of the most relevant cases concerning the post-Soviet de facto entities are brought by a State against another High Contracting Party of the Convention.

In the last chapter, all the paths followed in the previous chapters will merge. As a matter of fact, it will be dealt with the "right to justice" in the *de facto* entities of the post-Soviet area. It is evident that after almost thirty years of war the human rights violations occur on a daily basis in these territories, but it very difficult to obtain justice al local or even at national level. As a consequence, the victims often choose to bring their claims under the ECtHR, because it is one of the most effective instruments of protection and because all the *patron* and *parent* states are part of the Council of Europe and of the ECHR and can therefore be held responsible for human rights violations under this system.

The final part will concentrate therefore on the methods used by the Court in order to deal with the huge number of applications derived from these areas. Moreover, it will be made the analysis of the most relevant jurisprudence of the Court that has often applied the principle of "extra-territorial jurisdiction" in these cases, in order to establish which State had responsibility over the violation occurred in the separatist area.

At the end of the dissertation, it will be made a summary of all the points reached and some conclusions will be drafted, especially in relation to the contradiction found between the concept of recognition and the possibility of representation in front of a court. Moreover, it will be made some remarks about to the importance of the presence of the *parent states* in the Council of Europe, that is basically the key factor that enables the inhabitant of the *de facto* regions to see their *right to justice* fulfilled and protected.

CHAPTER 1

THE ROLE OF STATEHOOD AND RECOGNITION IN INTERNATIONAL LAW

ABSTRACT: 1. Introductory remarks - 2. Importance and evolution of the concept of statehood – 2.1 Criteria for statehood in international law: the Montevideo Convention – 2.1.1 Permanent population – 2.1.2 Defined territory – 2.1.3 Effective government – 2.1.4 Capacity to enter into relations with other states – 3. Recognition in international law: declaratory and constitutive theories towards new approaches – 3.1 Different types of recognition – 3.1.1 State and Government – 3.1.2 De jure and De facto – 3.1.3 Explicit and Implicit – 3.1.4 Non-recognition – 4. The principle of self-determination in international law – 4.1 Some notions about secession

1. Introductory remarks

The main focus of this work is the right to justice of individuals, especially the right of individual petition under the European Convention on Human Rights owned by people living in the contested territories of the post-Soviet area. Nevertheless, as it will be shown in the last chapter, also the inter-state cases are very important for the purpose of this analysis: it will be therefore necessary to develop a bit more the concept of "state" in order to understand the history and the characteristics of these entities that occupy a fundamental place in international law. Even if speaking of the State as the primary and exclusive subject of international law is a bit inappropriate and obsolete[1], it is still one of the elements at the basis of international law and of this thesis. As affirmed by Malcolm N. Shaw indeed, notwithstanding the increasing number of actors in the international legal system, states remain the most important legal person[2].

There is also a second reason behind this chapter: the main goal of the present work is to understand how the right to justice can be exerted in the *de facto* regions of the post-Soviet area: in order to understand what a *de facto* state is, it is first of all necessary to understand what a state is. This point is very important because, as underlined by M. Craven and R. Parfitt, "even the movements of resistance tend to adopt it (the model of the Nation-state) as their principal mode

[1] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 179.
[2] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 197: *"Despite the increasing range of actors and participants in the international legal system, states remain by far the most important legal persons and despite the rise of globalisation and all that this entails, states retain their attraction as the primary focus for the social activity of humankind and thus for international law".*

of emancipation"[3]. From their perspective, it seems clear that the desire to become a state is the uniform objective of the independence movements (such as the ones of Nagorno-Karabakh and Somaliland that we will analyse below or the ones of Catalonia and Scotland, nearer to our Western society), of the micro-nations projects (such as Liberland and North Sudan), of the former colonies (like Palestine and Western Sahara, that will be part of our analysis) and of oppressed peoples within States (like the Kurds and Oromo): the opposition to the State appears indeed to resolve itself often in the advent of another State[4].

In order to understand the doctrine behind the concepts of "self-proclaimed authorities", "*de facto* entities" and "*de facto* states" it is very important to have clear in mind the concept of statehood: it would be useless to describe why these entities are not states without having clear in mind what a state is. Maybe this chapter could appear a bit theoretical and off the "beaten track", but - as shown - I think that this part of analysis is prerequisite for the other chapters of the work. For this reason, I have chosen to put it at the beginning of the entire thesis.

2. Importance and evolution of the concept of statehood

In order to figure out what a state is, it is useful to start from the classical definition of State used in international law, the one enshrined in Article 1 of the Montevideo Convention on the Rights and Duties of States of 1933 that affirms that:

"*The state as a person of international law should possess the following qualifications:*

a) a permanent population;
b) a defined territory;
c) government; and
d) capacity to enter into relations with other states"[5].

Even if this definition (that will be analysed in a while) was agreed only between the American States of the Pan American Union, it is "the most widely accepted formulation of the criteria of statehood in international law"[6]. Moreover, it was evoked also in 1991 by the Badinter Committee, the Arbitration Commission of the European Conference on Yugoslavia, which in its

[3] *V. Supra*, to note 1, p. 178.
[4] *V. Supra*, to note 1, p. 178.
[5] *Montevideo Convention on the Rights and Duties of States*, 26 December 1933 (entered into force on 26 December 1934), Montevideo, Art 1.
[6] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 198.

Opinion No. 1 concluded that: "The state is commonly defined as a community which consists of a territory and a population subject to an organised political authority; such a state is characterised by sovereignty"[7]. These two definitions are not exhaustive and entail other concepts that will be touched in this section, such as recognition or self-determination, but are the point of arrival of a long evolution started in the seventeenth century.

A key point in the story of the states was indeed the Peace of Westphalia of 1648 that, putting an end to the Thirty Years' War, is considered the conventional starting point of the Law of Nations and the moment in which a secular international society within Europe appeared[8]. This important event consolidated the existing states and principalities at the expense of the Empire and made it possible to rethink international society as a community composed by independent sovereigns and their subordinates[9]. In this context writers and scholars started to have some difficulties and divergences over the topic of statehood. Even if the word "state" in its modern meaning appeared for the first time with Machiavelli, we have to wait until 1576 in order to have a first definition of the concept of sovereignty in *Les six Livres de la République* published by Jean Bodin. He defined the state as "an aggregation of families and their common possessions, ruled by a sovereign power and by reason", underling the fact that the government is conditioned by a moral end; moreover, he described sovereignty as "a supreme power over citizens and subjects, unrestrained by the laws" pointing out for the first time that an authority in order to be truly sovereign must be not only supreme, but also without limits of time[10].

It was the seventeenth century the moment in which most of the scholars started the debate on this topic. Already before the Peace of Westphalia, Hugo Grotius had given his definition of "state" in its *De Jure Belli ac Pacis* of 1625: "State is a complete association of free men, joined together for the enjoyment of rights and for their common interest"[11]. This definition is more philosophical than legal and imagines the State, and the people who compose it, as bound by the law of nations that for him was identical to the law of nature[12]; as a matter of fact, he asserted also

[7] Established pursuant to the Declaration of 27 August 1991 of the European Community, this Committee takes its name from its chair Mr. Robert Badinter. See A. PELLET, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, European Journal of international Law (EJIL), Vol.3, pp. 178 -185. Available at: *http://ejil.org/pdfs/3/1/1175.pdf*

[8] See R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 183 and J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 10.

[9] *V. Supra*, to note 8.

[10] See more about sovereignty in the next paragraph. See also J. BODIN, *Les Six Livres de la République*, 1576 (Book I) and see WM. A. DUNNING, *Jean Bodin on Sovereignty*, Political Science Quarterly, Vol.11, No 1, Mar. 1896, pp. 82-104. Available at: *https://www.jstor.org/stable/2139603?seq=12#metadata_info_tab_contents*

[11] H. GROTIUS, *De Jure Belli ac Pacis* (first published in 1625), quoted in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 6.

[12] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 6.

that: "Outside of the sphere of the law of nature, which is also frequently called the law of nations, there is hardly any law common to all nations"[13]. This doctrine was pursued obviously by Hobbes in his *Leviathan*[14] and by Locke in the second of the *Two Treatises of Government*[15]. In their masterpieces they supported the idea of "social contract", term used in political philosophy in order to indicate an agreement between the ruled (people understood as a community of individuals or as a multitude) and the rulers or sovereign (the individual or group of people who were endowed with the right to rule); according to the theory, individuals were born into an anarchic state of nature from which they had been able to free thanks to this contract, that had led them to form a society and a government[16].

The main prosecutor of the theories of both Grotius and Hobbes is for sure Samuel Pufendorf that defined the state as a "*compound Moral person, whose will being united and tied together by those covenants which before passed amongst the multitude , is deemed the will of all, to the end that it may use and apply to strength and riches of private persons towards maintaining the common peace and security"*[17]. By this definition it is evident that for Pufedorf the State was both a moral entity and a "person", meaning that the state was entrusted not only with the task of securing peace and order, but that it was also endowed with certain passions and interests[18].

The personification of the State paved the way to one of the main writers of the early positivist period: Emmerich de Vattel. He conceived States as "political bodies of men that had aggregated their forces in order to produce mutual welfare and security"[19]. Moreover, he thought that states existed in a state of nature, living in a condition analogous to the one of individuals prior to the establishment of a civil society, looking for security and community in their relations with other states[20]. In his masterpiece of 1758, he affirmed indeed that:

> *"Every Nation which governs itself, under whatever form, and which does not depend on any other Nation, is a sovereign State. Its rights are, in the natural order, the same as those of every other State. Such is the character of the moral persons who live together in a society established by nature and subject to the law of Nations. To give a Nation the*

[13] *V. Supra*, to note 10.
[14] T. HOBBES, *Leviathan; or The Matter, Forme and Power of a Commonwealth Ecclesiastical and Civil*, Printed for Andrew Crooke, London, 1951.
[15] J. LOCKE, *Two Treatise of Government*, 1690.
[16] See R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 183; see also Internet Encyclopedia of Philosophy (IEP) – The Social Contract Theory at: *https://iep.utm.edu/soc-cont/* and Encyclopedia Britannica at: *https://www.britannica.com/topic/polyarchy*
[17] S. PUFENDORF, *De jure naturae et gentium libri octo*, 1672.
[18] See R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 184.
[19] E. DE VATTEL, *Le Droit des Gens ou Principes de la Loi Naturelle Appliquée à la Conduite et aux Affaires des Nations et des Souverains,* 1758, introduction, p.1.
[20] *V. Supra*, to note 18.

right to a definite position in this great society, it need only be truly sovereign and independent; it must govern itself by its own authority and its own laws"[21].

There are some important elements here such as the distinction between the notion of "State and "Sovereign State" and the introduction of the concept of "equality of states" that entails the precondition that each state is the sole judge of its rights and obligations under the law of nations[22].

The doctrines about statehood during the nineteenth century touched for a large part the emerging topic of recognition that will be analysed further. At this point of our study, it is only necessary to remind the fact that at the beginning of the century were emerging a number of independent movements that were claiming statehood against the former colonial powers[23]. If "sovereignty" until that moment had been considered as the detention of the power within a particular territorial unit that necessarily came from within and did not require an external recognition[24], in that context became fundamental a differentiation between the internal effectiveness of the state and its membership in the international community (that depended on the practice of recognition)[25]. The most significant author in this context was H. Wheaton that in 1866 in his *Elements of International Law* made a distinction between what he considered as "internal" and "external" sovereignty:

> *"The internal sovereignty of a State does not, in any degree, depend upon its recognition by other States. A new State, springing into existence, does not require the recognition of other States to confirm its internal sovereignty...The external sovereignty of any State, on the other hand, may require recognition by other States in order to render it perfect and complete...If it desires to enter into that great society of nations...such recognition becomes essentially necessary to the complete participation of the new State in all the advantages of this society. Every other State is at liberty to grant, or refuse, this recognition..."*[26].

This extract envisaged the question of sovereign status on the one hand and the question of participation in the international community on the other[27]. This approach, that clearly recalls the so-called "constitutive theory of recognition" - according to which it is the act of recognition by other states that creates a new state[28] - was abandoned in the early twentieth century in favour of the "declaratory theory" - according to which statehood is a legal status independent of

[21] *V. Supra*, to note 19, introduction, p. 4.
[22] *V. Supra*, to note 12, p. 6.
[23] *V. Supra*, to note 18, pp. 190-191.
[24] *V. Supra*, to note 12, p. 12.
[25] *V. Supra*, to note 18, p. 191.
[26] H. WHEATON, *Elements of International Law*, 1866, quoted in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 6.
[27] *V. Supra*, to note 18, pp. 191 – 192.
[28] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 445.

recognition[29]. These theories will be fully investigated below, but it is important to remind that the declaratory perspective is the one adopted during the drafting of the *Montevideo Convention* of 1933, that is very close to the one used in 1905 by L. Oppenheim who, even if he was a supporter of the constitutive theory, in his definition of State affirmed that: "A State proper is in existence when people is settled in a country under its own Sovereign Government"[30]. Before getting into the analysis of the four principles of the Convention just mentioned, one last point must be touched.

At the end of the nineteenth century, were entering into the international scene also non-European actors to which international law had to be applied. "In this context lawyers began to differentiate between the normal relations that pertained between Europe States and those characterized relations with other political communities on the outside"[31]. Even if the degree of sovereignty was different between European and non-European States, it was impossible to deny any legal status to the non-European entities because this would have put into question the treaties of cession, concession and about boundaries that had been stipulated between European nations and African or Asian territories and upon which seemed to depend all European privileges[32]. In order to be admitted into the family of Nations the aspirants states had to demonstrate to be "civilized": this meant to have institutions of government, laws and a system of administration modelled upon those of Western Europe[33]. The fact that these state-like entities had a lower degree of legal personality in respect of the European States is clear, and it was only in the early twentieth century that it was possible to speak about statehood in a clear and technical legal sense thanks to "the globalization of international law and of the homogenization of state-like entities in all parts of the world"[34]. Nevertheless, the obsolete term "civilized" has not disappeared at all from international law. As a matter of fact, it was applied in Article 38.3 of the Statute of the Permanent Court of Justice with reference to "the general principles of law recognized by *civilised* nations"[35], a principle that was then directly incorporated into the present Statute of the International Court of Justice at Article 38.1(c) that affirms that: *"The Court, whose function is to decide in*

[29] *V. Supra*, to note 12, p. 4.
[30] L. OPPENHEIM, *International Law, A Treatise, Vol.1-2*, Longmans, Green & Co. (Second Edition), London, 1912, quoted in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 190.
[31] See R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 186.
[32] *V. Supra*, to note 31.
[33] *V. Supra*, to note 31, p. 187.
[34] See R. NICHOLSON, *Statehood and State-Like in International Law, Oxford University Press*, 2019, Introduction and Chapter 2.
[35] League of Nations, *Statute of the Permanent Court of International Justice*, 16 December 1920, Art. 38.3.

accordance with international law such disputes as are submitted to it, shall apply… c) the general principles of law recognized by civilized nations"[36].

2.1 Criteria for statehood in international law: the Montevideo Convention

The starting point for the analysis has been the Montevideo Convention of 1933. After having seen the evolution of the concept of statehood during the history, it is necessary to analyse in detail the four principles contained in the definition of State under Article 1 of the Convention[37]. It is always important to bear in mind the fact that there is not an authoritative definition of State in international law and that every author gives his/her interpretation of this concept, but these four principles are recognized as the minimum standard for an entity to become a state[38]. The definition of state that I am keeping in mind at this point of the analysis in order not to create misunderstandings is the one proposed by J. Crawford in 2006: *"A State is not a fact in the sense that a chair is a fact; it is a fact in the sense in which it may be said a treaty is a fact: that is, a legal status attaching to a certain state of affairs by virtue of certain rules or practices"*[39].

2.1.1 Permanent population

The first criterion laid down in the Montevideo Convention of 1933 is the one of "permanent population". It is not required a minimum number of inhabitants and for this reason even territories with populations under a million such as Andorra (77,265), the Marshall Islands (59,190, Monaco (39,242), Liechtenstein (38,128), San Marino (33,931), Palau (18,094), Tuvalu (11,792) and Nauru (10,824) are considered States[40] and therefore have a place in today's General Assembly, being statehood a prerequisite for the membership in the United Nations[41]. This point

[36] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Art. 38.1(c).
[37] *Montevideo Convention on the Rights and Duties of States,* 26 December 1933 (entered into force on 26 December 1934), Montevideo, Art. 1: "*The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other states".*
[38] D.WONG, *Sovereignty Sunk? The Position of "Sinking States" at International Law,* Melbourne Journal of International Law, Vol.14, 2013, pp. 7-8.
[39] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 5.
[40] To see more about the population of the States in the world and constant updating, consult: *https://www.worldometers.info/world-population/population-by-country/*
[41] See J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 52; See R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M.

is very important, first of all for the micro-states, because it is statehood that grants both UN membership and legal standing in front of the ICJ: the first one guarantees a cost-effective method of maintaining international contacts, while the second one is fundamental in order to have legal protection and to retain the capacity to bring legal claims; they permits therefore to be subject of international law even with small population and little territory[42].

The permanent population requirement of the Convention is not related to the nationality of the population because "it appears that the grant of nationality is a matter that only States by their municipal law (or by way of treaty) can perform. Nationality is dependent upon statehood, not vice versa"[43] . Moreover, the definition of permanent population implies that inhabitants must live together as one people, forming a national community that identifies itself with the territory[44]. Therefore, the controversies born with respect to the population of the Vatican City State are comprehensible[45]. With a population of 801 people is the least inhabited territory in the world, but of these few hundreds of people only 450 have the Vatican citizenship. Following the last law about citizenship in the Vatican City State, Law n. CXXXI of 2011 issued by Pope Benedict XVI, citizenship is not based on birth, but can be acquired only by those who have their place of work or office in the territory of the Vatican City[46]. As it can be inferred, the population of this territory

D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 195; See also M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 199.

[42] *V. Supra*, to note 38, pp. 4-5.

[43] See J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 52.

[44] J. SHEN, *Sovereignty, Statehood, Self-Determination, And the Issue of Taiwan*, American University International Law Review 15, no. 5, 2000, pp. 1126-1127

[45] The Vatican City State was founded as a separate sovereign State by the Lateran Pacts signed between the Holy See and Italy on February 11, 1929. Pursuant to these treaties and to international law, the Vatican City State, the Holy See, and Italy are different entities and the relationships between them are multiple and complex. The Holy See represents the universal government of the Catholic Church and is considered a juridical entity under international law, but it does not possess the attributes of a sovereign state: territory, population and sovereignty. Crawford has concluded that the Holy See is both an international legal person in its own right and the government of the Vatican City. Article III of the Lateran Pacts contains the recognition by Italy of the Vatican City State's ownership of the Vatican territories (including Saint Peter's Square) and its right to grant citizenship to its subjects. See more at: *https://blogs.loc.gov/law/2012/07/the-current-legislation-on-citizenship-in-the-vatican-city-state/* and at: *https://www.vaticanstate.va/it/stato-governo/note-generali/popolazione.html*; See also J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 221-233 and M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), pp. 243-244.

[46] The traditional factors utilized to acquire citizenship (*ius sanguinis*, *ius loci*, or *ius soli*) are not applicable in the particular context of the Vatican City. Under the new legal regimen, citizenship can be acquired by law (*ex iure*) or by administrative decision. *Ex iure* citizenship is granted to only three classes of persons: (a) the Cardinals resident in the Vatican City State or in Rome; (b) the Holy See's diplomats; and (c) the persons who reside in Vatican City State by reason of their office or service (this last class includes the members of the Swiss Guard). The acquisition of citizenship by administrative decision can only be requested in three situations: (a) by residents of the Vatican City State when they are authorized by reason of their office or service; (b) by the persons who have obtained papal authorization to reside in the State, independently of any other conditions; and (c) by the spouses and children of current citizens, who are also residents, of the Vatican City State. See more in A. SARAIS, *La Disciplina Giuridica della Residenza e dell'Accesso nella Città del Vaticano*, Prawo Kanonicze, 57, nr.1, Pontificio Istituto Orientale, Città del Vaticano, 2014, pp. 127-156.

is not permanent, however it is often considered a State (but at UN level the Holy See it is a "non-member state with observer status"). This creates ambiguity because it is evident that in other cases such as the one of Taiwan analysed below, that counts with a population of more than 21 million people, the requirement of a permanent population – that furthermore resides in a defined territory - has not been enough to be recognized as a state at international level. The case of the Vatican City State is therefore a peculiar one because even if the first two requirements of the Convention have not been fully fulfilled, it seems that "the strength and influence of the government – the Holy See - have compensated for the lack of a permanent population and a tiny territory"[47].

2.1.2 Defined territory

The second criterion that must be respected in order to be a State according to the Montevideo Convention concerns a "defined territory". As in the case of population, it is not required a minimum area of territory to be considered States. For this reason, the territories just mentioned above are considered States even if they all have a territory under 500 km^2: Andorra (470 km^2), the Marshall Islands (180 km^2), Monaco (1,5 km^2), Liechtenstein (160 km^2), San Marino (60 km^2), Palau (460 km^2), Tuvalu (30 km^2), Nauru (20 km^2) and the Holy See (0,5 km^2)[48]. It is evident that the prerequisite of independent territory is not only about size, about possession of land or about the factual control over territory, but it is rather "the ability to rightfully claim the territory as a domain of exclusive authority"[49].

There is therefore a strict connection between statehood and territorial sovereignty, a concept that the Arbitrator Huber of the famous case of the *Island of Palmas* described in the following way:

> *"… Sovereignty in relation to a portion of the surface of the globe is the legal condition necessary for the inclusion of such portion in the territory of any particular State. Sovereignty in relation to territory is in the present award called "territorial sovereignty". Sovereignty in the relations between States signifies independence. Independence in*

[47] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 223.
[48] To see more about the area of the States in the world and constant updating, consult: *https://www.worldometers.info/world-population/population-by-country/*
[49] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 196.

regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State"[50].

The question of territorial sovereignty had not been investigated during the nineteenth century because it was considered as analogous to the ownership of land: it was the concept of *terra nullius* (unoccupied territory) that regulated the disputes about the acquisition of new lands by already existing states, which could occur through the conquest of these unoccupied land or through explicit or tacit cessation[51]. Nowadays it does not exist any place in the world that could be considered as *terra nullius* and the proliferation of the number of states in the international context required new and more suitable solutions*:* at the beginning of the twentieth century there were fifty acknowledged States; immediately before World War II there were about seventy-five and nowadays there are almost 200[52].

It was with the dispute between USA and the Netherlands for the Island of Palmas and the masterful interpretation of Arbitrator Huber that a change has occurred. First of all he concluded that the contended Island of Palmas formed part of the territory of the Netherlands because after having exercised sovereignty over that territory for more than 200 years the Dutch government had gained a certain degree of authority that could not be challenged and questioned by a mere title ceded by Spain to United States in 1898[53]; secondly he has been able to define territorial sovereignty and to describe its positive and negative aspects: the former related to the exclusivity of the competence of the state on its own territory and the latter referred to the obligation to protect the rights of the other states[54].

Another nuance of the requirement of a defined territory that must be highlighted is the distinction between boundaries and territory because it has been accepted for a long time that "the absence of clearly delimited boundaries is not a prerequisite for statehood"[55]. This principle has become clear with the admission to the League of Nations of Albania in 1920 when its borders had not

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[50] *Island of Palmas Case*, 4 April 1928, 2 RIAA 829, p. 838. Available at: *https://legal.un.org/riaa/cases/vol_II/829-871.pdf*

[51] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 197 and J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 48.

[52] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 4. To be precise there are 193 UN members, 2 permanent observer (the Holy See and Palestine), Taiwan (ex UN member), two free association within the realm of New Zeland (Cook Islands and Niue) and other ten states that are not recognized or only partially recognized by the other UN members that will be analyzed further.

[53] See Permanent Court of Arbitration, *Island of Palmas (or Miangas) (The Netherlands/The United States of America)* available at: https://pca-*cpa.org/en/cases/94/#:~:text=The%20dispute%20concerned%20the%20sovereignty,for%20more%20than%20200%20years.*

[54] *Island of Palmas Case*, 4 April 1928, 2 RIAA 829, p. 838. See also M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 490.

[55] *V. Supra*, to note 49, p. 197.

been finally fixed[56]; this principle was confirmed in the Advisory Opinion of the PCIJ on the *Monastery of Saint Naoum* case of 1924 in which it is affirmed that:

> *"The appurtenance of a given area, considered as an entity, in no way governs the precise delimitation of its boundaries, any more than uncertainty as to boundaries can affect territorial rights. There is for instance no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not, as is shown by the case of the entry of Albania into the League of Nations"*[57].

Therefore, while territory is a prerequisite for the assignation of statehood and for the existence of it as the legal subject with property in relation to space, borders seem to be only a consequence of this process[58]. Nevertheless, borders and changes of borders cannot be ignored because sometimes they have clear effects, such as in the dissolution process of the former USSR and of the former Yugoslavia. In this last case it clearly emerged the importance of the principle of *uti possidetis juris*: a principle defined by the Chamber of the ICJ in 1986 in relation to the African situation between Burkina Faso and Mali and whose primary aim is the one of "securing respect for the territorial boundaries at the moment when independence is achieved"[59]. Even if the borders were very clear and definite during the dissolution process of Yugoslavia, there were some uncertain situations such as the one of Croatia in which the effective control over the territory was under discussion due to the conflict between the new State and the Serbian forces[60] or the fact that all the new states - and also Serbia and Montenegro (recognized as the prosecutor of former Yugoslavia) - had to reapply to UN as different states[61]. Therefore, borders "are not merely lines on the ground or ways of delimiting spheres of public jurisdiction. Instead, they serve to delimit both the identity and existence of a political order by means of its separation from others"[62].

Both the issues about territory and about borders have merged in the case of Israel of 1948, in which not only a part of its boundaries was in question, but all of them due to fact that it had been created from the territory of the ex-Mandate for Palestine with Resolution 181 (II) of 1947 in which it was envisaged the termination of the Mandate for Palestine and the partition of Palestine into an Arab and a Jewish State[63]. The Security Council's failure to endorse the plan of the General

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[56] *V. Supra*, to note 49, p. 197.
[57] *Monastery of Saint-Naoum*, Advisory Opinion, PCIJ, Ser B, No 9, 1924. See also R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 197 and J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 50.
[58] *V. Supra*, to note 49, p. 197.
[59] ICJ Reports, 1986. *Frontier dispute (Burkina Faso/Republic of Mali).* Available at*: https://www.icj-cij.org/en/case/69*
[60] *V. Supra*, to note 47, p. 50.
[61] *V. Supra*, to note 51, p. 198 and p. 50.
[62] *V. Supra*, to note 49, p. 198.
[63] GA Resolution 181(II), *Future Government of Palestine*, 29 November 1947. Available at: *https://unispal.un.org/DPA/DPR/unispal.nsf/0/7F0AF2BD897689B785256C330061D253*

Assembly for the Partition of Palestine, the unilateral withdrawal of the British administration from the territory and the admission of Israel to the United Nations on 11 May 1949[64] - despite the fact that its borders had not been yet fully confirmed - are the causes of the atmosphere of uncertainty that has been generated and of all the following conflicts that have emerged in the area and that still continue today[65]. The question of Israel and Palestine will be analysed below, but it has been here important to underline this peculiar example in which both the territory and the borders not only of Israel, the new state, but also of Palestine, a former mandate territory awaiting for recognition, were under discussion at the same time[66].

2.1.3 Effective government

The third criterion expressly required from the Montevideo Convention in order to become a state is the possession of a government, or better, of an effective government, that has been described by J. Crawford as the "the most important single criterion for statehood, since all the others depend upon it"[67]. *"Effectiveness in this context is generally taken to mean that the government of a putative State must demonstrate unrivalled possession and control of public power […] throughout the territory concerned. Once that unrivalled possession is established, recognition of statehood may follow"*[68]. In a dispute between Sweden and Finland over possession of the Aaland Islands the Commission of Jurist appointed by the League of Nations affirmed - with reference to the fact that an order had been re-established in the territory only after the withdrawal of the Russian troops from the Finnish territory by Sweden - that the establishment of a state cannot occur *"until a stable political organization had been created, and until the public authorities had become strong enough to assert themselves throughout the territories of the State without the assistance of foreign troops"*[69]. Nevertheless, effectiveness is not enough on its own because, as demonstrated during the twentieth century, there have been cases of effective entities that have not been recognized as States - such as Taiwan whose recognition has been deferred because of the claims of China - and cases of less-effective entities that however are considered States - such as the Baltic Republics that have kept alive their idea of being States despite a fifty-

[64] GA Resolution, 273(III), *Admission of Israel to Membership in the United Nations,* 11 May 1949. Available at: *https://unispal.un.org/DPA/DPR/unispal.nsf/0/83E8C29DB812A4E9852560E50067A5AC*
[65] *V. Supra*, to note 51, p. 198 and pp. 424-425.
[66] *V. Supra*, to note 49, p. 198.
[67] *V. Supra*, to note 47, p. 56.
[68] *V. Supra*, to note 49, p. 199.
[69] L.N.O.J. Spec. Supp. No. *4, Aaland Island Case,* 1920, pp. 8-9.

years occupation by the Soviet Union or the case of Kuwait that continued to exist due to the presumptive illegality of the invasion of its territory by Iraq[70].

As it can be inferred from these cases, and as it will be demonstrated with respect to recognition, a government can be recognized as effective only if it does not occur a case of premature recognition[71] and when the "creation" of the new state occurs without violations of *jus cogens* norms and without the use of force (by respecting the principle *ex inuria ius non oritur*)[72]. For example, to the Turkish Northern Republic of Cyprus (TRNC), that will be studied further, has always been denied recognition because its creation had been obtained through unlawful military intervention with the Turkish invasion in 1974[73]. On the other hand, regarding premature recognition, from the recent practice it has emerged the willingness to recognize states that are not fully effective: Croatia and Bosnia-Herzegovina, for example, have been recognized by the EC community and admitted to UN in a situation in which non-governmental forces controlled substantial areas of their territories [74]. If on the one hand it can be concluded that at least a foundation of effective control is required for statehood, on the other hand "the loss of control by the central authorities in an independent state will not obviate statehood": therefore, the collapse of governance within a state "has no necessary effect upon the status of that state as a state"[75]. This process is usually referred to as a "failed state" and it is often controversial in terms of international law[76].

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[70] *V. Supra*, to note 49, pp. 200-201-202.

[71] Recognition of a new State which has declared its independence from another State can constitute a violation of the principles of non-intervention and territorial integrity if such recognition is premature. Recognition is premature if it disregards the right to respect for territorial integrity enjoyed by the original State in a situation where the "new State" cannot be considered to exercise effective State power over the territory concerned, whilst the "old State" still maintains some degree of control. See more in D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 23-24.

[72] United Nations, Charter of the United Nations, 24 October 1945, Art. 2.4: *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations".* See also International Law Commission (ILC), *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Art. 41.2*: "No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation".*

[73] ECtHR, *Cyprus v. Turkey* (Application no. 25781/94), Grand Chamber, 12 May 2014.

[74] They have been recognized by the European community on 15 January 1992 and 6 April 1992 respectively and they were both admitted to Un on 22 May 1992. See more in a R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 202 and M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 201, 461-462.

[75] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 201.

[76] A failed state (the most famous example is Somalia that will be analysed below) arises when a government has become incapable of providing the basic functions and responsibilities of a sovereign nation, such as military defence, law enforcement, justice, education, or economic stability. Common characteristics of failed states include ongoing civil violence, corruption, crime, poverty, illiteracy, and crumbling infrastructure. The origins of this debate can be found in: G. B. HELMAN – S. R. RATNER,

"Statehood is not simply a factual situation; it is a legally circumscribed claim of right, specifically to the competence to govern a certain territory"[77] and it is from the government that derive certain legal effects. As noted above, the negative effects reside in the fact that the lack of a coherent form of government in a given territory can affect also its statehood, conversely it is the existence and the continuity of a government in a defined territory that gives the state a certain legal status: it can be affirmed that government is a precondition for statehood and that it is very complex to divide states from their governments, because are governments that bind States through treaties, laying foundations for relations with other states[78].

For example, it has been argued that the Vatican City may not be considered a State because it is not independent from the government of the Holy See, but no state is independent from its government[79]. Here the concept of independence, already defined above, is introduced by quoting the words of Judge Huber, as "the right to exercise therein, to the exclusion of any other State, the functions of a State"[80]. Independence is considered as a principle at the basis of statehood and both "government" and "independence" are two aspects of the effective control exercised by a state: government is the exercise of authority with respect to persons and property within the territory of the State; whereas independence is the exercise, or the right to exercise, such authority with respect to other States[81]. The leading case usually employed in this field is the *Austro-German Customs Union* case regarding the continuance of Austria and its separation from Germany[82], from which emerged the classical statement used with reference to independence given by Judge Anzilotti:

> *"The independence of Austria … is nothing else but the existence of Austria, within the frontiers laid down by the Treaty of Saint-Germain, as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty (suprema potestas), or external sovereignty, by which is meant that the State has over it no other authority than that of international law*"[83].

This definition entails two main concepts: first of all, an entity must exist within reasonably coherent frontiers; secondly, it has not to be subject to the authority of any other state or group of

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Saving Failed States, *Foreign Policy*, No. 89, Winter, 1992-1993), pp. 3-20. Available at: *https://www.jstor.org/stable/1149070?origin=crossref&sid=primo&seq=7#metadata_info_tab_contents*

[77] *V. Supra*, to note 47, p. 61.

[78] *V. Supra*, to note 47, p. 60.

[79] *V. Supra*, to note 47, p. 225.

[80] *Island of Palmas Case*, 4 April 1928, 2 RIAA 829, p. 838. Available at: *https://legal.un.org/riaa/cases/vol_II/829-871.pdf*

[81] *V. Supra*, to note 47, p. 55 (footnote 85). As already seen the same distinction had been made by Wheaton, who utilized the terms "internal" and "external" sovereignty.

[82] PCIJ, *Austro-German Customs Union case*, Series A/B, No. 41, 1931.

[83] *V. Supra*, to note 82, Individual Opinion by M. Anzilotti.

state, but can have over it only the authority of international law[84]. Moreover, both from this quotation and from the one of Arbitrator Huber, it is clear that the concepts of independence and sovereignty are tied together and are often used in an interchangeable way. These notions in international law imply a number of rights and duties: the right of a state to exercise jurisdiction over its territory and permanent population, the duty not to intervene in the internal affairs of other sovereign states and the in the areas of exclusive competence of other states, the equality of state in legal terms, the freedom to develop its political, social, economic and cultural system and the dependence upon consent of obligations arising from customary law or treaties[85].

2.1.4 Capacity to enter into relations with other states

To conclude it is essential to bear in mind that independence and sovereignty are at the basis of the fourth and last principle prescribed by the Montevideo Convention: the capacity to enter into relations with other States. This final principle has often been described as a consequence and not a criterion for statehood[86] or as a conclusion, rather than a starting point for statehood[87]. This last point essentially depends on the recognition of other states. Even if the declaratory approach – the one that implies that recognition does not determine statehood - is the one employed by the Convention, the need to prove this capacity to enter into relations with other states implicitly gives to recognition an important role: "whilst recognition by fellow States can prove the effectiveness of a given entity's State-like power, non-recognition can render an entity de facto non-existent"[88]. Moreover, this criterion is vital for an effective government to determine freely and independently its external sovereignty, which in turn is strictly connected to the capacity to establish an independent statehood, especially in a globalised and interconnected era[89]. Therefore, recognition has always occupied a fundamental place in the field of statehood and need to be analysed further in a proper way.

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[84] *V. Supra*, to note 47, p. 66.
[85] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, A/RES/2625(XXV), 24 October 1970; United Nations, Charter of the United Nations, 24 October 1945, Art. 2.1: *"The Organization is based on the principle of the sovereign equality of all its Members";* See also M. M. T. A. BRUS, C. J. R. DUGARD, J. C. DUURSMA, G. P. H. KREIJEN, AND A. E. DE VOS, *State, Sovereignty, and International Governance*, Oxford University Press, 2002. See more at: *http://journals.univ-danubius.ro/index.php/juridica/article/view/2798/2585#:~:text=The%20United%20Nations%20Declaration%20of,its%20political%2C%20social%2C%20economic%20and*
[86] *V. Supra*, to note 47, p. 61.
[87] *V. Supra*, to note 49, p. 194.
[88] D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 20.
[89] *V. Supra*, to note 88.

3. Recognition in international law: declaratory and constitutive theories towards new approaches

As it has been possible to understand from these first two introductory paragraphs, recognition plays an important role in the international law arena and only States, as the primary subjects of international law, are subject to this procedure[90]. States benefit indeed of a wide legal personality through which they can be bearers of rights and duties, but without recognition the capacity of that state to enter into relations with other states is very limited and tend to isolate it from the international community[91]. If statehood is based on the legal requirements provided by the Montevideo Convention, recognition is largely dependent on the political will of the states and therefore a first theorical foundation is necessary in order to understand the case studies that will be provided. There are two main theories at the basis of recognition that we have already met: the constitutive and the declaratory one.

The constitutive theory is the one that claims that is the act of recognition by other states that creates a new state and give it legal personality; from this perspective "recognition is therefore a condition *sine qua non* for statehood"[92] and states become subjects of international law "by virtue of the will and consent of already existing states"[93]. During the eighteenth century the relationship between sovereignty and recognition was treated as an exclusive internal matter of the state[94], indeed the first appearance of this theory in the world has been in 1815 at the Peace Congress of Vienna during which were recognized 39 sovereign existing states and was established the principle that any future state could be recognised only through the acceptance of prior existing states[95].

Such constitutive view has fundaments in Hegel's production who affirmed that a state *"is sovereign and autonomous against its neighbours, [being] entitled in the first place and without qualification to be sovereign from their point of view, i.e. to be recognized by them as sovereign*"

[90] A. MURPHY – V. STANCESCU, *State formation and recognition in international law,* Juridical Tribune, Volume7, Issue1, June 2017, p. 6.
[91] *V. Supra*, to note 90, p. 7.
[92] C. RYNGAERT – S. SOBRIE, *Recognition of States: International Law or realpolitik? The Practice of recognition in the Wake of Kosovo, South Ossetia, and Abkhazia,* Leiden Journal of International Law, 24, 2011, p. 469.
[93] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 446.
[94] *V. Supra*, to note 90, p. 9 and J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 12.
[95] *V. Supra*, to note 90, p. 10.

and that *"recognition […] is conditional on the neighbouring state's judgement and will"*[96]. The theory of Hegel was directly applied by Wheaton in his differentiation between internal and external sovereignty, the second of which requires recognition by other states in order to become "perfect and complete"[97]. This theory spread first of all in Britain and North America from 1860s principally due to the emergence of new States in the Americas in the aftermath of the revolutions of those centuries, to the gradual transformation of the international space from an inter-dynastic to an inter-state one and to the acceleration of the European imperialism (that led to the fusion for a certain period of time of the concepts of legal personality with the one of civilized nation, as noted above)[98].

"This theory in addition is supported by the traditional positivist conception of international law as a consensual *jus gentium voluntarium*: an entity can only develop into a state with the agreement of other states"[99]. The main supporters of this constitutive theory are L. Oppenheim who affirmed that *"International Law does not say that a State is not in existence as long as it isn't recognised, but it takes no notice of it before its recognition. Through recognition only and exclusively a State becomes an International Person and a subject of International Law"*[100] and H. Lauterpacht who proposed that states have the legal duty to recognize one another when the conditions of statehood exist and who gave one of the most persuasive arguments with reference to this position:

> *"[T]he full international personality of rising communities... cannot be automatic... [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be someone to perform that task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy as distinguished from legal duty"*[101].

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[96] G.W.F. HEGEL, *Elements of the Philosophy of Right*, 1820, quoted in A. MURPHY – V. STANCESCU, *State formation and recognition in international law*, Juridical Tribune, Volume7, Issue1, June 2017, p. 10.
[97] H. WHEATON, *Elements of International Law*, 1866, quoted in R. PARFITT**,** *Theorizing Recognition and International Personality***,** The Oxford Handbook of the Theory of International Law, Edited by Anne Orford and Florian Hoffmann, 2016, p. 4.
[98] R. PARFITT**,** *Theorizing Recognition and International Personality***,** The Oxford Handbook of the Theory of International Law, Edited by Anne Orford and Florian Hoffmann, 2016, p. 4.
[99] *V. Supra*, to note 92.
[100] L. OPPENHEIM, *International Law, A Treatise, Vol.1-2*, Longmans, Green & Co. (Second Edition), London, 1912 quoted in A. MURPHY – V. STANCESCU, *State formation and recognition in international law*, Juridical Tribune, Volume7, Issue1, June 2017, p. 10. See also J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 14-16.
[101] H. LAUTERPACHT, Recognition in International Law, Cambridge University Press, 1947 quoted in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 20. See also A. MURPHY – V. STANCESCU, *State formation and recognition in international law*, Juridical Tribune, Volume7, Issue1, June 2017, p. 11.

The main drawback that emerges with the adoption of this approach is the fact that recognition is intended as a legal act and, without a duty to recognize and with the absence of an agency competent to adjudicate, the determination of the status of "state" is entirely dependent upon the individual position of the recognizing states[102]. Moreover, difficulties emerge when an entity is recognized only by a part of the international community of states: the question that arises at a very practical level is how many recognizing states are needed before the transformation of that entity into a state can occur and to which factors the recognition decision should be based? This inquiry leads directly to the conclusion that statehood is more a relative than an absolute concept[103].

The theory that has begun to affirm itself at the beginning of the 20th century and that has remained predominant until today, is the declaratory one. It affirms that recognition consists merely in the acceptance by a state of an already existing situation, aiming at minimising the power of states to confer legal personality[104]. As explained above, this approach is the one used in the Montevideo Convention of 1933: once an entity fulfils the criteria listed in Article 1 of the Convention is a state *erga omnes*, leaving to recognition the role of "an official confirmation of a factual situation – a retroactive act that traces back to the moment at which the factual criteria were fulfilled and the entity became a state"[105]. This approach has been clearly defined by Brierly in 1955 who suggested that granting the recognition to a new state is a declaratory act because this act does not bring into legal existence a state that did not exist before it: *"A state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state."*[106].

Even if this theory is the most appreciated in recent times, it does not mean that it lacks downsides. As a matter of fact, this approach tries to maintain both the importance of the creation of States as a rule-governed process and recognition as an essential political and discretionary act: this entails at the same time the postulation of a rule and its denial in any ground of application[107]. Moreover, it is impossible to believe that the assessment of the existence of a government involves the mere acknowledgement of facts; additionally, this perspective does not help in the evaluation of single cases involving strong declarations of governments or some features of illegality[108].

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[102] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 205.
[103] *V. Supra*, to note 93.
[104] *V. Supra*, to note 93.
[105] *V. Supra*, to note 92, p. 470.
[106] J.L. BRIERLY, *The Law of Nations: An Introduction to the International Law of Peace*, The Clarendon Press, 1955 (5th Edition), p. 131.
[107] *V. Supra*, to note 102.
[108] I. BROWNLIE, *Recognition in Theory and Practice, British Yearbook of International Law*, Volume 53, Issue 1, 1982 (published on 1 November 1983), p. 206.

Therefore, there are some crucial aspects that remain unsolved: the supporters of the constitutive approach argued that even if an entity believed itself to have fulfilled the criteria for statehood, it is only through the acceptance of it by other states that this belief becomes real because it is meaningless to assert that something is a state if nobody is ready to treat in a proper way; while the defenders of the declaratory approach point out the discretionary character of recognition that as a consequence must be placed as posterior to the determination of statehood[109].

In order to overcome this ever-ending gap between the two approaches, the solution proposed by Crawford seems to be a suitable one because he endorses the declaratory approach by giving to recognition a political, legal and, sometimes even constitutive, role:

> *"The question is whether the denial of recognition to an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State .... The answer must be no, and the categorical constitutive position … is unacceptable. But this does not mean that recognition does not have important legal and political effects. Recognition is an institution of State practice that can resolve uncertainties as to status … That an entity is recognized as a State is evidence of its status …"*[110].

This position became clear with three opinion of the Badinter Commission established in 1991 to arbitrate on the process of Yugoslavia dissolution: in Opinion No.1 they supported that "*the existence or disappearance of the state is a question of fact' and that 'the effects of recognition by other states are purely declaratory*"[111]; in Opinion No.8 it is reported that *"while recognition of a state by other states has only declarative value, such recognition … bears witness to these states' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law"*[112]*;* while in Opinion No.10 it is stated that recognition is *"a discretionary act that other states may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law"*[113].

In the same period the European Community adopted the *"'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"* that established a common position on the process of recognition of the new states emerging from Yugoslavia and Soviet Union at the basis of which there was their readiness to recognize "subject to the normal standards of international practice and the political realities in each case, those new States which … have constituted

[109] *V. Supra*, to note 102, pp. 204-205.
[110] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 27.
[111] Arbitration Commission of the Peace Conference on Yugoslavia, *Opinion No. 1* (29 Nov. 1991) 92 ILR, pp. 162-165.
[112] Arbitration Commission of the Peace Conference on Yugoslavia, *Opinion No. 8* (4 Jul. 1992) 92 ILR, pp. 199-201.
[113] Arbitration Commission of the Peace Conference on Yugoslavia, *Opinion No. 10* (4 Jul. 1992) 92 ILR, pp. 206-208.

themselves on a democratic basis"[114]. In this Declaration they furthermore established that recognition must be based also on the respect of the rule of law, democracy, human rights, minority rights and that entities which are the result of aggression would not be recognized as States[115]. These could be considered as a sort of additional requirements to statehood and seemed to function for example in the cases of Croatia or Bosnia-Herzegovina that were recognized before the fulfilment of the relevant criteria for statehood[116]. Nevertheless, different critics have been moved to these new conditions because in some occasions they have proved to be nothing more than a "new standard of civilization" constructed on the Council of Europe perspective, able to compensate for the criteria for statehood when these are met inadequately or, vice versa to underline the downgrade of the rights of a certain reality[117].

Another interesting new proposal in the approaches to recognition that I want to underline at the end of this discussion is the one recently presented by R. Nicholson in his book "*Statehood and State-Like in International Law"*[118]. He affirms that even if the debate about recognition is usually presented as debacle between the ones who sustain that an entity can acquire statehood only when it complies with criteria of effectiveness (declaratory approach) and the one who believe in statehood as something derived by the recognition of a state by other state (constitutive approach), it is actually possible to have four, and not only two, possible scenarios: that effectiveness alone is necessary; that recognition alone is necessary; that both effectiveness and recognition are necessary; and that either effectiveness or recognition can be sufficient[119]. He arrives at the conclusion that "international law contains two coexisting rules, the effectiveness norm and the recognition norm, either of which can suffice to create statehood" and that when an entity is recognized universally it can be nominated as "state", but that when the recognition is only partial it is better to use the term "state-in-context"[120].

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[114] *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 16 December 1991. Available at: *https://www.dipublico.org/100636/declaration-on-the-guidelines-on-the-recognition-of-new-states-in-eastern-europe-and-in-the-soviet-union-16-december-1991/*

[115] *V. Supra*, to note 114. See also: M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), pp. 451-452; D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 20; R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 216.

[116] R. PARFITT**,** *Theorizing Recognition and International Personality***,** The Oxford Handbook of the Theory of International Law, Edited by Anne Orford and Florian Hoffmann, 2016, p. 8 and R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 216.

[117] *V. Supra*, to note 116.

[118] R. NICHOLSON, *Statehood and State-Like in International Law, Oxford University Press,* 2019.

[119] *V. Supra*, to note 118, p. 92.

[120] *V. Supra*, to note 118, p. 92.

3.1 Different types of recognition

After this necessary overview of the different approaches about recognition, it is now useful to underline the different types of recognition in order to better understand all the possible scenarios. There are different types of recognition depending on the perspective that we decide to adopt: there can be recognition of government or of states, recognition *de jure* or *de facto*, and express or tacit recognition. To start this analysis, it is necessary to study these three main dichotomies, while always keeping in mind that there is an obvious distinction between the metropolitan recognition from part of the previous sovereign and the recognition by third states, that is the one on which we will concentrate[121].

3.1.1 State and Government

The main distinction to draw is the one between the recognition of a government or the recognition of a state, here the difference lays in the entity that must be recognized. The criteria for the assignation of statehood of the Montevideo Convention refer principally to the recognition of a state, while other types of assumptions have to be adopted when it is the government and not the state that it is changing. The recognition of governments gains importance only when the change of a government is unconstitutional[122] and this can occur in situations of internal conflicts, civil wars, revolutions or *coup d'état* in which "the international community can find itself in the position to recognize the authority of a faction or entity over a previously-recognized state"[123].

However, a change in a government does not affect statehood and here relies the most important difference: the recognition of a state affect its legal personality and can turn the state into a subject of international law, while the recognition of a government affect only the administrative authority, but not the state itself[124]. Nevertheless, it is possible that the two recognitions occur simultaneously, such as in the case of Israel when a new state has been created together with a new government, but it is always the recognition of a government that implies the recognition of the state, not vice versa[125].

[121] See more in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 376-379.
[122] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 454.
[123] A. MURPHY – V. STANCESCU, *State formation and recognition in international law*, Juridical Tribune, Volume7, Issue1, June 2017, p. 9.
[124] *V. Supra*, to note 122, p. 456 and to note 123.
[125] *V. Supra*, to note 122, pp. 456-457.

There are three main more complex situations in which a third state has to take position in order to recognize or not a government of a determined state, exposed with accuracy by S. Talmon[126]: the first is a situation in which two or more local *de facto* authorities claim to be the legitimate government of a state (as we will see with China contended between the government of the Republic of China – or Taiwan - and the Government of the People's Republic of China); the second situation regards the government of a State that claims to continue to be the government of a part of the State's territory that has *de facto* seceded (as the Greek Cypriot Government that does not accept the *de facto* secession of the Turkish North, sustained in this non-recognition by the whole international community with the exception of Turkey as it will be explained below); the third situation is about an authority in exile that claims to be the government of a State which is under the effective control of another authority, represented by a colonial power, a local puppet or someone came to power through *coup d'état* or revolution (in these cases third states can decide to adopt a policy of recognition only towards states and not towards governments and decide to recognize the state, while denying the recognition to the de facto authorities *in situ* in favour of the ones in exile, such as in the case of Kuwait).

As it can be inferred, the recognition of a government entails different aspects and it is for this reason that some criteria were born to bring order, such as the well-known Estrada Doctrine proposed by the Mexican Authority of Foreign Relations in 1930[127], that suggested the recognition "of all effective governments irrespective of the means by which they came to power"[128]. This doctrine nevertheless does not take into account the political factor and it is thus unrealistic in the majority of the cases, especially where there are two competing governments[129]. The most important guideline followed during the recognition process of a government has been the exercise of effective control over the territory of the state in question. This principle takes into consideration also the political choices of a state and it is very well represented in one of the leading cases in this field: the *Tinoco Arbitration*[130].

The Tinoco regime had seized power in Cost Rica by a coup for thirty months, but had not been recognized by United States and Great Britain; for this reason, when the new government took the power, it nullified all the contracts with UK, including an oil concession to a British Company, due to the non-recognition of Great Britain of the previous government[131]. The Chief Justice Taft,

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[126] S. TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 1998, pp. 7-9.
[127] See more in *Estrada Doctrine of Recognition*, The American Journal of International Law, October1931, Vol. 25, No. 4, Supplement: Official Documents (Oct., 1931), Cambridge University Press, p. 203. Available at: at: *https://www.jstor.org/stable/2213173?seq=1#metadata_info_tab_contents*
[128] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 206.
[129] *V. Supra*, to note 122, pp. 457- 458.
[130] *Tinoco Arbitration (Costa Rica v. Great Britain)*, 18 October 1923, 1 RIAA 369.
[131] See more at: *egal.un.org/riaa/cases/vol_I/369-399.pdf*

the sole arbitrator of the case, decided that the Tinoco administration had effective control over the country and for this reason was the valid government of the country irrespective of the recognition of some states[132]; it can be read in a relevant passage that:

> *"The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition vel non of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned"*[133].

The view of Taft is very interesting because underlines the importance of the factual nature of any situation and entails an amalgam between the constitutive and declaratory approach: "where the degree of authority asserted by the new administration is uncertain, recognition by other states will be a vital factor. But where the new government is firmly established, non-recognition will not affect the legal character of the new government"[134].

3.1.2 De jure and De facto

Another difference to examine is the one between recognition *de jure* and *de facto*. This distinction firstly emerged during the secession of the Spanish provinces in South America in a Memorandum dated 8 August 1822 drawn up by the British Foreign Secretary Lord Castlereagh in which it can be read that:

> *"1st. The Recognition, de facto, which now substantially subsists;*
>
> *2nd. The more formal recognition by diplomatic agents;*
>
> *3rd. The recognition, de jure, which professes to decide upon the title and thereby to create a certain impediment to the assertion of the rights of the former occupant."*[135]

In this definition appears in the second point also the recognition "by diplomatic agents" that must be intended as "diplomatic recognition". This normally refers to the diplomatic ties between two

[132] *V. Supra*, to note 122, p. 456.
[133] *V. Supra*, to note 128.
[134] *V. Supra*, to note 122, p. 456.
[135] FO 139/49, 8 August 1822, quoted in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 377 and in S. TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 1998, p. 44.

countries that can be interrupted or restarted for different reasons, as in the case of Taiwan that is still recognized *de facto* through cultural and trade relations with some states even if it has lost UN membership, but that has troubles in the diplomatic relations and missions due to the stronger political influence of the People's Republic of China in the international arena[136].

In the first and third points of the Declaration of 1822 are mentioned the two types of recognition that have to be taken into consideration: Recognition *de facto* - that implies doubts about the viability of the government in the long-term - and recognition *de jure* – that arises where the effective control displayed by the government appears "permanent and firmly rooted"[137]. Generally, therefore *de facto* recognition has been described as something provisional, conditional, implied, incomplete and even revokable, while *de jure* recognition is final, unconditional, express, full and even irrevocable[138].

There are some examples of entities that have gained only recognition *de facto* - enabling them to establish relations with other states - but to whom it was denied (or initially denied) a *de jure* recognition based on ideological ground: for example, UK has recognized the Soviet Union *de facto* in 1921, but has conceded its *de jure* recognition only in 1927[139]. "*In the past this distinction allowed states to deal with insurgent governments without being seen to implicate themselves overtly in an act of intervention, so also the more recent practice of recognizing the acts of certain governments whilst not recognizing their claims to statehood underlines … that the legal doctrine has consistently sought to embed both law and fact within itself – at the price of an apparently chronic normative instability"*[140]. Moreover, it can be said that *de facto* recognition expresses only the general willingness to maintain official relations, while *de jure* recognition regards the maintenance of a certain kind (and to a certain extent) of these official relations[141].

It can be inferred that both *de jure* and *de facto* recognition are based on the degree of political approval and acceptance involved; for this reason, some authors have defined this distinction as "old fashioned" and the recent practice of the United States has demonstrated that it is preferred to use the formula "full recognition", "full diplomatic recognition", "formal recognition",

[136] A. MURPHY – V. STANCESCU, *State formation and recognition in international law,* Juridical Tribune, Volume7, Issue1, June 2017, pp. 9-10.
[137] M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), p. 460.
[138] S. TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 1998, p. 46. In this context it has to be noted that also the withdrawal of recognition works in the same way: due to its cautious and temporary character, it is much easier to withdraw a *de facto* recognition; while *de jure* recognition is more difficult to withdraw due to its definitive nature.
[139] *V. Supra*, to note 136, p. 8.
[140] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 207.
[141] *V. Supra*, to note 138, pp. 53-54.

"official recognition", instead of the traditional form *de jure*[142]. Therefore both *de facto* and *de jure* recognition (this last one intended as interchangeable with the more recent variants) have a double meaning and a double function: the first one underlines the intention on the one hand (*de facto* recognition) to maintain general relations with a government that is not considered as sovereign and on the other (*de jure* recognition) to establish and maintain normal and official relations; the second function is to give a simple acknowledgment that a government exists and have control on people and territory with the *de facto* recognition, while to express with a *de jure* recognition that the new recognized government actually qualifies as such[143]. It is clear that the topic of recognition cannot be taken separately from the concepts of statehood and sovereignty and for this reason each case needs to be analysed independently in order to understand which terms and behaviours are adopted in each situation.

3.1.3 Explicit and Implicit

The third important difference to underline is the one between explicit and implicit recognition, a divergence that appears very clear but that it is not. The explicit recognition occurs only through an official, open, unambiguous declaration of a state, while implicit recognition takes place when it can be deduced from certain acts of a state that it has implicitly recognized an entity as an international legal person: this can happen sending a diplomatic mission (with the acceptance of credentials), signing a bilateral treaty, the establishment of diplomatic relations, the conclusion of a bilateral treaty or with a message of congratulations to a new state upon its new obtained sovereignty[144]. Due to the facility of an implicit recognition states may make declaration in order to assert that any action involving a particular country should, by no means, be interpreted as an indirect recognition (for example the Arab States have done this declaration with regard to Israel)[145]. It must be noted that the participation of both parties in a negotiation or in a multilateral treaty does not entails recognition. For example, many of the members of the United Nations Charter do not recognize each other, but when a State votes in favour of UN membership of the entity in question this automatically involves recognition: UN membership encompasses

[142] I. BROWNLIE, *Recognition in Theory and Practice, British Yearbook of International Law*, Volume 53, Issue 1, 1982 (published on 1 November 1983), pp. 2017-208 and S. TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 1998, p. 109.
[143] *V. Supra*, to note 138, pp. 88, 109.
[144] *V. Supra*, to note 136, p. 8 and to note 397, pp. 462-463. It has to be noted that the maintenance of informal and unofficial contact does not entail an implicit recognition.
[145] *V. Supra*, to note 137, p. 462.

statehood, being this one prerequisite for the membership as asserted in Article 4 of the UN Charter[146]. This leads us again to the conclusion that each case needs to be analysed separately.

3.1.4 Non- recognition

Until now several cases have emerged in which recognition occurs but following different paths. In some cases, however, recognition can even not occur and in these cases, we speak about "non-recognition". As it has been shown above, recognition is invalid in cases of premature recognition or when the new entity has been created in violation of *jus cogens* norms or through the use of force[147]. The principle *ex iniuria jus non oritur* emerged strongly in the *Manchukuo case* regarding the invasion of the Chinese territory of Manchuria in 1931 by Japan, from which arose the so-called "Stimson Doctrine", a policy proposed by the United States of America with the aim of not recognizing any situation (including the establishment of a new state), treaty or other agreement procured by illegal means, particularly by an unlawful use of armed force[148]. This condition is enshrined not only in Article 2.4 of the UN Charter and in Article 41.2 of the ILC *Draft Articles on Responsibility of States for Internationally Wrongful Acts,* already quoted above, but it is also included in some important resolutions issued by the UN General Assembly such as Resolutions 2625(XXV)[149] and 3314(XXIX)[150] which confirm that the importance of non-recognition in cases of territorial acquisitions resulting from threat or use of force[151].

Also the Security Council has the power to condemn explicitly or to nullify the claims for statehood of entities formed through gross violations of international law by requiring the other

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[146] *V. Supra*, to note 137, p. 464. United Nations, Charter of the United Nations, 24 October 1945, Art. 4: *"1)Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations. 2)The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council".*

[147] *V. Supra*, to note 71.

[148] See more in D. TURNS, *The Stimson Doctrine of Non-Recognition: its Historical Genesis and Influence on Contemporary International Law*, Chinese JIL, 2003, pp. 105-143. Available at: *https://academic.oup.com/chinesejil/article-abstract/2/1/105/357990?redirectedFrom=PDF*

[149] UN GA Resolution 2625(XXV), *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations* (A/8082), 24 October 1970, pp. 121-124.

[150] UN GA Resolution 3314(XXIX), *Definition of Aggression*, 2319th plenary meeting, 14 December 1974, pp. 142-144.

[151] See more in W. CZAPLINSKI, *State Responsibility for Unlawful Recognition*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 147-157.

UN members not to recognize the these entities and the consequences of their actions[152]. This has therefore happened in relation to a certain number of unrecognized entities claiming statehood: in 1965 with Resolution 216 calling not to recognize the Unilateral Declaration of Independence of Southern Rhodesia proposed by an illegal racist minority regime[153]; in 1983 with resolution 541 in order to deny the secession of the northern part of the Republic of Cyprus[154] or in 1990 when States have been called upon not to recognize any regime set up by Iraq in the occupied territory of Kuwait with resolution 661[155].

As we will see this principle has been applied also to the more recent case of Crimea in which the UN General Assembly (and not the Security Council due to the veto of Russia Federation) as a consequence of the use and threat of use of force against the territorial integrity of Ukraine have called upon *"all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the … referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status"*[156].

Non-recognition can be used also as an instrument of sanction or as a method of protection for the inhabitants of a determined territory as discussed in the Advisory Opinion of the ICJ in 1971 in the Namibia case: the South African Presence in Namibia had to be regarded by all states as illegal and invalid and therefore states should avoid any relations with South Africa and should prevent from any act of presumed recognition towards the activities carried out by south Africa in Namibia[157].

There is therefore an obligation not to recognize newly established entities in situations in which violation of this kind occurred[158]. However, when it is asserted that "State A does not recognize an Entity X as a state" there can be at least five possible meaning pointed out by Warbrick in 1997: 1) the A state does not take decisions about recognizing X; 2) A choose to not to recognize X for political reasons related to X's status; 3) it doesn't recognize X because it would be unlawful or premature; 4) A does not recognize X because there are customary law obligations or specific

[152] M. ARCARI, The UN SC, Unrecognized subjects and the Obligation of Non-Recognition in International Law, in in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 227.
[153] UN SC Resolution 216, *Calling on all States not to recognize the minority regime in Southern Rhodesia*, 1258th meeting, 12 November 1965. See also UN SC Resolution 232, 16 December 1966.
[154] UN SC Resolution 541, *On declaration by the Turkish Cypriot community of its secession from Cyprus*, 2500th meeting, 18 November 1983.
[155] UN SC Resolution 661, *On Sanctions against Iraq*, 2933rd meeting, 6 August 1990.
[156] UN GA Resolution 68/262, *Territorial Integrity of Ukraine*, 80th plenary meeting, 27 March 2014.
[157] ICJ Reports, *Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia*, 21 June 1971.
[158] See more in D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 23.

treaty obligations that prohibit recognition; 5) it does not recognize X because there is a specific obligation imposed by the Security Council not to do so[159].

Both recognition and non-recognition therefore, especially if collective[160], have lots of legal consequences in the field of legal personality of the recognized (or non-recognized) entity, but what makes the difference is also the reason behind the decision to recognize or not a certain entity. For example, Norther Cyprus, as demonstrated, has not been recognized due to the illegality of Turkish intervention, while the former Yugoslav Republic of Macedonia has not been recognized due to the fear of jeopardizing diplomatic relations with Greece[161]. There are also some enigmatic cases in which it is very difficult to understand the real logic behind a decision of non-recognition: in the case of Israel we will see that is not clear if the Arab States have not recognized it because they don't consider it a state or whether they just want to deny its existence[162].

4. The principle of self-determination in international law

To conclude this part, it is essential to make a brief passage on the concept of self-determination, that is strictly connected with the ones of statehood and recognition and that will be of fundamental importance for the analysis of our cases. This principle has emerged in international law as part of the Wilson Project in 1918 with whom the US President "directly applied the concept of self-determination to minorities, offering them a choice of political lineage, determined through plebiscites"[163] and made clear that the new boundaries of Europe should be establish on the basis of the historical relations of nationality and allegiance[164]. Nevertheless, this principle gained importance and became more explicit under international law only after the Second World War. It is now enshrined in Article 1.2 and Article 55 of the UN Charter that affirm respectively that "*The Purposes of the United Nations are … To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples…* "[165] and that "*With a view to the creation of conditions of stability and well-being which are necessary for*

[159] C. WARBRICK, *Recognition of States: Recent European Practice*, quoted in M. D. EVANS *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 206.
[160] *V. Supra*, to note 158, pp. 25-28.
[161] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 207.
[162] *V. Supra*, to note 161.
[163] J. CASTELLINO, *International Law and Self-Determination, Peoples, Indigenous Peoples and Minorities*, in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law*, Oxford University Press, 2014, p. 29.
[164] *V. Supra*, to note 161, p. 209.
[165] United Nations, Charter of the United Nations, 24 October 1945, Art. 1.2

peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote…"[166].

In the UN era it has become the leading principle of the decolonization, during which self-determination could led to the secession of the self-determining unit from the former colony or to the association with/integration to an existing state[167]. As a matter of fact, most of the Non-Self Governing Territories and of the Trust Territories identified respectively by Chapter XI an XII of the UN Charter, thanks to the promoted principle of self-determination have gained independence and a seat at the United Nations[168]. It was therefore unclear if this principle could be applied to territories not derived from a decolonization process and whether it legitimated secession in other contexts: it was only in 1966 that self-determination was transformed into a legal norm applicable to "all peoples" with Article 1 of both the two UN Covenants on Human Rights (ICCPR and ICESCR)[169]. Moreover, the topic of self-determination was touched also in the Friendly Relations Declaration annexed to resolution 2625(XXV) of the UN General Assembly in which it can be read that:

> "*Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle…"*[170].

This declaration is very important because seems to find a solution also for the constant debate between the right to self-determination of people and the right to territorial integrity of the state. Indeed with the provision *"The territory of a colony or other non-self-governing territory has … a status separate and distinct from the territory of the State administering it; and such … status … shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter"*[171] it became clear that the incongruity between the principle of self-determination and the one of territorial integrity could be overcome

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[166] United Nations, Charter of the United Nations, 24 October 1945, Art. 55.
[167] *V. Supra*, to note 163, p. 30 and in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 128.
[168] *V. Supra*, to note 161, p. 210. See more about Chapter XI and XII of the UN Charter in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), Ch. 13 - 14.
[169] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976) and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966 (entered into force 3 January 1976, Art. 1.1: *"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development".*
[170] *V. Supra*, to note 149, Annex, *Principle e.*
[171] *V. Supra*, to note 170.

only "by means of re-casting the relationship between the colonizer and the colonized"[172]. At the same time, the fundamental norms of international law must always be respected also in the application of the principle of self-determination in order to avoid a case of non-recognition: as we have seen, Southern Rhodesia's process of independence was denied by the UN Security Council due to the illegality of its basis and the South African Government, that pursuit its apartheid policy under the pretext that this constituted an implementation of the principle of "self-government", has seen its claims rejected by the UN General Assembly and Security Council[173].

Moreover, it has to be highlighted the distinction between "internal" and "external" self-determination: internal self-determination means the pursuit of a people's development within an existing state from a political, economic, cultural and social point of view; while external self-determination is a principle that allows a people to choose for example the establishment of a sovereign and independent State, free association or integration with an independent State, and emergence into any other political status freely determined by a people[174]. It was this distinction indeed that has created a strong tie between the principle of self-determination and the protection of human rights, transforming it in something applicable to "all people". Nevertheless, there are still various territories whose "external" self-determination is under threat, as in the case of Palestine analysed below. The most representative case in this sense is perhaps the one the so-called *failed decolonization* of Western Sahara[175]. It was a former Spanish colony on the UN list of non-self-governing territories that have always affirmed the right of the Sahrawi people to self-determination, a right that was confirmed by the ICJ Western Sahara Advisory Opinion in 1975[176]. Due to the withdrawal of Spain from the region, the *Frente Polisario Liberation Movement* proposed the establishment of the Sahrawi Arab Democratic Republic, which was finally proclaimed on 27 February 1976 (with the recognition of a consistent number of UN Member State), but that has never actually gained its independence due to the persistent sovereignty exercised by Morocco over the territory especially in the exploitation of its natural resources[177].

[172] *V. Supra*, to note 161, p. 212.
[173] *V. Supra*, to note 161, p. 213. See UN SC Resolution 216 (12 November 1965), UN SC Resolution 232 (16 December 1966) for Southern Rhodesia and UN GA Resolution 31/6A(26 October 1976), UN SC Resolution 402 (22 December 1976) for South Africa.
[174] R. NICHOLSON, *Statehood and State-Like in International Law, Oxford University Press,* 2019, p. 171, p. 209.
[175] *V. Supra*, to note 158, p. 31.
[176] ICJ Reports, *Western Sahara*, Advisory Opinion, 16 October 1975.
[177] *V. Supra*, to note 158, p. 31. In this context it is interesting to note the position of the European Community that in the same years was insisting that the occupied Palestinian territory were not included in the Israeli territory, but that was not following the same doctrine with respect to the right to self-determination of the Sahrawi people, probably due to the interest it had with Morocco. See the recent developments in the case *Front Polisario v. Council*, 2015 (T-512/12).

In conclusion, the self-determination principle can in general be applied to people under foreign occupation, subject to racial segregation, minorities or former colonies, but there are some uncertainties that have emerged in this field: the first one regard the notion of territoriality that remains contested in international law raising questions about its legitimacy with significant implications for the human rights agenda, the second doubt regards the fact that "all people" have the right to self-determination because it is unclear "who" these people are[178]. For this reason, self-determination has often been invoked in the wrong context or without the correct legal basis, especially in the post-decolonization phase as in Yugoslavia and URSS[179], and this leads us again to the examination of the single cases.

4.1 Some notions about secession

Before proceeding it is important to define a term strictly related to the concept of self-determination and that will emerge several times in the analysis of the case studies proposed. I am referring to "secession" that is usually defined as the "creation of a State by the use or threat of force and without the consent of the former sovereign"[180]. Nevertheless, in international law three main kinds of secession exist that entail three different scenarios:

a) *Bilateral secession*. Under this theory the first aim is the cooperation between the party seeking independence and the parent state. This type of secession provides for the concession of independence in response to a democratic pressure and this entails two main elements: "a clear expression of democratic will" and the negotiations between the seceding territory and the parent state[181];

b) *Unilateral or remedial secession*. This possibility arises when the parent state has no intention to negotiate; in this case there are three main conditions required: that those wishing to secede were people, that the government of the parent state committed serious breaches of human rights at their damage and that there were no other available

[178] See more in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law*, Oxford University Press, 2014, pp. 27-44.
[179] See more in R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), pp. 212-214.
[180] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 375.
[181] The explanation of the three different theories of secession is taken from: A. KREUTER, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, Minnesota Journal of International Law 19 (2), 2010, pp. 369-371.

remedies[182]. In this case, third states are expected to remain neutral because the support for internal movement that had not succeeded in establishing its independence could constitute an international law tort because it could be treated as an interference in the internal affairs of the state: from this consideration it seems clear that the principle of territorial integrity is placed above the right of secession[183];

c) *De facto secession*. This scenario emerges when the secessionists simply declare themselves independent from the mother state. This differs from the case of unilateral secession because in this case the threefold standard is not required and it seems that the unique justification in this case might be the recognition by other nations, but even this possibility may led to insufficient legal basis for the justification of secession. Moreover, the right of territorial integrity and of state sovereignty of the parent state are the primary elements to be taken into consideration[184].

The concept of secession does not have to be confused with the one of dissolution that is, as secession, a "non-consensual separation of territory and population giving rise to a new state", but that is "characterized by the extinction of the parent state and its replacement by one or more newly created states"[185]. This distinction is very clear in principle, but it can be difficult to distinguish it in practical case: it may happen that the dissolution of a state is initially triggered by one part of the state and it is only after the withdrawal of the majority of the territories concerned and the loss of the central component that it becomes evident that the predecessor state has ceased to exist[186]. The main difference lies therefore in the fact that in case of dissolution no one has the right to veto the process, while in case of secession the assent of the parent state to secession is necessary, "unless and until the seceding entity has firmly established control beyond hope of recall"[187].

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[182] These requirements emerged in the *Aaland Islands Case* (*V. Supra*, to note 69*).* Moreover also the Supreme Court of Canada applied similar requirements in its decision on the secession of the Province of Quebec in 1998 affirming that this theory could be applied when: the seceding group are "people"; "governed as part of a colony, or subject to alien subjugation, domination or exploitation"; and when it is deprived of "the meaningful exercise of its right to self-determination". See more in: Supreme Court of Canada, *Reference re Succession of Quebec*, 2 S.C.R. 217, 1998.

[183] See J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 388-389 and in W. CZAPLINSKI, *State Responsibility for Unlawful Recognition,* in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 154.

[184] *V. Supra*, to note 181, pp. 390-392.

[185] B.R. FARLEY, *Calling a State a State: Somaliland and International Recognition*, Emory International Law Review, 24 (2), 2010, p. 795.

[186] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 390-391.

[187] *V. Supra*, to note 186.

To conclude, international law is neutral in relation to secession because there is no right likewise no prohibition against secession. "The law of secession remains largely unsettled, reflecting the ambiguity surrounding the law of self-determination"[188]. Even if the two concepts are strictly related, they do not always coincide because "even a group that does not qualify as a people, and is therefore not vested with the right to self-determination, may pursue secession" and in this last case the criterion to take into consideration is the "maintenance of a stable and effective government" to the exclusion of the metropolitan state"[189].

[188] A. KREUTER, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, Minnesota Journal of International Law 19 (2), 2010, p. 369.
[189] *V. Supra*, to note 185, p. 796.

CHAPTER 2

DE FACTO ENTITIES AND CASE STUDIES

ABSTRACT: 1. Introductory remarks 2. *De facto* entities in international law – 2.1 *Contested territories* and *frozen conflicts* in the post-Soviet area – 3. Historical cases of "self-proclaimed" authorities – 3.1 Somaliland – 3.2 The Turkish Republic of Northern Cyprus (TRNC) – 3.3 Taiwan – 3.4 Kosovo – 3.5 Palestine – 4. Case studies of the post-Soviet rea: historical and geopolitical context – 4.1 Transnistria – 4.2 Nagorno-Karabakh – 4.3 South Ossetia and Abkhazia – 4.4 Crimea and the Donetsk and Luhansk People's Republics

1. Introductory remarks

The first chapter has been a more theoretical one, but I think that it was necessary for the purpose of this work. Statehood, recognition, and self-determination are indeed the concepts at the basis of our analysis, together with the one of *locus standi* that will be investigated in the third chapter. At any paragraph we move a step closer to the heart of the matter and it is now time to analyse the case studies chosen to show what has been explained until now.

The term generally used with reference to these entities that have achieved *de facto* independence from the territorial state but have not been accepted as states by the international community (o by a part of it)[190], is usually "*de facto* states", but it is not the only one. As a matter of fact, it has already been inferred that each situation has its historical, geographical, and legal peculiarities and it is therefore necessary to pay attention to the terminology used for each territory. For this reason, it will be useful to dedicate the first part of this chapter to a terminological analysis in order not to create confusion. For example, as it will be shown, with reference to the case studies of our interest it is better to use the neutral terms "self-proclaimed-authorities" or "*de facto* entities" or the expression "contested territory" that better describes the peculiar situations of these areas. Another locution that will result to be very interesting with reference to these entities – and that will be analysed further - is the one of "frozen conflict" that is often used by scholars in this context.

After a theoretical analysis, in the second part of the chapter, it will be proposed an investigation of some historical cases of *de facto* entities that will facilitate the comprehension of the case

[190] A. CULLEN – S. WHEATLEY, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, Human Rights Law Review, 13:4, 2013, pp.694.

studies at the basis of this work, namely the self-proclaimed authorities of the post-Soviet area: Transnistria, Nagorno-Karabakh, Abkhazia, South Ossetia, and Crimea.

Here a little digression must be done. It can be surprisingly not to find Chechnya in the list of territories that will be studied since it is often associated with the other post-Soviet *de facto* entities. The case of Chechnya has been discussed for a long period: the Chechen and Ingush people, reunited under the Autonomous Republic of Chechen-Ingushetia, declared their independence from the Russian Federation in 1991 which, as a response, made a large attempt to suppress the separatist movement[191]. After this unsuccessful attack it was signed a ceasefire in 1996 that held until 1999, when the Russian troops started a second bloody war against the Chechen separatists who ended this time defeated[192]. The Russian conduct during the two (sadly) famous Chechen wars was often criticized due to the disproportionate use of force and the numerous breaches of humanitarian law; nevertheless, the conflict was considered as an internal affair of Russian Federation and the principle of territorial integrity was applied and reaffirmed, prevailing over the Chechens "people" that had been subjects to huge human rights violations[193]. From this brief introduction the two main reasons behind the choice not to introduce Chechnya in the list of the case studies become clearer. First of all, the Chechen Republic of Ichkeria, unlike the other case studies, has claimed its independence from within the territory of the Russian Federation and that was therefore strongly opposed - and not supported - by the Russian Federation; secondly, in contrast to the other territories as we will see, it was reintegrated into the Russian territory, joining the other "failed *de facto* states" of that time, such as the Republic of Srpska that was reintegrated in 1995 as a separate autonomy into Bosnia-Herzegovina , from which it had tried to secede in 1992[194].

2. *De facto* entities under international law

[191] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 408.
[192] J. O'LOUGHLIN – V. KOLOSSOV – G. TOAL, *Inside the post-Soviet de facto states: a comparison of attitudes in Abkhazia, Nagorny Karabakh, South Ossetia, and Transnistria*, Eurasian Geography and Economics, 55:5, 2014, p. 427.
[193] *V. Supra*, to note 191, pp. 409 - 410.
[194] *V. Supra*, to note 192, pp. 426-427.

After having clear in mind what a state is, it is necessary to make an attentive distinction among the variety of terms usually utilized in this context in order to establish which territories can be defined as "*de facto* states" and which ones cannot.

Many authors have defined the category of "de facto" states in different ways. Borgen refers to these entities as *incomplete secessions*, meaning "political entities that have established *de facto* political independence for considerable periods of time with limited, if any, recognition in international community", from which can emerge three main possibilities: the recognition by international community of the entity as a state; the perpetuation of the *status quo* or the reintegration of the entity within the *mother state*[195].

Stefan Oeter has generally defined a *de facto* state or *de facto* regime as an international phenomenon caught between factuality and (il)legality, or better between the factual existence of an entity that looks like a state and a legal situation in which a number of legal reasons speak against that same entity being qualified as an independent "state" in terms of international law[196]. The main peculiarity of these entities is that statehood is jeopardized because they usually secede from the mother state without consent, they arise as a consequence of military intervention or with the threat or use of force: for this reason, even if they practically fulfil the requirements of independent states, they suffer from some legal impediment to full recognition and must be differentiated from the full sovereign states[197].

It can be noted that Oeter uses the terms *de facto* state and *de facto* regime in an interchangeable way, nevertheless there are other authors that make a distinction between the two expressions. The scholar that I am taking as a reference in this sense is J. V. Essen who defines a *de facto* state as *"geographical and political entity that has all the features of a state, but is unable to achieve any degree of substantive recognition and therefore remains illegitimate in the eyes of international society*" and a *de facto* regime (or DFR) as *"an entity which exercises at least some effective […] authority over a territory within a state. This degree of effective authority is coupled with a certain degree of political and organizational capacity. Moreover, this entity intends to represent the state of which it partially or completely controls the territory in the capacity of official government"*[198]. Essen distinguishes the two nomenclatures stating that the difference lies

[195] See C. J. BORGEN, *The Language of Law and the Practice of Politics: Great Powers and the rhetoric of self-determination in the Cases of Kosovo and South Ossetia*, Chicago Journal of International Law 10, 2009, pp. 1-27.
[196] S. OETER, *De Facto Regimes in International Law*, in in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 65.
[197] *V. Supra*, to note 196, pp. 65-66.
[198] J. V. ESSEN, *De Facto Regimes in International Law*, Merkourios, Volume 28/Issue 74, 2012, pp. 32-33. See more in J. FROWEIN, *Das de facto-Regime im Völkerrecht*, Köln: Heymann, 1968; M. SCHOISWOHL, *De Facto Regimes and Human Rights Obligations – The Twilight Zone of Public*

in the ambition behind the organization: while a *de facto* state, such as the Republic of Somaliland or Kosovo, aspires to a full constitutional independence and widespread recognition as a sovereign state pursuing a secession from the parent state, a DFR seeks to be recognized by the international community as the official government of an already existing state, leaving the parent state and its territories intact[199]. Therefore, also in the case of DFRs the authority exercised over a territory is considered a *de facto* authority due to its illegal or extra-legal basis[200].

Another difference that must be stressed is the one between a *de facto* entity and other forms of more provisional power arrangements exercising some territorial control: armed non-state groups for example can exercise some forms of authority during civil war situations, but their territorial control is usually fragmented and provisional and for this reason cannot be compared to the consolidated power-structure of a *de facto* regime[201]. For the same reason DFRs differ also from belligerent and insurgent groups because the latter do not require political organization or organizational ability to achieve their goals and can therefore be declared DFRs only whether they achieve a certain degree of authority and effectiveness, both on political and on organizational side[202]. Last but not least, they must be distinguished from the National Liberation Movements (NLM), whose aim is to free a certain territory and its population from a suppressive regime or a situation of repression; this is not always the case of the DFRs, whose principal aim is to be recognized as the government of a territory[203].

Moreover, as we have seen, it does exist a difference between state and government in international law and, as a consequence, it is possible to track down also a difference between *de facto* state and *de facto* government. As Talmon suggests in his analysis, the term de facto government has been used to described different entities during the years: 1) a government wielding effective control over people and territory; 2) an unconstitutional government; 3) a government fulfilling some but not all the conditions of government in international law; 4) a partially successful government; 5) a government without sovereign authority; 6) an illegal

International Law?, Austrian Review of International and European Law 50, 2001; M. SCHOISWOHL, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of Somaliland*, Martinus Nijhoff, 2004; S. PEGG, *Internationa Society and De Facto State*, Ashgate, 1998.

[199] J. V. ESSEN, *De Facto Regimes in International Law*, Merkourios, Volume 28/Issue 74, 2012, pp. 33.

[200] *V. Supra*, to note 199.

[201] *V. Supra*, to note 196, p. 68.

[202] *V. Supra*, to note 199.

[203] *V. Supra*, to note 199.

government under international law[204]. It is therefore important to understand under which category the term is being used.

For the purpose of this work, I have decided to follow the line of Essen who intends a *de facto* government as an entity with factual control over the complete territory of a state, that is not recognized as that state's government by the international community[205]. In the case of a *de facto* regime instead, the control over the territory can be partial and it is only when the DFR owns control over the entire territory of a state – without the recognition of the international community- that it can be labelled as a *de facto* government of that state: as a matter of fact, a *de facto* government can always be defined as a *de facto* regime, but not vice versa[206].

To conclude, there is a multitude of terms that could be used in order to refer to a multitude of different cases. For the purpose of this work, I won't make a rigorous difference between the terms "*de facto* state" and "*de facto* regime", as stressed by Essen, but I will mainly try to utilise neutral widespread expressions such as "*de facto* entity", "*de facto* authority" or, even better, "self-proclaimed authority" that is the word used by the European Court of Human Rights[207]. Nevertheless, with reference to the case studies of the post-Soviet area a further distinction must be done because it is "contested territory" the expression that seems to fit most with their peculiarities.

2.1 *Contested territories* and *frozen conflicts* in the post-Soviet area

A further specification of the terms used in with reference to the case studies of the post-Soviet area it is therefore compulsory given their peculiar characteristics that will be highlighted in their analysis at the end of the chapter.

As noted in the previous chapter, a large series of terms can be used in this field of study such as "state-like entities, "self-proclaimed authorities", "quasi-state", "pseudo-states", "de facto regimes", "near-States", "proto-states" and so on. Nevertheless, for these Eurasian entities the most widespread term used is again the general one "*de facto* state". This concept finds its formal elaboration in 1998 with a definition provided by Scott Pegg which identified a *de facto* state

[204] S. TALMON, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford University Press, 1998, p. 60.
[205] *V. Supra*, to note 199.
[206] *V. Supra*, to note 199.
[207] *V. Supra*, to note 190, pp. 694-695.

where an organized political leadership took the power through indigenous capacity, receiving popular support and being able to provide governmental services to a given population in a given territory "over which effective control is maintained for a significant period of time" and which "views itself as capable of entering into relations with other states and it seeks full constitutional independence and widespread international recognition as a sovereign state"[208].

Nevertheless, this generic term does not fit well with all the five case studies that will be analysed. As a matter of fact, as it will be shown, they do not own all the characteristics listed by Scott Pegg many of them do not seek fully constitutional independence and are not able to act like real states in search of sovereignty among the international community. For this reason, it is preferable to use in the context of the Eurasian separatist area the non-legal term "contested territories" that is often used in the tenets in order to describe those complex realities in which there is a dispute over sovereignty[209].

Another generic nomenclature often used in relation to these contested territories is "unrecognized states", a locution that has been elaborated by Nina Caspersen, who defined them as territories that *"... have achieved de facto independence ...They have demonstrated an aspiration for full de jure independence, but either have not gained international recognition or have, at most, been recognised by a few states"*[210]. On the one hand, from the definition of S. Pegg, it could be inferred that these entities are characterized by structure, institutions and political processes similar to the ones of states; on the other hand, from the definition of N. Caspersen, emerges the fact that these attributes lack international recognition, endangering the sovereignty and the independence of these entities[211]. The main point seems to be therefore the dichotomy between the "internal sovereignty" - gained by the *de facto* authorities over a certain portion of territory - and the lack of "external sovereignty" – missed in the international system - [212] and that could prevent them

[208]S. PEGG, *International Society and De Facto State*, Ashgate, 1998, p. 26.

[209] Take as reference in this sense M. MILANOVIĆ - T. PAPIĆ, *The Applicability of the ECHR in Contested Territories*, International and Comparative Law Quarterly, 2018, quoted in S. DE VIDO, *Di Autorità, Poteri Sovrani e Iurisdictio: l'incerta Situazione della Crimea nei Procedimenti Innanzi a Corti Internazionali, Regionali e a Tribunali Arbitrali*, Ordine Internazionale e Diritti Umani, 2020, p. 782 and available at:
https://www.researchgate.net/publication/326367769_The_applicability_of_the_ECHR_in_contested_territories

[210] N. CASPERSEN, *Democracy, Nationalism and (lack of) sovereignty: the Complex Dynamics of Democratisation in Unrecognized States*, Nations and Nationalism, 17 (2), ASEN/Blackwell Publishing Ltd, 2011, pp. 337-338. She has stated also that she favoured this term pre-2008, before Russia's recognition of Abkhazia and South Ossetia, see more in: N. CASPERSEN, *Making Peace with De Facto States*, ALPPI Annual of Language & Politics and Politics of Identity 10:7, October 2016, p. 9.

[211] S. VON STEINSDORFF - A. FRUHSTORFER, *Post-Soviet de facto states in search of internal and external legitimacy. Introduction*, Communist and Post-Communist Studies 45, Elsevier, 2012, p. 118.

[212] J. O'LOUGHLIN – V. KOLOSSOV – G. TOAL, *Inside the post-Soviet de facto states: a comparison of attitudes in Abkhazia, Nagorny Karabakh, South Ossetia, and Transnistria*, Eurasian Geography and Economics, 55:5, 2014, p. 424.

"from enjoying membership of the exclusive and all-encompassing club of states"[213], seeing for example their right to become part of the UN denied[214].

Some authors argue that the lack of international sovereignty does not necessarily prevent these entities to act like "real states" (even if not officially recognized)[215], nevertheless from the analysis of the single cases it will emerge that in the majority of the situations it results very difficult to affirm that the contested territories are acting like real states. However, it will appear that these entities have been able to establish certain degree of control over the majority of the area they claim by the creation of some kinds of institutions and political apparatus and that therefore the lack of recognition does not condemn them "to disorder and eventual oblivion", "to anarchy, nor to international isolation or to the status of mere puppets", rather provides a strong incentive for the introduction of political reforms and institutional improvements[216].

The problem lays in the fact that "the longer a territorial entity survives, the bigger this discrepancy between the formal *(de jure)* nonexistence and the real *(de facto)* existence of statehood becomes"[217]. This is very important for the post-soviet contested territories because, of all the self-proclaimed authorities that have emerged after World War II[218], they have proven a real endurance. As a matter of fact, the *de facto* entities were often viewed as transitory phenomena, collocated in a limbo that could led to the establishment of *de jure* independence or to the reintegration of the territory within the parent state[219], but for the post-Soviet area the things have gone in a different direction: N. Caspersen had identified two years as the approximate period of time required for an entity to be considered as *de facto* state (in order not to be confused with other phenomena)[220], but the entities of our interest are maintaining their status for more than two decades[221]. They cannot therefore be considered as transient phenomena, but they must be regarded as entities that will continue to exist under their current configuration, meaning as *"entities that have achieved and maintained internal sovereignty over an area for an extended*

[213] D. LYNCH, *Separatist States and Post-Soviet Conflicts*, Oxford University Press on behalf of the Royal Institute of International Affairs, Vol. 78, No. 4, October 2002, p, 835.
[214] D. Ó BEACHÁIN - G. COMAI - G. TOAL - J. O'LOUGHLIN, *Politics within de Facto States*, Caucasus Analytical Digest No. 94, 28 April 2017, p. 2.
[215] *V. Supra*, to note 211, p. 119.
[216] N. CASPERSEN, *Making Peace with De Facto States*, ALPPI Annual of Language & Politics and Politics of Identity 10:7, October 2016, pp. 8, 10.
[217] *V. Supra*, to note 211, p. 119.
[218] *V. Supra*, to note 212, p. 424. N. Caspersen and G. Stansfield have identified 21 de facto states that have emerged since 1945, while A. Florea has identified 34 de facto entities on the world map after 1945. See more in N. CASPERSEN – G. STANSFIELD, *Unrecognized States in the International System*, London: Routledge, 2011; A. FLOREA, *De Facto States in International Politics (1945-2011): A New Data Set*, International Interactions 40, pp. 788-811.
[219] *V. Supra*, to note 216, p. 8.
[220] See more in N. CASPERSEN, *The Struggle for Sovereignty in the Modern International Law*, Polity Press, 2012.
[221] *V. Supra*, to note 216, p. 8.

period, with a degree of internal legitimacy but only limited formal recognition at the international level, or none at all"[222].

If the lack of external sovereignty in these cases is clear and obvious, it is sometimes argued that also their internal sovereignty is absent[223]. As a matter of fact, another characteristic shared by the authorities in question is the dependence from an external actor for their existence, both at military and financial level[224]. Lack of external recognition combined with this dependency on a third entity has risen several questions about the internal legitimacy of these territories in the region[225]. These entities indeed born "sandwiched between two states"[226]: the "parent state", that is the internationally recognized state from which they are trying to break away (Moldova in the case of Transnistria, Azerbaijan in the case of Nagorno-Karabakh, Georgia in the case of Abkhazia and South Ossetia and Ukraine in the case of Crimea); while the "mother state" or the "patron state" is the one that grants the existence of these entities, through the provision of economic and political support and of security guarantees (represented in all our case studies by the Russian Federation, with the exception of Nagorno-Karabakh that has Armenia as patron state)[227]. These two notions will be very useful for the development of the entire chapter because, as we will see, the strong presence of Russian Federation and the dependence from the mother state is one of the most undisguised characteristics of this area of the world. This is true to the extent that they sometimes seem to seek not fully independence, but rather a closer relation with a strong patron: this has led G. Comai to the conceptualization of these post-soviet contested territories as "Small Dependent Jurisdiction" which, as Palau or Micronesia, *"mostly prefer integration with a patron to fully fledged independence, their state-capacity and political economy is largely determined by the technical and financial assistance they receive from external actors, their economic structure fits at least in part the MIRAB model (migration, remittances, aid, and bureaucracy)"*[228].

If the Chechen territory, even with all the problems that are still connected with the violation of human rights and the radicalization of the Islamic faith[229], has remained under the auspices of the

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[222] See more in G. COMAI, *Developing a New Research Agenda on Post-Soviet De Facto States,* Armenia, Caucaso e Asia Centrale, Ricerche 2018, edited by C. Frappi - A. Ferrari.
[223] *V. Supra*, to note 210, p. 338.
[224] *V. Supra*, to note 214, p.8.
[225] *V. Supra*, to note 214, p. 10.
[226] V. BAAR – B. BAAROVÁ, *De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea*, Studia z Geografii Politycznej i Historycznej tom 6, 2017, p. 271.
[227] H. BLAKKISRUD – P. KOLSTØ, *Dynamics of de facto statehood: the South Caucasian de facto states between secession and sovereignty*, Southeast European and Black Sea Studies, 12:2, 2012, p. 282; V. BAAR – B. BAAROVÁ, *De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea*, Studia z Geografii Politycznej i Historycznej tom 6, 2017, p. 283.
[228] G. COMAI, *Conceptualising Post-Soviet de facto States as Small Dependent Jurisdictions*, Ethnopolitics, 17:2, 2018, p. 182.
[229] See more at: *https://www.hrw.org/tag/chechnya* and at *https://it.insideover.com/societa/cecenia-tra-kadyrov-islamismo-e-radicalizzazione.html*

Russian Federation without further armed clashes, the *de facto* entities that will be analysed are in different limbo-situations that is often labelled with the expression "frozen conflicts"[230], meaning generically that the "hot fighting was stopped, but peace was not re-established"[231]. This term has been applied to describe the four "classical" Eurasian situations – the so called "Eurasian Quartet"[232] composed by Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh – and it is also adopted for the new conflict emerged in 2014 regarding Crimea[233]. Even if all the four pre-2014 entities and Crimea are very different from one another, T. D. Grant has extrapolated seven main characteristics shared among these "frozen conflicts":

1. "*Armed hostilities have taken place, parties to which include a State and separatists in the State's territory;*
2. *A change in effective control of territory has resulted from the armed hostilities;*
3. *The State and the separatists are divided by lines of separation that have effective stability;*
4. *Adopted instruments have given the lines of separation (qualified) juridical stability;*
5. *The separatists make a self-determination claim on which they base a putative State;*
6. *No State recognizes the putative State;*
7. *A settlement process involving outside parties has been sporadic and inconclusive."*[234]

Even if this list of attributes is partially correct, it is required a deeper analysis of the single cases in order to have more clarity. The most important thing to point out here is the fact that these conflicts are literally not frozen at all: on the contrary - as demonstrated for example by the last developments of last summer in Nagorno-Karabakh – many events are taking place in these separatist zones, often involving the use of force; moreover, they cannot be labelled as "frozen" because the situation is very different from the early post-Soviet years[235]. For this reason, in this work, it will be referred to the five situations in question with more adequate expressions such as "protracted conflicts" or "unresolved conflicts". Moreover, I will prefer the terms "self-proclaimed authorities", "de facto entities" or "contested territory" to the one of "de facto state" in order to avoid misinterpretations and to give a better description of these peculiar situations.

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[230] See more about the etymology and the use of the expression "frozen conflict" in T. D. GRANT, *Frozen Conflicts and International Law*, Cornell International Law Journal Vol. 50, 2017, pp. 363-376.
[231] *V. Supra*, to note 211, p. 118.
[232] *V. Supra*, to note 228, p. 194.
[233] Directorate-General for External Policies - Policy Department, *The frozen conflicts of the EU's Eastern Neighbourhood and their impact on the respect of human rights*, European Parliament, 2016, pp. 5-6.
[234] *V. Supra*, to note 230, pp. 390 – 397.
[235] *V. Supra*, to note 213; to note 222, p. 147 and to note 212, p. 428. See also the title of a recent publication that underlines this aspect: S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016.

3. Historical cases of "self-proclaimed" authorities

Before moving to the analysis of the case studies of the five contested territories of the post-Soviet area, it is useful now to make a historical and political overview of all the principal cases of *de facto* entities that have emerged in the international scene during the last century. This part of analysis will be of fundamental importance for the full comprehension of the most recent cases of our interest examined in the next section.

The following cases have helped developed both the doctrine and the jurisprudence concerned with the issue of recognition. I have decided to briefly present the history and the most important political features of the five entities that, in my opinion, represent the best examples for the purpose of our research because concern different types of recognition, different periods of time, different parts of the world and, as a consequence, different legal and political implications: I am referring to Somaliland, the Turkish Republic of Northern Cyprus (TRNC), Taiwan (ROC), Kosovo and the Israeli-Palestinian conflict. All these examples belong to a different group of recognition: the first group is composed by the entities that are recognized by no other state, such as Somaliland; the second one is formed by those entities that are recognized by a very small number of states, like Turkish Republic of Northern Cyprus that is recognized only by Turkey; the third one comprises the case such as Taiwan that are recognized by a few number of States (19 in the case of Taiwan) while the last group includes entities claiming to be states which have obtained recognition by a substantial number of states, such as Kosovo or Palestine[236]. Before starting I want to remind that I will try to use the most neutral terms thereinafter because the aim in this part is just to provide a comprehensive overview of the topic from the point of view of recognition and statehood without further legal interpretations, a step that will be made in the last chapter.

3.1 Somaliland

The first case study chosen is the one of Somaliland, a former British Protectorate in the northern region of the modern-day Somalia, that became independent on 26 June 1960 and that merged with the southern part of the territory, the former Trust Territory of Italian Somaliland, under the

[236] P. SAGANEK, *Forms of Recognition*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 93.

Act of Union that established the unite Republic of Somalia[237]. After the unification there was a great political turmoil in the region due to the clashes between different clans and exacerbated by the different colonial traditions and economic conditions that had characterized on the one hand the Italian Trust Territory and on the other the British Protectorate until that moment[238]. In 1969, the General Mohammed Siad Barre took the power with a coup putting an end to the democratic rule[239]. Nevertheless, the violence of this regime, marked by internal repression and external aggression, resulted in a disastrous war with Ethiopia, that produced heavy losses and hundreds of refugees, worsening the gap between North and South[240]. This led to the creation of movements of northern resistance, such as the Somali National Movement (SNM) that carried out several attack to Barre's regime until he left Mogadishu in 1991[241]. On 17 May 1991 the "Republic of Somaliland", corresponding to the previous territory of the British Protectorate, was declared independent and a definitive Constitution was issued on 31 May 2001 with Article 1 stating that:

> *"The country which gained its independence from the United Kingdom of Great Britain and Northern Ireland on 26th June 1960 and was known as the Somaliland Protectorate and which joined Somalia on 1st July 1960 so as to form the Somali Republic and then regained its independence by the Declaration of the Conference of the Somaliland communities held in Burao between 27th April 1991 and 15th May 1991 shall hereby and in accordance with this Constitution become a sovereign and independent country known as 'The Republic of Somaliland'"*[242].

Since 1991 Somalia had no effective government and has been often defined as a "failed state"[243]: as a matter of fact there is no real government in the southern part of Somalia and thought the Somali Transitional Government – the should-be official government of Somalia – has control over a part of Mogadishu, the rest of the territory is controlled by clans, pirates and the fundamental Muslim terror group Al-Shabaab[244].

In the northern part, to which we will refer to as Somaliland, the situation is different because since it has declared its independence in 1991 it has evolved "from a tradition Somali tribal mode

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[237] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 412-413. The republic of Somalia was recognized in this context by 35 states.
[238] *V. Supra*, to note 237.
[239] A. KREUTER, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, Minnesota Journal of International Law 19 (2), 2010, pp. 375-376.
[240] A. J. CARROLL - B. RAJAGOPAL, *The Case for the Independent Statehood of Somaliland,* American University International Law Review 8 no. 2/3, 1993, p. 654; B.R. FARLEY, *Calling a State a State: Somaliland and International Recognition*, Emory International Law Review, 24 (2), 2010, pp. 781-782.
[241] B.R. FARLEY, *Calling a State a State: Somaliland and International Recognition*, Emory International Law Review, 24 (2), 2010, pp. 781-782.
[242] *V. Supra*, to note 237, p. 414.
[243] *V. Supra*, to note 76.
[244] *V. Supra*, to note 239, p. 377.

of government to a representative democracy"[245]. The UN Secretary-General has described the conditions in Somaliland as "calm" in contrast to the "anarchic" character of the leftover Somali territory and has affirmed that Somaliland "has maintained a high degree of autonomy" at least since 1996[246]. Even if it has maintained a certain degree of independence, unlike 1960, the territory of Somaliland was recognized by nobody in 1991. It remains unrecognized by the whole international community because, in contrast to entities arisen after the invasion of a foreign force such as Manchukuo o TRNC that have enjoyed the recognition of the state responsible for their invasion and creation, Somaliland has been established by internal clans and it is therefore not recognized by any other state[247]. Even if remains unrecognized, Somaliland meets the four principle of statehood proposed by the Montevideo Convention: it has a population of approximately 3.5 million people; it has fixed borders and territory corresponding to the former British Protectorate; it has an effective government able to provide national defence and an efficient system of elections, to maintain law and order, to issue currency and passports, to afford anti-piracy campaigns; finally, it has the capacity to enter into relations with other states demonstrated by the existence of Minister of Foreign Affairs and diplomatic missions[248].

Nevertheless, recognizing Somaliland on the basis of these four principles would create a precedent in international law because *"there is no legal precedent indicating that the four requirements of statehood are a prima facie basis for independence. Such a precedent would be disastrous to the idea of state sovereignty*"[249]. It must be always underlined that recognition is a political act and, as a matter of fact, the most widespread reasons behind its non-recognition are politically motivated: states usually explain that they prefer the preservation of a unite Somalia, that the Somali peace process take precedence or that it is the African Union that should declare

[245] *V. Supra*, to note 241, p. 787. See more about the political and financial development of Somaliland in: S. G. PHILLIPS, *When less was more: external assistance and the political settlement in Somaliland*, International Affairs 92: 3, 2016, pp. 629–645.
[246] S/2000/1211, 19 December 2000, para 34; S/2001/1201, 13 December 2001, para 55; S/2002/198, 26 February 2002, para 28, quoted in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 414.
[247] *V. Supra*, to note 241, p. 809.
[248] With reference to the last point, it must be noted that it maintains a Minister of Foreign Affairs, operates diplomatic missions in USA, UK, Italy and Ethiopia – with whom has entered into agreement regarding the access to the port of Barbera – it has hosted delegations from Pakistan and Djibouti and in the last months has also opened a representative office in Taiwan. See more in B.R. FARLEY, *Calling a State a State: Somaliland and International Recognition*, Emory International Law Review, 24 (2), 2010, pp. 805-809; in A.K. EGGERS, *When Is a State a State? The Case for Recognition of Somaliland*, Boston College International & Comparative Law Review, 30 (1), 2007, pp. 218-219; in P. SAGANEK, *Forms of Recognition*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 95-96. See also the latest development about Somaliland at: *bbc.com/news/topics/c77jz3mdm8vt/Somaliland*; check here the official website of Somaliland: *https://somalilandgov.com/*
[249] *V. Supra*, to note 239, p. 381.

the independence of Somaliland[250] . Furthermore, Somaliland could choose to exercise the right to self-determination and secede from Somalia. However even the legal arguments regulating self-determination and secession are difficult to applicate to the case of Somaliland due to the fact that the state from which they are trying to secede is "failed": internal self-determination is not possible because the Somali state has failed and Somalilanders are unable to exercise their political rights and secession is legitimate only under certain circumstances not applicable to Somaliland[251].

3.2 The Turkish Republic of Northern Cyprus (TRNC)

The former British Crown Colony of Cyprus became independent in 1960 after a bloody war fought between the Greek Cypriots and the British power, sustained by the Turkish Cypriot Allies[252]. At the time of independence, the ethnic group of the Ethnic Cypriots composed the 78% of the entire population of the Island, while the Turkish Community amounted only to 18% of the total population[253].

In that year it was also created a Constitution that established institutions designed to assure Greeks and Turkish as separate communities within the State and permitted a balance of power between the two sides; moreover, in the same year it was singed a Treaty of Guarantee between the United Kingdom, Greece and Turkey in order to preserve the political order established after independence, affirming at Article 4 that "the three countries undertook to protect the sovereignty, territorial integrity and independence of the new state and were given an explicit right of intervention if the political situation on the island was challenged internally or externally"[254] . This provision was strongly criticized by the Greek Cypriots because it denied the full sovereignty

[250] *V. Supra*, to note 241, p. 809.
[251] *V. Supra*, to note 239, pp. 385-397.
[252] See more about the history of Cyprus in J. KER-LINDSAY, *The Cyprus Problem, What everyone Needs to Know*, Oxford University Press, 2011.
[253] *V. Supra*, to note 252, pp. 2-8.
[254] United Kingdom of Great Britain and Northern Ireland, Greece and turkey and Cyprus, *Treaty of Guarantee*, No. 5475, Nicosia, 16 August 1960, Art. 4: *"In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions. In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty". V. Supra*, to note 252, pp. 25-28. See also J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), pp. 242-243.

of Cyprus and gave Turkey the right to intervene in its internal affairs[255]. Under these circumstances the Constitution and the institutions proved to be unworkable and by the end 1963 a civil war had already started.

The presence of UN Peacekeeping forces presents in the territory after Resolution 186 of the UN Security Council of 1964[256], did not prevent Turkey to invoke Article 4 of the Treaty of Guarantee and to invade the Island during July and August 1974[257]. This invasion entailed grave breaches of human rights and the expulsion of 170,000 Greek-Cypriots from Northern Cyprus and the exodus of the Turkish-Cypriots from Southern Cyprus[258]. This act was accompanied by the response of both the UN General Assembly and Security Council that with the Resolutions 3212(XXIX)[259] and 365(1974)[260] called for the withdrawal of foreign forces from the territory and highlighted the respect for the independence, sovereignty and territorial integrity of the Republic of Cyprus. These resolutions did not work, because the Turkish army consolidated its power in the north until establishing on 13 February 1975 a "Turkish Federate State of Cyprus", followed by the declaration of independence of the Turkish Republic of Northern Cyprus (TRNC) on 15 November 1983[261].

Since its declaration of independence, the TRNC has been recognized only by Turkey, while the UN Security Council has deplored "the declaration of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus" and has called upon all states "not to recognize any Cypriot State other than the Republic of Cyprus" with the famous – and already quoted – Resolution 541(1983)[262]. This position was reiterated in Security Council Resolution 550(1984)[263]. The illegal basis of foundation of the TRNC derived from the use of force and its incompatibility with the existing treaties, has led also the Committee of Ministers of the Council of Europe, the Council of Europe and even the European Court of Human Rights to decline the statehood of TRNC recognizing the Cypriot government as the unique legitimate government of

[255] While it was expected that this right of intervention would be exercised jointly by Britain, Greece, and Turkey, Article 4 of the Treaty stated that if this was not possible, any of the three countries could act to restore the status quo ante. *V. Supra*, to note 252, p. 27 and to note 208, p. 243.
[256] UN SC Resolution 186, *The Cyprus Question*, 4 March 1964. This resolution is very important because it implicitly recognizes the Greek Cypriot effective control over the Republic of Cyprus.
[257] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 144.
[258] D. RICHTER, *Illegal States?,* in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 34.
[259] UN GA Resolution 312 (XXIX), *On Question of Cyprus*, A/RES/3212, 1 November 1974.
[260] UN SC Resolution 365, *Cyprus*, 13 December 1974.
[261] *V. Supra,* to note 257, p. 144. See the official website of TRNC at: *https://mfa.gov.ct.tr/*
[262] UN SC Resolution 541, *On declaration by the Turkish Cypriot community of its secession from Cyprus,* 2500th meeting, 18 November 1983.
[263] UN SC Resolution 550, *The Situation in Cyprus,* 2539th meeting, 11 May 1984.

the republic of Cyprus[264], leading to a situation that has been described as a "*collective non-recognition*"[265].

While Cyprus was admitted to United Nations already on 20 September 1960 and to European Union on 1 May 2004[266] (even if the *acquis communautaire* does not apply to the North)[267], the TRNC paradoxically continues to depend on the Turkish military presence for its existence and could be also defined as an "illegal de facto regime" or "an illegal state-like entity"[268]. The "Cyprus Question" remain unsolved even after half a century from its declaration of independence and, as it will be demonstrated through the analysis of ECHR jurisprudence, the European Union has still great interest for this topic because its ties with Turkey and with the entire world also depend from it[269].

3.3 Taiwan

Taiwan, also known as Formosa, became part of the Chinese Empire in 1683 and remained so until 1895 when, after Japan defeated China in the Sino-Japanese war, it was given to Japan under the Treaty of Shimonoseki[270]. The situation remained stable until the Second World War when in 1943 with Cairo Declaration it was established by the Allies that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China"[271]. This position was carried out also in the Potsdam Proclamation of 26 July 1945 in which it was emphasized that "the terms of the Cairo Declaration shall be carried out" and that the "Japanese sovereignty shall be limited to the island of Honshu, Hokkaido, Kyushu, Shikoku, and such other minor islands as we determine"[272]. The only possible consequence was

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[264] See ECtHR, *Loizidou v. Turkey* (Application no. 15318/89), Grand Chamber, 18 December 1996; ECtHR, *Cyprus v. Turkey* (Application no. 25781/94), Grand Chamber, 12 May 2014. These two cases will be analysed in Chapter 3 and will be the model cases used for the jurisprudence about Eastern Europe.
[265] *V. Supra*, to note 258, p. 36.
[266] *V. Supra*, to note 257, p. 147, 243.
[267] Protocol no.10 on Cyprus, 2003 Act of Accession, OJ L 236, 23 September 2003, Art. 1: *"1. The application of the acquis shall be suspended in those areas of the Republic of Cyprus in which the Government of the Republic of Cyprus does not exercise effective control; 2. The Council, acting unanimously on the basis of a proposal from the Commission, shall decide on the withdrawal of the suspension referred to in paragraph 1".*
[268] *V. Supra*, to note 258, p. 38.
[269] *V. Supra*, to note 252, pp. xi-xiii.
[270] *V. Supra*, to note 257, p. 198.
[271] P. L. HSIEH, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 MICH. J. INT'L L. 765, 2007, pp. 768-769. The Cairo Declaration was issued by Generalissimo Chiang Kai-Shek of the Republic of China, Prime Minister Winston Churchill of the United Kingdom, and President Franklin D. Roosevelt of the United States. *The Cairo Declaration*, 26 November 1943, available at: *https://digitalarchive.wilsoncenter.org/document/122101*
[272] *V. Supra*, to note 271. *Potsdam Proclamation*, 26 July 1945, available at: http://www1.udel.edu/History-old/figal/hist371/assets/pdfs/potsdam.pdf

the surrender of the Japanese forces in Taiwan to the Commander in Chief of the Republic of China.

Nevertheless, four years later a civil war began between the Government of the Republic (the Nationalist Party) and the proclaimed People's Republic (the Chinese Communist Party leaded by Mao Tse Tung); therefore, 1949 was the real turning point because, after that year, the defeated Government led by the Nationalist Party retreated to Taiwan - where it continued the functioning of the ROC (Republic of China) – while on the Mainland China it was installed the Government of the PRC (People's Republic of China)[273]. For the first twenty years, even if both the governments claimed the sovereignty of the entire territory of China, it was the ROC that had maintained the recognition as legitimate representative of China, until 15 October 1971 when, with the Resolution 2758(XVI) adopted by the UN General Assembly[274], the representation of the ROC government at the UN was replaced by the one of the PRC[275]. This act made clear that the ROC was losing its importance at international level, fact that was confirmed in 1979 when even the United States, the historical ally of the ROC, recognized the PRC as the sole government of China ending diplomatic relations with the ROC[276].

The question remains always whether Taiwan can be considered a state or not. In theory it fulfils the four requirements of the Montevideo Convention: it has a permanent population of about 23 million people; it has a territory that comprises Taiwan, the Pescadores and the islands of Kinmen and Matsu; it has an autonomous government independent of the PRC and democratically elected and, finally, it has the capacity to enter into diplomatic relations with other states[277]. As a matter of fact, it is recognized by almost twenty states all over the world and it is able to maintain strong trade relations with about sixty states, even if in an informal way and sometimes using different

[273] See more in J. SHEN, *Sovereignty, Statehood, Self-Determination, And the Issue Of Taiwan,* American University International Law Review 15, no. 5, 2000, pp. 1117. Note that the change was succession of government and not of state.

[274] UN GA Resolution 2758(XXVI), *Restoration of the lawful rights of the People's Republic of China in the United Nations*, 1976th plenary meeting, 25 October 1971. See more about this resolution in E. TING-LUN HUANG, *Taiwan's Status in a Changing World*, 9 Annual Survey of International & Comparative Law 55, 2003, pp. 55-99.

[275] A. KLECZKPWSKA, *Recognition and the Use of Force,* in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 337.

[276] *V. Supra,* to note 252, p. 769. In The United States maintained a large paradiplomatic mission in Taipei, and accepted a similar Taiwanese mission in Washington, and, more important, remained committed to the defence of Taiwan ensuring its military support in the event of a mainland attempt to annex the island. The United States continued to sell military technology and weapons systems to Taiwan with the 1979 Taiwan Relations Act (See also B. BARTMANN, *Between De Jure and De Facto Statehood: Revisiting the Status Issue for Taiwan*, Island Studies Journal, Vol.3, No.1, 2008, p. 115). See more about the Taiwan-USA relations in A. KLECZKPWSKA, *Recognition and the Use of Force*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 340.

[277] *V. Supra,* to note 271, p.771. See the official website of the Republic of China (Taiwan) at: *https://www.taiwan.gov.tw/index.php*

names for its embassies and offices such as "Taipei Economic and Cultural Offices" (in USA, Poland, Canada), "Representative Office"(as in Denmark, Finland, The Netherlands and Slovakia), "Mission" (Latvia, Korea), "Trade Mission" (in Papua New Guinea), and "Commercial Office" (in Dubai)[278]. Moreover, it is the 16th economy in the world and it is therefore part of different international organizations such as the WTO, the Asian Development Bank (ADB) and the Asia-Pacific Economic Cooperation (APEC) within which it has almost equal status to the other members even if it often labelled as "Chinese Taipei," "Taipei, China," or "China (Taiwan)"[279].

The issue here is more complicated first of all because the principle of non-recognition cannot be applied because Taiwan has not emerged after violations of international law, but as a consequence of a civil war lost; secondly because the two parties have always based their will on the *One-China Policy*, following which there is only one Chinese Government[280]: the Constitutions of the ROC at Article 4 affirms indeed ROC's sovereignty over all of China[281] and, at the same time, the preamble of the PRC Constitution refers to Taiwan as part of its territory[282]. Assuming the point of view of the PRC, the Taiwan question is therefore an internal Chinese affair, lacking Taiwan any separate legal status[283]. The cross-strait relations are very important to understand this issue: *"on the one hand, Taiwan did not declare independence from old China, to which both Mainland China and Taiwan once belonged. An independent Republic of Taiwan never came into existence. The state of the ROC remains the same. On the other hand, the PRC, since its creation, has never exercised jurisdiction over Taiwan and its outer islands"*[284]. In this vision, the PRC and the ROC are separate but equal, and neither belongs to the other.

This leads us to different conclusions: that Taiwan is not a State because it still has not unequivocally asserted its separation from China and it is not recognized as a state distinct from China[285]; secondly, that Taiwan - even if it is not recognized - has the characteristics of a state

[278] P. SAGANEK, *Forms of Recognition*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 95-97. See also B. BARTMANN, *Between De Jure and De Facto Statehood: Revisiting the Status Issue for Taiwan*, Island Studies Journal, Vol.3, No.1, 2008, pp. 116-120.
[279] CHUN-I CHEN, An Unrecognized State?, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 251-252.
[280] *V. Supra*, to note 279, pp. 243-246.
[281] *Constitution of the Republic of China (Taiwan*), 1 January 1947, available at: *https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=A0000001*. Art.4: *"The territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly".*
[282] *Constitution of the People's Republic of China*, as amended on 14 March 2004, available at: *http://www.npc.gov.cn/zgrdw/englishnpc/Constitution/node_2825.htm*
[283] *V. Supra*, to note 271, p. 341.
[284] *V. Supra*, to note 271, p. 770.
[285] *V. Supra*, to note 257, p. 219.

and could be bearer of rights and duties and own *locus standi* in front of courts[286]; finally, that it has not changed since 1949 - when all the states did recognize it – and it is therefore the symbol of the high degree of politicization typical of the act of recognition[287].

3.4 Kosovo

Under the constitution of the former Yugoslavia, Kosovo was considered a self-administering province of Serbia with a predominantly Albanian population[288]. This autonomous status within Serbia changed after the coming into power of the nationalist leader Slobodan Miloševic who abolished the Kosovar autonomous status in 1989[289]. This was part of a series of conflicts that led to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY) and the consequent secession of four of the six constituents Republics (Slovenia, Croatia, Macedonia and Bosnia-Herzegovina) and the union of Serbia and Montenegro that, under the name of the Federal Republic of Yugoslavia (FRY), maintained the role of prosecutor of the former Yugoslavia (but excluded from its scope the other four Republics)[290]. Even Kosovo, that had been until that moment an autonomous province, declared its independence, but it was actually incorporated into the new rump state of Serbia and Montenegro[291]. During all the 90's the violence exacerbated in the territory due to the clashes between the Kosovo Liberation Army (KLA), who attacked the federal army, and the Serbian forces of the FRY who were trying to reaffirm their control over the province; the conflict culminated between 1997-98, until 6 February 1999 when a tentative of peace talk began in Rambouillet; nevertheless, Miloševic refused to collaborate provoking a prompt intervention by the NATO which started a bombing campaign against the FRY on 24 March 1999[292]. After this military intervention, the nationalist leader was obliged to accept and sign the peace agreement that was subsequently adopted with Resolution 1244 issued by the UN Security Council on 10 June 1999[293]. With this resolution the Secretary General was authorized

> *"to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional*

[286] *V. Supra*, to note 279, p. 255.
[287] *V. Supra*, to note 275, p. 341.
[288] *V. Supra*, to note 257, p. 557.
[289] T. JABER, *A Case for Kosovo? Self-determination and Secession in the 21st Century*, International Journal of Human Rights, Vol. 15 No. 6, August 2011, p. 927.
[290] *V. Supra*, to note 257, pp. 395-401.
[291] *V. Supra*, to note 289.
[292] *V. Supra*, to note 257, pp. 557-558.
[293] UN SC Resolution 1244 (1999), *On the deployment of international civil and security presences in Kosovo*, adopted by the Security Council at its 4011th meeting, 10 June 1999.

administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo"[294].

This Resolution aimed not to change the legal status of the territory, but established a UN Interim Administration Mission in Kosovo (UNMIK) that had two primary objectives: "to engage in institution building, and to facilitate a political process in order to reach an agreement on Kosovo's final status"[295]. For the last nine years, while the UN actively participated in the administration of Kosovo, political negotiations were taking place unsuccessfully between the Kosovar, who claimed for independence, and the Serbian representative, who opposed to secession[296]. Martti Ahtisaari, the head of the diplomatic mission, announced in 2007 that the negotiation process had ended in impasse and that the following step for Kosovo would have been a "supervised independence"[297]. On 17 February 2008 the Assembly of Kosovo unilaterally declared the independence of Kosovo as an "independent and sovereign state"[298].

From that moment began the procedure of recognition toward Kosovo with more than 100 states that recognized it as a state (included the United States and a large majority of the EU states) and with the other half of the remained states that did not recognize it as a sovereign state (included obviously Serbia, Russian Federation, Spain, Cyprus or Moldova). Most of the recognizing states have justified their position by referring to political considerations such as the need for stability and security in the region; while the non-recognizing states have justified their move resorting to the principle of territorial integrity, but the real reason behind this choice seems to be a matter of internal politics, rather than of international law: as a matter of fact, the majority of the states that have refused to recognize Kosovo have to deal with minorities issues and secessionists claims and they were trying to prevent a precedent-setting recognition of a region with the characteristics of Kosovo that would have mined both international and domestic stability[299]. Thus, for some states, it remains a rebellious province that is trying to secede from Serbia which, furthermore, has not given its consensus for the changing of status[300]. Nevertheless, in theory Kosovo fulfils the requirements of the Montevideo Convention: it has a permanent population of 1.7 million,

[294] *V. Supra,* to note 293, operative clause 10.
[295] *V. Supra,* to note 289, p. 928.
[296] *V. Supra,* to note 289, p. 928; C. J. BORGEN, *The Language of Law and the Practice of Politics: Great Powers and the rhetoric of self-determination in the Cases of Kosovo and South Ossetia*, Chicago Journal of International Law 10, 2009, p. 4.
[297] *V. Supra,* to note 289, p. 928.
[298] *Kosovo Declaration of Independence*, 47 ILM 467, 17February 2008.
[299] Think in this sense for example to Catalonia for Spain or to Transnistria for Moldova. C. RYNGAERT – S. SOBRIE, *Recognition of States: International Law or realpolitik? The Practice of recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, Leiden Journal of International Law, 24, 2011, p. 480.
[300] S. OETER, *De Facto Regimes in International Law*, in in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 67.

who lives in a defined territory corresponding to the autonomous region of Kosovo that existed under the former Yugoslavia, it has an effective government put in place in 2008 and it has the capacity to enter into relations with other states, proved by the fact that it was admitted to the International Monetary Fund and to the World Bank[301].

An important step related to the issue of Kosovo has been made in 2010 with the International Court of Justice Advisory Opinion[302] referred by the General Assembly to the Court, at the request of Serbia, in order to ask *"whether the unilateral declaration of independence of Kosovo is in accordance with international law"*[303]. The ICJ reached the conclusion that the principle of territorial integrity invoked in order to prevent secession was confined to the sphere of relations between states and that does not prevent a state from internal attempts of separations; moreover it concluded that the resolution 1244 and the declaration of independence of 2008 operated on a different level and that the authors of the declaration did not breach any obligation established under resolution 1244 and the Constitutional framework[304].

Nevertheless, from the Opinion of the Court it remains unanswered the question of whether the Kosovar had the right to external self-determination having suffered discriminations and violations during the 90's or whether the recognition of Kosovo would constitute a violation of Serbian Sovereignty[305]. This Opinion seems to leave the Kosovo status in a sort of limbo, but it actually suggests that the Kosovo institutions may exercise an authority independent of the UNMIK: the answer is now to what extent these functions may correspond to the ones of a state[306]. Even if the competences have been transferred during the years from the UN side to the Kosovar authorities, the international presence in Kosovo remains substantial (with the Kosovo Force formed under the auspices of NATO and the presence of the EU Rule of Law Mission –

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[301] J. CRAWFORD, *Kosovo and the Criteria for Statehood in International Law*, in M. MILANOVIĆ – M. WOOD, *The Law and Politics of the Kosovo Advisory Opinion,* Oxford University Press, 2015, pp. 281. See the official website of the Republic of Kosovo at: *https://www.rks-gov.net/EN*

[302] ICJ Advisory Opinion, *Accordance with International Law of Unilateral Declaration of Independence in Respect of Kosovo*, 22 July 2010.

[303] UN GA Resolution 63/3, *Request for an advisory opinion of the International Court of Justice on whether the unilateral declaration of independence of Kosovo is in accordance with international law*, 8 October 2008. This resolution was adopted with 77 votes in favour, 6 against (included USA) and 74 abstentions (included EU): see more in C. J. BORGEN, *The Language of Law and the Practice of Politics: Great Powers and the rhetoric of self-determination in the Cases of Kosovo and South Ossetia*, Chicago Journal of International Law 10, 2009, pp. 14-16.

[304] *V. Supra,* to note 301, p. 283,285

[305] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 217. It is interesting to consider the illegal use of force also from part of the NATO forces in 1999 which led ultimately to the independence of Kosovo, but that could be considered a violation of jus cogens norms and prohibit states from recognition (see more in C. RYNGAERT – S. SOBRIE, *Recognition of States: International Law or realpolitik? The Practice of recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, Leiden Journal of International Law, 24, 2011, p. 479).

[306] *V. Supra,* to note 301, p. 286.

EULEX[307]) and this often causes doubts about its effective independence and sovereignty leading some states to consider it as a *de facto* regime with a consolidated authority over the territory[308]. Nevertheless, these grounds of reasoning seem to be insufficient for the denial of statehood because "it cannot be assumed that, because an entity has special or unusual characteristics, it cannot qualify as a state"[309].

3.5 Palestine

The last, but not less important historical case that will be proposed is the one concerning the Israeli-Palestinian conflict. This issue has already been met speaking about recognition because it entails two entities, created in the same years, in which both the borders and the territory were (and are) under discussion. The territory of Palestine had been part of the British Mandate for Palestine, but in 1947 Britain announced its withdrawal from the territory and referred the question of Palestine to United Nation[310]. On 29 November 1947 the General Assembly adopted the resolution 181(II) with whom established a plan of partition for Palestine between the Arab and the Jewish State, the economic union between them, the internationalization of Jerusalem and the commitment for Britain to withdraw not later than 1 August 1948[311].

The independence of Israel was declared on 14 May 1948[312] and soon after, on 15 May 1948, the armed forces of the Arab States that had not accepted the UN Resolution invaded Palestine, sealing the beginning of the first Israeli-Palestinian conflict: the war ended with Israel possessing more territories than provided by the partition Resolution, with the exception of the West-Bank and East Jerusalem (occupied by Jordan) and the Gaza Strip (occupied by Egypt)[313]. The ceasefire was signed in 1949 and on 11 May 1949 Israel was admitted to UN and recognized by a large majority of States[314]. This admission, as already noted above, has been often qualified as

[307] See more about EULEX in T. ALTWICKER – N. WIECZOREK, *Bridging the Security Gap through EU Rule of Law Missions? Rule of Law Administration by EULEX*, Journal of Conflict and Security Law, Vol. 21 No.1, 2016, pp. 115-133.
[308] *V. Supra*, to note 300, pp. 66-67.
[309] *V. Supra*, to note 301, p. 287.
[310] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 424.
[311] UN GA Resolution 181(II), *Future Government of Palestine*, 29 November 1947. This was voted by 33 in favour (including France, USA, URSS) to 13 against (including the Arab States and 10 abstentions (including China, UK and Yugoslavia).
[312] Provisional Government of Israel, *The Declaration of the Establishment of the State of Israel*, Official Gazette: Number 1, Tel Aviv, 14 May 1948.
[313] *V. Supra*, to note 310, p. 425. These territories will be re-gained by Israel in 1967 after the Six Dy War.
[314] UN GA Resolution 273, *Admission of Israel to the United Nations*, 11 May 1949.

"premature" because occurred even if the borders of Israel had not yet been fixed[315]. Interesting in this sense is the position of the United States that, in the person of President Truman, have prematurely recognized the sovereignty of the Jewish government as the *de facto* authority of Israel the same day of the declaration of independence of the Jewish State[316].

For Palestine, the things went in a different way because *"neither the recognition of the right to self-determination of the Palestinian people by the UN, nor the declaration of independence of Palestine, proclaimed on 15 November 1988[317], succeeded in attracting broad recognition for the State of Palestine"[318]*. However, its declaration of independence caused an international reaction: the UN General Assembly adopted the Resolution 43/177 with whom acknowledged "the proclamation of the State of Palestine by the Palestine Council on 15 November 1988"[319] and the Resolution 67/19 which gave "to Palestine non-member observer state status in the United Nations"[320]. Nowadays Palestine is recognized by the majority of states, but it has not been admitted as full member to UN[321]. Nevertheless, the entrance of Palestine as an observer state to UN had different effects such as the usage of the designation of "State of Palestine" in all the UN Documents, the acceptance of Palestine in 46 multilateral treaties, the acceptance of Palestine as a State Party under the International Criminal Court in 2015 and also its admission to UNESCO in 2011[322].

One last aspect must be taken into consideration in this context, the one concerning the Israeli annexation and occupation of the territories of the West Bank, Eastern Jerusalem, the Gaza Strip and the Golan Heights after the third Israeli-Palestinian conflict of 1967. The occupation of these territories has been condemned by two resolutions of the UN Security Council[323]. Moreover, this position was emphasised especially in the ICJ *Wall Advisory Opinion* of 2004[324] following the

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[315] R. M. CRAVEN - R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 198.
[316] See more about the US recognition of the state of Israel at: *https://www.archives.gov/education/lessons/us-israel#:~:text=At%20midnight%20on%20May%2014,on%20January%2031%2C%201949).*
[317] *Palestinian Declaration of Independence*, 15 November 1988, A/43/827(1988).
[318] A. KLECZKPWSKA, *Recognition and the Use of Force,* in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 332. See more about the National Liberation Movement of the Palestine Liberation Organization (PLO) in M.N. SHAW, *International Law*, Cambridge University Press, 2008 (Fifth Edition), pp. 245-248.
[319] UN GA Resolution 43/177, *Question of Palestine*, 15 December 1988. Adopted by 104 in favour, 2 against (USA and Israel and 36 abstentions.
[320] UN GA Resolution 67/19, *Status of Palestine in the United Nations*, 4 December 2012.
[321] *V. Supra*, to note 318, p. 333. Adopted by 138 in favour, 9 against and 41 abstentions.
[322] S. HAMAMOTO, Status of Unrecognized Subjects: Recent Practice of "Collective Recognition": Admission to or Granting a Status in an International Organization, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, pp. 129-136.
[323] UN SC Resolution 242(1967), 22 November 1967; UN SC Resolution 446(1979), 22 March 1979.
[324] ICJ Advisory Opinion, *On the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* General List, No. 131, 9 July 2004.

decision of the Israeli Cabinet in 2002 to build a "security fence" in order to separate the occupied West bank and the Jordan River from the Israel Proper[325]. The ICJ after the analysis of the case reached the conclusion that "third parties have a duty not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" and "not to render aid and assistance in maintaining the situation created by such construction" [326].

To conclude, it is clear that also the example of Palestine leads to consider recognition as a highly politicized gesture and that "States are reluctant to assert any rights and obligations to unrecognised States, but are also in the meantime aware of facts, and consequently seek to reconcile lack of recognition with the realities of international politics and global security"[327].

4.Case studies of the post-Soviet area: historical and geopolitical context

After having understood which terms are more suitable for our research, it will be useful now to make a brief overview of these entities from a historical and geopolitical point of view.

It is necessary now to identify the territories on which I will focus – namely Transnistria, Nagorno-Karabakh, Abkhazia, South Ossetia, and Crimea - to explain their different stories, the characteristics they have in common and the relevance they take on in international law. The "historical" self-proclaimed authorities studied as examples in the previous part are of fundamental importance because they serve as models for the following case studies. If the territories already presented pertained all to a different category of recognition, all the cases of this chapter have in common the fact of being totally unrecognized or recognized, if anything, by one state.

All the situations proposed are connected, directly or indirectly, with the dissolution of the former Soviet Union. Under the Constitution of 1977[328], elaborated and approved under Brezhnev, USSR was a union of independent states or better of Soviet Socialist Republics, as stated at Article 70: *"The Union of Soviet Socialist Republics is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the*

[325] See more about the ICJ Advisory Opinion in: G.R. WATSON, *The "Wall" Decision in Legal and Political Context,* The American Journal of International Law, Vol. 99, No. 1, January 2005, pp. 6-26.
[326] *V. Supra*, to note 324, para 155-156, 159.
[327] *V. Supra*, to note 318, p. 336.
[328] Constitution and Fundamental Law of the Union of Soviet Socialist Republics (as adopted at the Seventh Special Session of the Supreme Council of the USSR Ninth Convocation on 7 October 1977) - Конституция (Основной закон) Союза Советских Социалистических Республик (принята на внеочередной седьмой сессии Верховного Совета СССР девятого созыва 7 октября 1977 г.). Original text available at: *https://constitution.garant.ru/history/ussr-rsfsr/1977/red_1977/5478732/*

voluntary association of equal Soviet Socialist Republics"[329]. All the fifteen Soviet Socialist Republics owned the right to *"freely secede from USSR"* under Article 72 of the Constitution[330] and therefore, during the dissolution process of the Soviet Union, they all declared their independence giving birth to the fifteen independent States that we all know today: Lithuania (11 March 1990), Estonia (20 August 1991), Latvia (21 August 1991, Georgia (9 April 1991), Ukraine (24 august 1991), Belarus (25 August 1991), Kirgizstan (26 august 1991), Moldova (27 August 19919), Uzbekistan (31 August 1991), Tajikistan (9 September 1991), Armenia (21 September 1991), Azerbaijan (18 October 1991), Turkmenistan (27 October 1991), Kazakhstan (16 December 1991)[331] and also Russian Federation, which by the end of December 1991 was soon considered as the prosecutor of the legal personality of the Soviet Union both by the other Republics and by the United Nations[332].

Nevertheless, USSR was composed not only by the 15 Soviet Socialist Republics, but also by other kinds of minor entities that were included in the territory of one of the Republics, such as the Autonomous Soviet Socialist Republics[333], the Autonomous Regions *(oblasti)* and the Autonomous Districts *(okruga)*[334]. For example, Abkhazia had been identified as an Autonomous Republic[335], while Nagorno-Karabakh and South Ossetia belonged to the category of the Autonomous Regions[336]. All these territories owned a certain degree of autonomy but did not had the right to secede from URSS, unlike the fifteen Republics. Despite this, between 1990 and 2014 all the territories that will be analysed have seek independence under the banner of national self-determination[337], which was "accompanied by allegations of ethnically motivated oppression on

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[329] *V. Supra*, to note 328. Translation of Art. 70: *"The Union of Soviet Socialist Republics is an integral, federal, multinational state formed on the principle of socialist federalism as a result of the free self-determination of nations and the voluntary association of equal Soviet Socialist Republics*" - Статья 70: "*Союз Советских Социалистических Республик - единое союзное многонациональное государство, образованное на основе принципа социалистического федерализма, в результате свободного самоопределения наций и добровольного объединения равноправных Советских Социалистических Республик".*

[330] *V. Supra*, to note 328, Translation of Art. 72: *"Each Union Republic shall retain the right freely to secede from the USSR"* - Статья 72: *"За каждой союзной республикой сохраняется право свободного выхода из СССР".*

[331] See more in G. SHINKARETSKAIA, *A Requirement of Conformity with International Law in Cases of State Succession*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 112 – 115.

[332] J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 395. With the Minsk Accords and the Alma Ata Declaration was set forth the cessation of the Soviet Union and creation of the Commonwealth of Independent States (CIS).

[333] *V. Supra*, to note 328, Chapter 10. The Autonomous Soviet Socialist Republic - Глава 10. Автономная Советская Социалистическая Республика.

[334] *V. Supra*, to note 328, Chapter 11. The Autonomous Region and the Autonomous District - Глава 11. Автономная область и автономный округ.

[335] *V. Supra*, to note 328, Art. 85 - Статья 85.

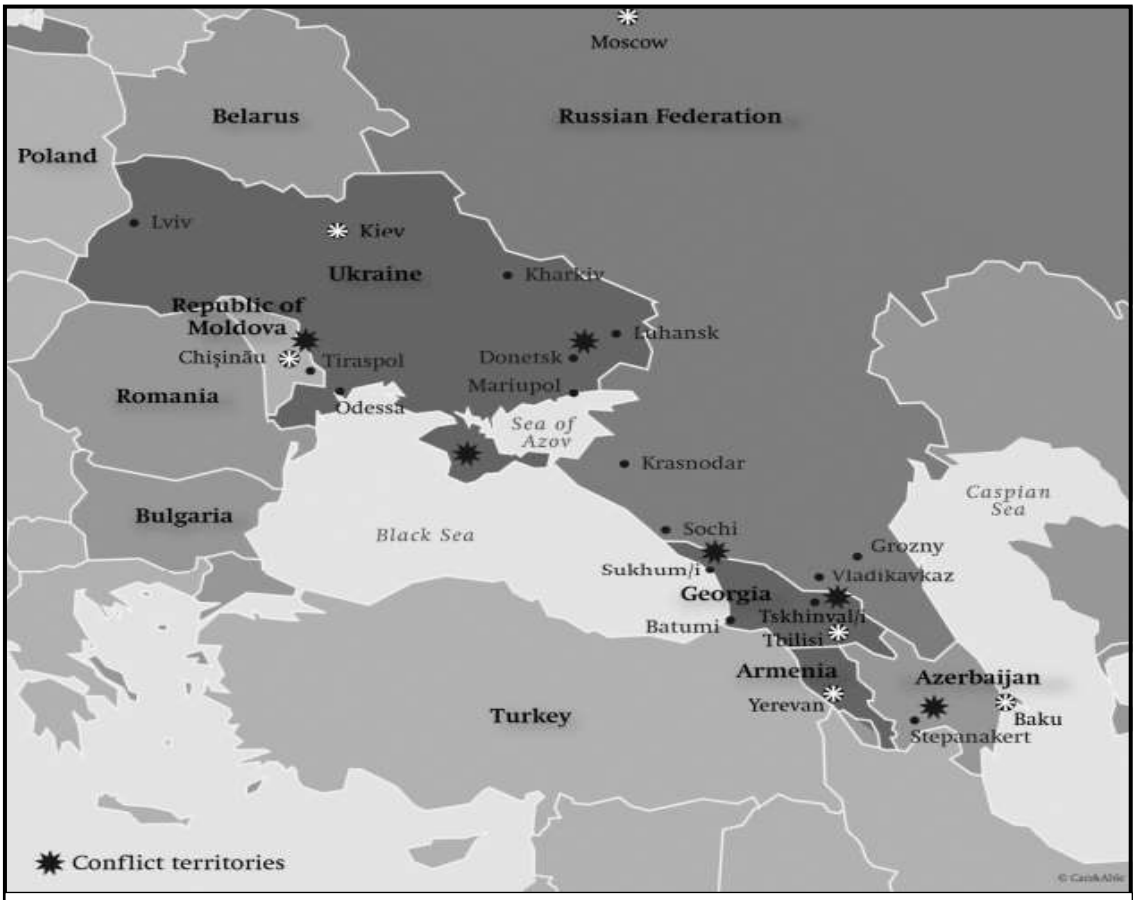
[336] *V. Supra*, to note 328, Art. 87 - Статья 87.

[337] H. BLAKKISRUD – P. KOLSTØ, *Dynamics of de facto statehood: the South Caucasian de facto states between secession and sovereignty*, Southeast European and Black Sea Studies, 12:2, 2012, p. 286.

the part of the State from which they wanted to secede"[338]. Transnistria (or the Pridnestrovian Moldavian Republic – PMR) declared its independence from Moldova on 2 September 1990; Nagorno-Karabakh (or the Republic of Artsakh) declared the independence of the territory contended between Armenia and Azerbaijan on 2 September 1991; in 2008 the Republic of Abkhazia (or Apsny) and the Republic of South Ossetia (or Alania) declared their independence from Georgia and, finally, in 2014 the Republic of Crimea, followed by the Donetsk People's Republic and the Luhansk People's Republic, declared independence from Ukraine[339]. The current protracted conflicts, even the more recent one concerning Crimea, are therefore the result of more ancient decisions taken during the Soviet era that have strengthen the ethnical and geographical identity of these regions, leading them to affirm their independence[340].

Before proceeding with the analysis of the single situations, a map that shows the conflict zones of our interest is inserted here because also a correct physical visualization of these areas is important for the purpose of this work in order to understand where these territories are situated. As demonstrated, even if they have roots in the Soviet history, the consequences of these conflicts are interest of the entire international community and, as it can be read from the caption of the map, are situated in the so-called Eastern Neighbourhood (of Europe), nearer to us than it can be expected.

[338] M. CRAVEN – R. PARFITT, *Statehood, Self-determination, and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 218.
[339] *V. Supra*, to note 338, p. 217.
[340] The territorial ethnical division of the Soviet territory and the resulting conflicts are mainly the result of the so-called "Policy of the Nationalities of the Soviet Union". See more in: E. HULA, *The Nationalities Policy of the Soviet Union,* Theory and Practice, Social research Vol. 11, No. 2, May 1944, pp. 168 -201; G. W. MACCOTTA, *Il Problema delle Nazionalità in Unione Sovietica*, Rivista di Studi Politici Internazionali, Vol. 58, No. 2 (230), April - June 1991, pp. 163-182; T. MARTIN, *The Affirmative Action Empire: Nations and Nationalism in the Soviet Union, 1923-1939*, Ithaca- London, Cornell University Press, 2001.



MAP 1 – Unresolved Conflicts in the Eastern Neighbourhood.

Taken from: S. FISHER, *Not Frozen!,* SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 8.

4.1 Transnistria

Following an order of time, the first self-proclaimed authority that will be analysed is the one known with the name of Transnistria. Nevertheless, this entity calls itself in Russian the "Pridnestrovskaya Moldavskaya Respublika (PMR)" or "Pridnestrovie", or in English "Transdniestria", while the European Court of Human Rights (ECtHR), as it will be shown, has referred to it as the "Moldovian Republic of Transdnietria (MRT) in two cases of 2004 and 2011, respectively *Ilaşcu and Others v. Moldova and Russia*[341] and *Ivanţoc and Others v. Moldova and*

[341] ECtHR, *Ilaşcu And Others v. Moldova and Russia* (Application no. 48787/99), Grand Chamber, 8 July 2004.

Russia[342], or in the case of 2012 *Catan v. Moldova and Russia*[343] both as "Transdniestria" and "MRT"[344]. I will refer to it interchangeably as Transnistria, PMR or MRT.

Transnistria is the first *de facto* entity that has originated in the post-Soviet context and it is the only case that is geographically separated from its patron state (Russian Federation), because it is situated in a stripe of land between the Republic of Moldova and Ukraine[345]. The conflict has arisen very quickly in this territory and has its main roots in the two-fold composition of the Moldavian territory. The Moldavian Soviet Socialist Republic (MSSR) has been created under the USSR auspices through the annexation of two realities with different history and traditions: the first one is Transnistria, situated to the eastern bank of the river Dniester (from which the name) and transferred to the Moldavian territory in 1940; while the second is Bessarabia that composes the remaining Moldovan territory, between the rivers Prut and Dniester, and which belonged to the Russian Empire from 1812, was occupied by Romania in 1918 and fell under the Soviet control in 1940 with the Ribbentrop-Molotov Pact[346]. One of the best passages that shows the ethnical and linguistic implications of this division can be found in the case of *Ilaşcu and Others v. Moldova and Russia:*

> *"The Moldavian Soviet Socialist Republic, which was set up by a decision of the Supreme Soviet of the USSR on 2 August 1940, was formed from a part of Bessarabia taken from Romania on 28 June 1940 following the Molotov-Ribbentrop Pact between the USSR and Germany, where the majority of the population were Romanian speakers, and a strip of land on the left bank of the Dniester in Ukraine (USSR), Transdniestria, which was transferred to it in 1940, and is inhabited by a population whose linguistic composition in 1989, according to publicly available information, was 40% Moldavian, 28% Ukrainian, 24% Russian and 8% others"*[347].

The MSSR proclaimed its sovereignty from USSR on 23 June 1990 and adopted the declaration of Independence of the Republic of Moldova, whose territory included Transnistria, on 27 August 1990[348]. At the same time, in the eastern region of Moldova, groups of resistance were organizing

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[342] ECtHR, *Ivanţoc and Others v. Moldova and Russia* (Application no. 23687/05), Former Fourth section, 15 November 2011 (Final 04/06/2012).
[343] ECtHR, *Catan and Others v. Moldova and Russia (*Applications nos. 43370/04, 8252/05 and 18454/06), Grand Chamber, 19 October 2012.
[344] B. BOWRING, *Transnistria*, in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law,* Oxford University Press, 2014, p. 157.
[345] V. BAAR – B. BAAROVÁ, *De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea*, Studia z Geografii Politycznej i Historycznej tom 6, 2017, p. 271.
[346] K. BÜSCHER, *The Transnistria Conflict in Light of the Crisis over Ukraine*, in S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 25.
[347] ECtHR, *Ilaşcu And Others v. Moldova and Russia* (Application no. 48787/99), Grand Chamber, 8 July 2004, par. 28.
[348] *V. Supra*, to note 347, par. 29, 31.

against the incorporation into the new Republic of Moldova and on 2 September 1990 the "Moldovan Republic of Transnistria" declared itself a separate territorial unit; on 25 August 1991 the "Supreme Council of the PMR" adopted the Declaration of Independence and on 1 December 1991 Igor Smirnov was elected president of the PMR[349].

This new willingness to create a separate political and geographical entity was the edge of the ethnic tensions born between Romanian-speaking Moldovans and Ukrainians and Russians - who composed a large part of the Transnistrian population - exacerbated by a discriminatory law against Russian[350]. As a matter of fact, in 1989 the Moldavian Supreme Soviet issued a controversial law that declared Moldovan the official language of the country (instead of Russian), recommended a transition to the Latin alphabet, recognized the unity of the Moldavan and Romanian languages and issued a program for extending the use of Moldovan in government, education and other spheres[351]. As it will emerge from the jurisprudence of the ECtHR, the language and ethnic matter is at the basis of the main important judgments analysed below and the "protection of the Russian speakers … and the self-representation as defenders of Moldovan culture were the main pillars of Transnistria's nation-building project as it took shape in the early 1990s"[352].

The first armed clashes between the Moldovan government's forces and the separatist units began in November 1990 and the Russian Federation forces helped Transnistria separatists[353]. As a matter of fact, when it declared its independence from USSR, Moldova did not have its own army, but even after the Declaration of Independence, the 14th Army of the military district of Odessa of the Ministry of Defence of the USSR (to which it will be referred to as 14th Army), whose headquarters had been in Chişinău since 1956, remained on Moldovan territory[354]. By Decree No. 234 of 14 November 1991, the President of Moldova declared that ammunition, weapons,

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[349] *V. Supra*, to note 344, p. 161; T. D. GRANT, *Frozen Conflicts and International Law*, Cornell International Law Journal Vol. 50, 2017, p. 377.
[350] D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 39.

[351] M. S. BOBICK, *Separatism redux, Crimea, Transnistria, and Eurasia's de facto States*, Anthropology Today, Vol.30 No. 3, June 2014, p. 4. The main difference between Moldavian and Romanian lays in the script: Romania officially introduced Latin script in 1859 when the Romanian nation-builders were removing all the Slavic elements from the lexicon, while Moldavian was using the Cyrillic script. There are still some problems about the name of the language, but the main point is that the authorities of Tiraspol continues to call it "Moldavan" preserving the Cyrillic alphabet, while Chişinău has preferred the adoption of a "Moldovan with Latin script" (following the definition of the Constitution at Article 13). See more in G. COMAI – B. VENTURI, *Language and education laws in multi-ethnic de facto states: the cases of Abkhazia and Transnistria*, Nationalities Papers, Vol. 43 Issue 6, November 105, pp. 886-905.
[352] G. COMAI – B. VENTURI, *Language and education laws in multi-ethnic de facto states: the cases of Abkhazia and Transnistria*, Nationalities Papers, Vol. 43 Issue 6, November 105, p. 890.
[353] T. D. GRANT, *Frozen Conflicts and International Law*, Cornell International Law Journal Vol. 50, 2017, p. 377.
[354] *V. Supra*, to note 347, par. 32.

military transport, military bases, and other property belonging to the military units of the Soviet armed forces stationed in Moldovan territory were the property of the Republic of Moldova[355]. By his own Decree, dated 5 December 1991, President Smirnov decided to place the military units of the 14th Army deployed in the PMR under the command of 'the National Defence and Security Department of the PMR'[356]. As a matter of fact, separatists received massive military support from the 14th Army and by the end of 1991 and beginning of 1992 several bitter fighting took place between the two parts resulting in "several hundred" deaths[357]. Given the support of the 14th Army – back under the Russian control from 1 April 1992 - that equipped with arms and ammunition the separatists and the large number of Russian Forces that joined them in the fight against Moldova, by the end of 1992 to the Moldavan army was prevented to take control again over Transnistria[358].

On 21 July 1992 Moldova and RSFSR (Russian Soviet Federative Socialist Republic) signed an agreement on the principles for the friendly-settlement of the conflict which provided at Article 1 a ceasefire and the creation of a "security zone" between the parties; at Article 2 the setting up of a Joint Control Commission (JCC) composed of representatives from Moldova, Russian Federation and the PMR and the establishment of peacekeeping forces under its control[359]; at Article 4 required the neutrality of the 14th Army and at Article 5 prohibited sanctions, blockade or obstacles to free movement[360].

While the Republic of Moldova adopted a new constitution on 29 July 1994[361] and was recognized by the entire international community, included Russian Federation, with the borders of the previous Soviet Republic, the status of Transnistria remained unclarified "along, incidentally, with the legal status of the Russian military presence on Moldovan-Transnistrian soil"[362]. The Organization for Security and Cooperation in Europe (OSCE) became soon the mediator for the status of the PMR and was joined in the negotiation by Moldova, Transnistria, Russia and (from

[355] *V. Supra*, to note 347, par. 37.
[356] ECtHR, *Catan and Others v. Moldova and Russia (*Applications nos. 43370/04, 8252/05 and 18454/06), Grand Chamber, 19 October 2012, par. 16.
[357] *V. Supra*, to note 356, par. 17. In It is reported of 320 Moldovans and 425 Transnistrian deaths: see more in G. SHINKARETSKAIA, *A Requirement of Conformity with International Law in Cases of State Succession*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 121.
[358] *V. Supra*, to note 356, par. 19.
[359] The peacekeeping force was composed of five Russian battalions, three Moldovan battalions, and two PMR battalions subordinate to the JCC.
[360] *V. Supra*, to note 356, par. 21.
[361] Official text available at: *http://www.presedinte.md/eng/constitution* .This constitution provided that Moldova was neutral, that it prohibited the stationing in its territory of troops belonging to other States and that a form of autonomy might be granted to regions which included some areas on the left bank of the Dniester and established Moldovan with Latin alphabet as official language (ECtHR, *Catan and Others,* par. 22).
[362] *V. Supra*, to note 346, p. 28.

1995) Ukraine[363]. A first memorandum, the so-called Moscow Memorandum or Primakov Memorandum, was signed on 8 May 1997 in order to "normalize" the relations between the Republic of Moldova and the PMR[364]. With this memorandum the parties recognized Moldova as subject of international law and indicated that: *"Transnistria has the right to enter into international contacts in respect of economic, scientific-technical, and cultural matters, but that the parties are to build their relations in the framework of a common state within the borders of the Moldavian SSR as of January of the year 1990"*[365]. In November 2003 Russia proposed a new Memorandum, named the Kozak Memorandum[366], that foresaw a new federal structure for Moldova "under which the authorities of the PMR would have a substantial degree of autonomy and guaranteed representation in the new federal legislature"[367]. Nevertheless, the last version of the memorandum included a long-term status for Russian military forces, and this has led the Moldovan President Vladimir Voronin to withdraw his initial approval[368].

Today the status of Transnistria remains unsolved. It has not been recognized by any member of the United Nations, but it has received only the recognition of other unrecognized entities such as South Ossetia, Nagorno-Karabakh and Abkhazia that cannot be considered relevant[369]. In 2006 President Smirnov organized a referendum in which the 96% of the Transnistria citizens voted in favour of independence and free association with Russia[370]. The MRT as a matter of fact has all the attributes and institutions to be considered as an independent state (with its own currency, tax system, a tripartite government and a delineated territory)[371], but it is certain that its nation-building process wouldn't have been successful without the role played by the Russian Federation, both as a mediator and a conflict party[372]. This strong presence of Russia will be of fundamental importance also for the analysis of the judgements of the ECtHR that has found that Russia shares the responsibility also for the violations of human rights committed in the

[363] *V. Supra*, to note 346, p. 28. Note that at the beginning of the negotiations OSCE was still labelled as CSCE (Conference on Security and Cooperation in Europe); it has become OSCE on 1 January 1995.
[364] MEMORANDUM, *On the Bases for Normalization of Relations Between the Republic of Moldova and Transdneistria*, The Moscow Memorandum, 8 May 1997. Available at: *https://peacemaker.un.org/sites/peacemaker.un.org/files/MD_970508_Memorandum%20on%20the%20Basis%20for%20Normalization%20of%20Relations%20between%20the%20Republic%20of%20Moldova%20and%20Transdniestria.pdf*
[365] *V. Supra*, to note 353, p. 379.
[366] MEMORANDUM, *On the basic principles of the state structure of a united state*, Kozak Memorandum, 17 November 2003. Translation available at: *https://www.stefanwolff.com/files/Kozak-Memorandum.pdf*
[367] *V. Supra*, to note 344, p. 163.
[368] *V. Supra*, to note 346, p. 28. Note that also the new-elected pro-European President of the Republic of Moldova, Maria Sandu, has strongly encouraged a withdrawal of the Russian forces from Transnistria, see more at: *https://warsawinstitute.org/moldovas-sandu-withdrawing-russian-forces-transnistria/*
[369] *V. Supra*, to note 350, p. 40.
[370] *V. Supra*, to note 344, p. 164. The European Parliament has clarified that it has fully rejected the organization and the outcomes of the referendum in the European Parliament Resolution on Moldova (Transnistria) 2006/2645(RSP), OJ C 313 E/427, 2006.
[371] M. S. BOBICK, *Separatism redux, Crimea, Transnistria, and Eurasia's de facto States*, Anthropology Today, Vol.30 No. 3, June 2014, p. 8.
[372] *V. Supra*, to note 346, p. 30.

Transnistrian territory[373]. Nevertheless, the fields in which Russian presence is more evident are for sure the military one (with the presence of 1,500 Russian troops that serve as peacekeepers in the region)[374] and the financial-economic one. While it represented the industrial core of the country during the Soviet Moldova, forming the 40% of the Moldovan GDP with its industrial production, nowadays Transnistria has become a "paradise for smugglers of alcohol, drugs, cigarettes… the most important export item, however, were weapons. They were not only produced in Transnistria but were also huge ammunition depots of Russian troops…"[375]. In monetary terms Russian assistance since 2008 hardly exceeds 500 million dollar per year, consisting especially in financial assistance for pensions, imports of Russian gas, realizations of projects such as schools and hospitals in the region[376]. The economic crisis connected with the Russian incorporation of Crimea affected directly also the TMR that in 2014 hit a deficit of 93 percent: direct and indirect funding from Russia is therefore at the basis of the economic (and social) survival of the region[377].

Besides OSCE and Russian Federation, also the EU interest in the region has grown during the years. In 2005 it participated with the United States in the negotiation process in a 5+2 format and since that year it is operating a Border Assistance Mission to Moldova and Ukraine (EUBAM)[378]. Moreover, the Republic of Moldova is a priority partner country within the Eastern Partnership initiative, the eastern dimension within the European Neighbourhood Policy (ENP)[379] and has signed with EU the EU-Moldova Association Agreement in 2014, that includes also a Deep and Comprehensive Free Trade Area (DCFTA)[380]. This increasing West-presence in Moldova has worsened the economic independence of Transnistria because Chişinău has affirmed that "no power sharing in favour of the left bank is possible at all" and because also Ukraine, that had always been considered a sort of patron state for Transnistria, has changed his attitude after 2014[381]. It is clear therefore that, especially after the Ukrainian crisis, Transnistria seems a

[373] *V. Supra*, to note 346, p. 30.
[374] *V. Supra*, to note 371, p. 8.
[375] *V. Supra*, to note 345, p. 278.
[376] A. DEVYATKOV, *Russia and Transnistria in a Patron-Client Relationship Russia and Transnistria in a Patron-Client Relationship*, Anuarul Laboratorului Pentru Analiza Conflictului Transnistrean, January 2017, p. 20.
[377] *V. Supra*, to note 346, p. 39.
[378] Directorate-General for External Policies - Policy Department, *The frozen conflicts of the EU's Eastern Neighbourhood and their impact on the respect of human rights*, European Parliament, 2016, p. 19.
[379] See more about the Eastern Partnership at: *https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/eastern-partnership_en*
[380] See more about the EU-Moldova relationships at: *https://eeas.europa.eu/headquarters/headquarters-homepage/1538/moldova-and-eu_en*
[381] *V. Supra*, to note 376, p. 19. See more about the effects of Crimea's incorporation on Transnistria in K. BÜSCHER, *The Transnistria Conflict in Light of the Crisis over Ukraine*, in S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, pp. 30 – 41.

strategic camp of confrontation between Russia and the West that are engaged in a "symmetric confrontation" surrounded by a deep mutual mistrust[382].

4.2 Nagorno-Karabakh

The second case study to analyse in the one of Nagorno-Karabakh, that "stands out for the extent of bloodshed involved"[383]. Officially, this *de facto* entity refers to itself as the "Nagorno-Karabakh Republic" (NKR) or as the "Artsakh Republic"[384], the Armenian name agreed on 20 February 2017 by the voters of Karabakh[385]. It could also be used the nomenclature "Nagorny Karabakh" that is the Russian translation from the original Azerbaijan, used also in the four Resolutions of the Security Council concerning the case[386]. In the following paragraph it will be used the more neutral term "Nagorno-Karabakh".

The first clashes in the area can be traced back already to 1905 and to the events of March and September 1918 during which thousands of people were killed both on the Armenian side and on the Azerbaijani one[387]. Even if the events of these years are very interesting to analyse[388], I want to concentrate more on the Soviet-era that, as I have already underlined, is at the basis of the current events. The key decision to take into consideration is the one of the 5 July 1921 through which the Caucasian Bureau decided to incorporate Nagorno-Karabakh into the Azerbaijan Soviet Socialist Republic (Azerbaijan SSR), a rule final and binding that was reaffirmed under the Soviet rule and Constitution in the following years [389].

The territory of Nagorno-Karabakh became the Autonomous Oblast (region) of Nagorno-Karabakh (NKOA) on 7 July 1923, maintaining a certain degree of autonomy within the

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[382] *V. Supra*, to note 376, p. 20.
[383] F. SMOLNIK – U. HALBACH, *The Nagorno-Karabakh Conflict in Light of the Crisis over Ukraine*, in S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 61.
[384] P. KOLSTØ - H. BLAKKISRUD, *De facto states and democracy: The case of Nagorno-Karabakh*, Communist and Post-Communist Studies 45, Elsevier Ltd, 2012, p. 141.
[385] D. Ó BEACHÁIN, *Electoral Politics in the De Facto States of the South Caucasus*, in D. Ó BEACHÁIN - G. COMAI - G. TOAL - J. O'LOUGHLIN, *Politics within de Facto States*, Caucasus Analytical Digest No. 94, 28 April 2017, p. 6.
[386] N. RONZITTI, *Il Conflitto del Nagorno-Karabakh , Analisi e Prospettive di Soluzione Secondo il Diritto*, G. Giappichelli Editore, 2014, p. 2. The SC Resolutions to which it will be made reference are: 822 (1993), 853 (1993), 874 (1993), 884 (1993).
[387] H. KRÜGER, *Nagorno-Karabakh*, in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law*, Oxford University Press, 2014, p. 215.
[388] See more in H. KRUGER, *The Nagorno-Karabakh Conflict, a Legal Analysis*, Springer-Verlag Berlin Heidelberg, 2010.
[389] *V. Supra*, to note 388, p. 16.

Azerbaijani territory[390]. In this context it is necessary to underline the fact that in 1923 the population of Nagorno-Karabakh was mainly composed by the Armenian community and the decision to divide the Armenian territory from this enclave seems to be the result of the often applied policy *divide et impera (divide and rule),* typical of the Russian colonial practice, that seemed to be a punishment for the Armenian anti-communist resistance of those years[391]. This produced a large discontent among the Armenian population of Nagorno-Karabakh that complained this isolation from the Armenian Soviet Socialist Republic (Armenian SSR) and the subsequent restriction from a linguistic, cultural, and economic point of view[392]. This caused also a dramatic fell in the Armenian population of the region that passed from 94.4% in 1923 to 75.9% in 1979[393].

Nevertheless, although these first initial protests, the political will of the region did not expand until the beginning of the *Perestroika*, a period of "reconstruction" put in place in the last years of the USSR under Gorbachev, when the NKOA raised new claims which aimed at a reunification with the Armenian SSR[394]. The first demonstration in this sense occurred in 1988 when "on 20 February the Soviet of the NKAO made a request to the Supreme Soviets of the Armenian SSR, the Azerbaijan SSR and the USSR that the NKAO be allowed to secede from Azerbaijan and join Armenia"[395]. This request was rejected, but on 1 December 1989 "the Supreme Soviet of the Armenian SSR and the Nagorno-Karabakh Regional Council adopted a Joint Resolution on the reunification of Nagorno Karabakh with Armenia"[396].

Clashes escalated between the Armenians and Azeris and therefore USSR placed Nagorno-Karabakh under a state of emergency[397]. However, in 1991 things changed when on 30 August Azerbaijan declared its independence from the Soviet Union and few days later, on 2 September, also the NKOA affirmed its separation from Azerbaijan and the establishment of the new "Republic of Nagorno-Karabakh" (NKR)[398]. This direction was reaffirmed by a referendum (of

[390] *V. Supra*, to note 386.
[391] V. BAAR – B. BAAROVÁ, *De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea*, Studia z Geografii Politycznej i Historycznej tom 6, 2017, p. 271.
[392] *V. Supra*, to note 383.
[393] *V. Supra*, to note 388, p. 17. According to the USSR census of 1989, the NKAO had a population of 189,000, consisting of 77% ethnic Armenians and 22% ethnic Azeris, with Russian and Kurdish minorities (ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015, par. 13)
[394] D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 43.
[395] ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015, par. 14.
[396] *V. Supra*, to note 395, par. 15.
[397] *V. Supra*, to note 395, par. 15.
[398] *V. Supra*, to note 395, par. 17.

dubious legality) held on 10 December 1991 during which almost the entire Armenian population voted in favour of independence[399].

Starting from early 1992 "*the conflict gradually escalated into a full-scale war"*[400]. In this context I will not concentrate on the mere war events occurred between the beginning of the conflict and the signature of the cease-fire on 5 May 1994[401], but I want to focus on the direct consequences of the conflict. It has been accessed that in the years of conflicts between 22,000 and 25,000 have been killed on both sides and more than a million people have resulted internally displaced or refugees (more than 700,000 Azerbaijanis and 400,000 Armenians had to flee their homes)[402].

As it can be observed, the numbers are higher on the Azerbaijani side because one of the main results of the war was the fact that Armenians took control not only over Nagorno-Karabakh, but also on a 20% of the Azerbaijani territory outside the former NKOA: this included the strategically vital Lachin Corridor, a strip of land that connects Armenia with Nagorno-Karabakh territory, as well as other important districts of the Azerbaijani territory (Kelbajar, Jebrayil, Gubadly, Zangilan, Fizuli and Agdam)[403]. This non-NKOA territories, referred to as "the liberated territories" by the Karabakh authorities and as "occupied territories" in diplomatic circles, compose two-third of the territory of Nagorno-Karabakh and are of vital importance also for the last developments in the region: if they had always been seen as a "bargaining chip" that could be used in change of recognition, with the adoption of the new Constitution of the Republic of Nagorno Karabakh in 2006[404] they have been officially incorporated into the remaining Karabakhian administrative entities[405].

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[399] *V. Supra*, to note 395, par. 17. See the translation of the official documents about the declaration fo independence of the Nagorno-Karabakh Republic at:
http://www.nkrusa.org/nk_conflict/declaration_independence.shtml

[400] *V. Supra*, to note 395, par. 18.

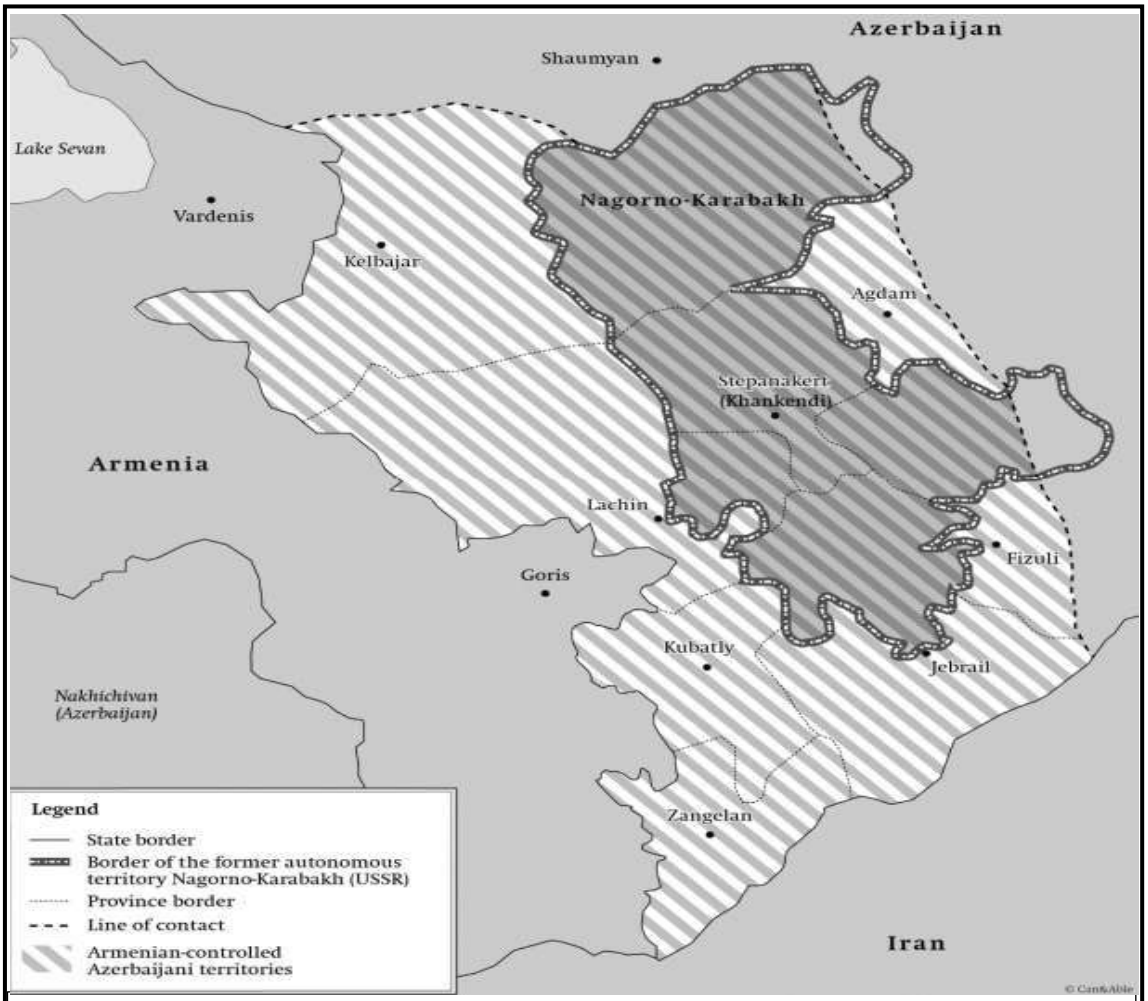
[401] *V. Supra*, to note 395, par. 24. The cease-fire agreement (the "Bishkek Protocol") was signed between Armenia, Azerbaijan and the NKR with the Russian mediation. See more at:
https://peacemaker.un.org/armeniaazerbaijan-bishkekprotocol94

[402] F. SMOLNIK – U. HALBACH, *The Nagorno-Karabakh Conflict in Light of the Crisis over Ukraine*, in S. FISHER, *Not Frozen!,* SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 62; ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015, par. 25. See more in: Human Rights Watch/Helsinki, Report, *Seven Years of Conflict in Nagorno-Karabakh*, 8 December 1994, p. ix; International Crisis Group (ICG), *Nagorno-Karabakh: Risking War,* Europe Report 187, Brussels, 2007, p. 1.

[403] P. KOLSTØ – H. BLAKKISRUD, *Living with Non-recognition: State- and Nation-building in South Caucasian Quasi-states,* Europe-Asia Studies, Vol. 60, No. 3, May 2008, p. 490.

[404] Translation of the text of the NKR Constitution, 10 December 2006, available at:
http://www.nankr.am/en/1839

[405] H. BLAKKISRUD – P. KOLSTØ, *Dynamics of de facto statehood: the South Caucasian de facto states between secession and sovereignty*, Southeast European and Black Sea Studies, 12:2, 2012, p. 283.



MAP 2 - The conflict over Nagorno-Karabakh

Taken from: S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 62.

During the last almost 30 years Nagorno-Karabakh has remained unrecognized by the whole international community, included Armenia (with the exception of South Ossetia, Abkhazia and other unrecognized entities such as the Basque Country)[406], but the conflicts in the region have never ended definitely. Recurring breaches of the ceasefire have occurred and have caused several deaths over the years, but all the proposals for a peaceful solution have failed[407]. Clashes erupted

[406] G. SHINKARETSKAIA, *A Requirement of Conformity with International Law in Cases of State Succession*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, p. 122.
[407] *V. Supra*, to note 395, par. 28.

not only in the so-called "line of contact" between Azerbaijan and Nagorno-Karabakh, but also directly between Armenia and Azerbaijan[408].

The best example to express the failure of the negotiations is represented by the Minsk Group: in 1992 the CSCE (now OSCE) had decided to settle a Peace Conference for the conflict that never took place; instead, it was established the Minsk Group, composed by 12 countries with the task to find a diplomatic resolution for the conflict[409]. Also the UN Security Council involvement became evident with the four resolutions of 1993 in which it reaffirmed the "sovereignty and territorial integrity of the Azerbaijan Republic" and called for the withdrawal of the foreign forces from the Azerbaijani territory[410].

All these attempts of negotiations failed and in 2007 the three Co-Chairs of the Minsk Group, composed by France, Russia and United States proposed to Armenia and Azerbaijan the so-called "Madrid Principles" or "Basic Principles" for a settlement of the conflict, whose updated version was presented in the 2009 Statement of L'Aquila with the following principles:

> "*1. Return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; 2. An interim statusforNagorno-Karabakhprovidingguaranteesforsecurityandself-governance; 3. A corridor linking Armenia to Nagorno-Karabakh; 4. Future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; 5. The right of all internally displaced persons and refugees to return to their former places of residence; and 6. International security guarantees that would include a peacekeeping operation"*[411].

Nevertheless, all these attempts were unsuccessful and Armenia is still claiming its rights to self-determination, while Azerbaijan reaffirms its right to territorial integrity: this dichotomy of intents is at the basis of the conflict and has been reopened after the events of 2014 in Crimea when Yerevan voted in the UN General Assembly against the Resolution declaring the referendum of Crimea invalid in order to strengthen the principle of self-determination also in Nagorno-Karabakh; while Baku did not take Russia's side and voted in favour of the Resolution in order to bring attention also on the violation of its own territorial integrity, supporting therefore the

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[408] F. SMOLNIK – U. HALBACH, *The Nagorno-Karabakh Conflict in Light of the Crisis over Ukraine*, in S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 64

[409] *V. Supra*, to note 408, p. 64. The countries involved were: Russia, the United States, Belarus, Finland, France, Germany, Italy, Sweden, Turkey, and Armenia and Azerbaijan as permanent members, along with representatives of the OSCE troika (the previous, current and next OSCE chairs).

[410] See UN SC Resolution 822 (1993) of 30 April 1993, S/RES/822; UN SC Resolution 853 (1993) of 23 July 1993, S/RES/853; UN SC Resolution 874 (1993) of 14 October 1993, S/RES/874; UN SC Resolution 884 (1993) of 12 November 1993, S/RES/884.

[411] *Statement by the OSCE Minsk Group Co-Chair countries*, Organization for Security and Cooperation in Europe (OSCE), 10 July 2009. Available at: *https://www.osce.org/mg/51152*

position and the sovereignty of Ukraine[412]. This leads us directly to the violent clashes of 2014, during which were registered 72 deaths, and to the ones of 2016 when between the 1 and the 5 of April it was consumed the "Four-Day War" during which more than 90 deaths and several missing are reported on both sides[413].

Even if the claims about territorial integrity and self-determination are the same, the ethnic political and geopolitical scenarios have changed in the two decades and a half passed between the first conflict and the more recent clashes. Nowadays Nagorno-Karabakh is composed almost completely by Armenia population[414], but the most striking difference concerns the change in the balance of power between the two countries: if the war at the beginning of the 90s was fundamentally won by Armenia, the more recent hostilities have been in favour of Azerbaijan. This is due primarily to the fact that while Azerbaijan was very fragile at the end of USSR, it has now strengthened its position (and its defence budget) thanks to its investments in the Oil&Gas industry becoming one of the main suppliers of hydrocarbons for several western countries, while Armenia on the contrary has lost strategic power and independence[415]. Moreover, both the Prime Minister of Armenia, Nikol Pashninyan, and the President of Azerbaijan, Ilham Aliyev, have undertook a policy that has led to the departure of the two countries not only at institutional level, but also at level of civil society[416]. This has resulted in the clashes occurred between July and November 2020, maybe the most violent and enduring since the 90s, clear evidence of the fact that this conflict is not frozen at all. Also with reference to this step of the conflict I do not want to focus on the war events, but on the results.

The final number of victims is not known already with precision, but there could have been thousands of deaths and more than 100,000 displaced persons; nevertheless, one thing to underline is the realization of an Agreement between Azerbaijan and Armenia on 10 November 2020, thanks to the mediation of Russian Federation. In this agreement are listed some important points (very similar to the ones proposed by the Minsk Group, but hopefully more successful), such as a cease-fire between the parties, the return of the territories outside the NKOA to Azerbaijan (except for the Lachin Corridor), the displacement of Russian peacekeeping forces parallel to the withdrawal of the Armenian forces, the return of the internally displaces people and refugees to

[412] *V. Supra*, to note 408, p. 65.
[413] *V. Supra*, to note 408, pp. 65-66.
[414] *V. Supra*, to note 395, par. 27.
[415] *V. Supra*, to note 408, p. 66, 73; *V. Supra*, to note 395, p. 289.
[416] See more about the latest developments in the region in the online conference held on 13 November 2020 by Osservatorio Balcani Caucaso Transeuropa, *Nagorno-Karabakh: cosa sta succedendo? (Nagorno-Karabakh: what is happening?)*, speeches of G. Comai, Researcher of OBC Transeuropa and M. Raffaelli, President of Amref Italia and President of the Peace Conference for Nagorno-Karabakh in 1992-1993; online conference held on 30 September 2020 by ISPI – Istituto per gli Studi di Politica Internazioanle, *Nagorno-Karabakh: sarà (nuovamente) Guerra*?, speeches of G. Comai, Researcher of OBC Transeuropa and A. Ferrari, Head of Osservatorio Russia, Caucaso e Asia Centrale in Ispi and professor at Ca' Foscari University of Venice.

their homes, the creation of a Corridor between Azerbaijan and its landlocked enclave of Nakhichevan and the return of corpses to the families[417]. This has been a huge event at international level that has reaffirmed the new balance of power in favour of Azerbaijan and that allows us to show some conclusions.

First of all, this conflict has become a pawn of a larger game disputed between Turkey and Russian Federation which have taken a part to the war at diplomatic and military level, while EU has been cut out of the game even this time trying to maintain a balance between two important members of the Eastern Partnership[418]. Turkey is a strong ally of Azerbaijan since they are both Muslim countries, they are part along with Kazakhstan, Kyrgyzstan and Uzbekistan of the *Cooperation Council of the Turkic-Speaking States (CCTSS)*[419], they have established in 2010 a military alliance based on the Agreement on Strategic Partnership and Mutual Support[420] and they have strong economic and energetic ties that has led Turkey, already in 1993, to operate a blockade together with Azerbaijan against Armenia and the separatist territory[421]. This behaviour has been repeated also in the most recent conflict when Turkey, aware also of the ever-increasing power of the hydrocarbons-rich Azerbaijan, has given its full support to its ally[422].

On the other side, while Turkey represents the historical enemy of Armenia[423], Russia has always represented the protector of the state. Armenia is part of the Collective Security Treaty Organization (CSTO), an intergovernmental security organization led by Russian Federation whose main objective is to strengthen *"peace, international and regional security and stability, protection of independence on a collective basis, territorial integrity and sovereignty of the Member States"*[424] and that represents a great guarantee for the security of Armenia. Moreover,

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[417] See more at: *https://www.bbc.com/news/world-europe-54882564*; *https://oc-media.org/armenia-and-azerbaijan-sign-peace-deal-in-nagorno-karabakh/; https://www.theguardian.com/world/2020/nov/10/nagorno-karabakh-armenia-pm-signs-deal-to-end-war-with-azerbaijan-and-russia* See also the official text of the Agreement in Russian Language at: *http://kremlin.ru/events/president/news/64384*

[418] *V. Supra*, to note 416. See more about Eastern Partnership projects in Azerbaijan and Armenia at: *https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/azerbaijan_en* and at *https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/armenia_en*

[419] V. BAAR – B. BAAROVÁ, *De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea*, Studia z Geografii Politycznej i Historycznej tom 6, 2017, p. 273. See more about the Council at: *https://mfa.gov.az/en/content/176/cooperation-council-of-turkic-speaking-states-cctss*

[420] *V. Supra*, to note 408, p. 76.

[421] *V. Supra*, to note 416.

[422] See more about Turkey's role at: *https://eurasianet.org/turkey-takes-assertive-role-in-caucasus-conflict* and at *https://www.balcanicaucaso.org/aree/Nagorno-Karabakh/Nagorno-Karabakh-la-Turchia-sostiene-l-Azerbaijan-205386*

[423] Turkey has perpetrated a "genocide" against Armenians in 1915-16 that have killed more than a million of people, which is still denied by the Turkish side and that has been officially recognized only by a little part of the international community.

[424] Charter of the Collective Security Treaty Organization, 7 October 2002, art. 3. The CSTO is composed by Russian Federation, Armenia, Belarus, Kazakhstan, Kyrgyzstan and Tajikistan. See the full text of the charter in English at: *https://en.odkb-*

Armenia, along with Belarus and Kazakhstan, is one of the founding members of the Eurasian Economic Union (EEU or EAEU) that is of fundamental importance for the economic re-boost of Armenia which finds itself in political and economic stagnation since a lot of years[425]. Even if in the last conflict Russia has played a more *super partes* role maybe due to the new energetical influence of Azerbaijan[426], it remains for sure an essential resource for Armenia which is, in its turn, an unavoidable resource for Nagorno-Karabakh, representing its "patron state".

The second concluding remark concerns therefore the actual independence of Nagorno-Karabakh in order to understand to which extent it can be considered a state. This is very difficult to assert because even if the Nagorno-Karabakh authorities have done a strong work of nation-building thanks to which they have their own elected President[427] and a Constitution[428], they do not have their own currency (they use the Armenian Dram), they cannot issue passports valid at international level (they usually turn to the ones of Armenia)[429] but, especially from an economic point of view, they depend from external sources. The budget of Nagorno-Karabakh is financed for more than 50% from Armenia and also the "Armenian diaspora" plays a fundamental role, especially for the construction (and re-construction after the conflicts) of roads, social housings, schools and health facilities[430]. This shows the difficulty to imagine a Nagorno-Karabakh completely independent from Armenia and also the ECtHR, as it will be shown below, has underlined this deep interconnection in a paragraph of the case *Chiragov and Others v. Armenia* affirming that *"... the two entities are highly integrated in virtually all important matters ... the "NKR" and its administration survive by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-*

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csto.org/documents/documents/ustav_organizatsii_dogovora_o_kollektivnoy_bezopasnosti_/.Text in Russian available at: *http://www.odkb.gov.ru/start/index_aengl.htm*

[425] *V. Supra*, to note 408, p. 70.

[426] *V. Supra*, to note 416; to note 408, pp. 73-75.

[427] From 1994 have succeeded four Presidents: Robert Kocharyan (1994-1997); Arkadii Ghukasyan (1997-2002); Bako Sahakyan (2007-2020); Arayik Harutyunyan (2020 – in power).

[428] Translation of the text of the NKR Constitution, 20 February 2017, available at: *http://president.nkr.am/media/documents/constitution/Constitution-eng2017.pdf*

[429] P. KOLSTØ – H. BLAKKISRUD, *Living with Non-recognition: State- and Nation-building in South Caucasian Quasi-states,* Europe-Asia Studies, Vol. 60, No. 3, May 2008, p. 501; H. BLAKKISRUD – P. KOLSTØ, *Dynamics of de facto statehood: the South Caucasian de facto states between secession and sovereignty*, Southeast European and Black Sea Studies, 12:2, 2012, p. 291.

[430] G. COMAI, *The External Relations of De Facto States in the South Caucasus*, in D. Ó BEACHÁIN - G. COMAI - G. TOAL - J. O'LOUGHLIN, *Politics within de Facto States*, Caucasus Analytical Digest No. 94, 28 April 2017, p. 8; N. CASPERSEN, *Playing the Recognition Game: External Actors and de Facto States*, The International Spectator, 44:4, 2009, pp. 53-54. The Armenians have one of the largest diasporas in the world: in early 90s the "external diaspora was estimated to count 1,5-2,5 million people and the "internal diaspora" (within the post-Soviet territory) an additional 1,5-2 million people. Some Armenian diaspora organizations, as well as individual Armeniand are wealthy and willing to provide support to their homeland (P. KOLSTØ - H. BLAKKISRUD, *De facto states and democracy: The case of Nagorno-Karabakh*, Communist and Post-Communist Studies 45, Elsevier Ltd, 2012, p. 144).

Karabakh and the surrounding territories…" in order to show that Armenia had jurisdiction even on the matter of the case in question[431].

From a more legal point of view, it can be concluded that even if under continuous evolution, Nagorno-Karabakh remains an unrecognized *de facto* entity that cannot be considered as "an entity that has already gained its owned statehood"[432]. It has been also demonstrated that it does not have the right to external self-determination because its population is an ethnic minority, and this principle can be applied only to "people[433] (but even if it had this right it could be valid only for the territory of the previous NKOA). Under international law Nagorno-Karabakh remains therefore part of the territory of Azerbaijan for which is valid the principle of territorial integrity[434].

4.3 South Ossetia and Abkhazia

The next section will focus on two case studies that due to their very similar characteristics and history are often analysed together, namely South Ossetia and Abkhazia. These two entities are little portions of territory, respectively of 3,900 and 8,500 square kilometers, that are *de jure* located within the borders of Georgia, but that are part of the broader category of the contested territories of the post-Soviet era[435]. Also in this case the terminology is very important in order to conduct an objective analysis of the matter: I will use the neutral terms South Ossetia and Abkhazia, but they could be referred to respectively with the terms Republic of South Ossetia, State of Alania, SOA and Republic of Abkhazia, RAB[436]. Being the analysis very entangled, I will try to follow the chronological order of the events in both the entities simultaneously in order to show how the results of these two conflicts have produced similar results.

South Ossetia has Tskhinvali as capital and it is situated between Georgia and its Russian prosecution, North Ossetia, with whom it formed the Mediaeval Reign of Alania; while Abkhazia, with capital Sukhumi, overlooks the Black Sea and shares its borders with Russia and Georgia.

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[431] ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015, par. 186.
[432] H. KRÜGER, *Nagorno-Karabakh*, in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law*, Oxford University Press, 2014, p. 230.
[433] *V. Supra*, to note 432, p. 222. See more in H. KRUGER, *The Nagorno-Karabakh Conflict, a Legal Analysis*, Springer-Verlag Berlin Heidelberg, 2010; N. RONZITTI, *Il Conflitto del Nagorno-Karabakh, Analisi e Prospettive di Soluzione Secondo il Diritto*, G. Giappichelli Editore, 2014.
[434] *V. Supra*, to note 433.
[435] D. RICHTER, *Illegal States?*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law*, Scholar Publishing House Ltd., Warsaw, 2019, pp. 46-47.
[436] *V. Supra*, to note 419, p. 271.

Both incorporated under the Soviet rule at the beginning of the XX century, they owned the status of Autonomous Oblast (South Ossetia, since 1922) and Autonomous Soviet Socialist Republic (Abkhazia, since 1931)[437]. As noted above they did not had the right to secede from the central authority, but after 70 years of coexistence under the Soviet rule they had developed a strong ethnical identity that reawakened during the USSR sunset, when they both claimed independence.

As a matter of fact, the first turmoil in South Ossetia began already in 1989 when in November the *Oblast* unilaterally declared its autonomy in order to reunite with North Ossetia[438]. In September 1990 they adopted a declaration on sovereignty and on republican status and in December they organized their own parliamentary elections[439]. This produced a strong reaction in the Georgian side that in December 1990 abolished the Georgian autonomy and blockade the territory[440]. In early January 1991 open clashes began in the region between the parties and when in April 1991 Georgia declared its independence from USSR, also South Ossetia took courage and in January 1992 held a referendum in which the majority of people voted for the secession from Georgia and incorporation with Russia[441].

Finally, on 29 May 1992, the South Ossetian Parliament adopted a declaration of independence, but at that time no one recognized this entity, included Russian Federation[442]. The conflict between South Ossetia and Georgia stopped on 24 June 1992 when they adopted the Agreement on Principles of Settlement of the Georgian-Ossetian Conflict, the so-called Sochi Agreement[443]. This Agreement provided for the withdraw of the armed units and for the formation of a Joint Control Commission (JCC) for the control of the ceasefire formed by representatives of Georgia, South Ossetia, North Ossetia and Russia[444], to which took part also representatives from CSCE after the implementation of the Agreement in 1994 with the adoption of an Agreement on Further Development of Georgian-Ossetian Peaceful Settlement Process and Joint Control Commission, the so-called Georgian-Ossetian Agreement[445]. The Sochi Agreement moreover provided for the establishment of a Joint Peacekeeping Force (JPKF) under the Russian command and a plan for

[437] *V. Supra*, to note 435, p. 47.
[438] P. KOLSTØ – H. BLAKKISRUD, *Living with Non-recognition: State- and Nation-building in South Caucasian Quasi-states*, Europe-Asia Studies, Vol. 60, No. 3, May 2008, p. 488.
[439] *V. Supra*, to note 438.
[440] T. D. GRANT, *Frozen Conflicts and International Law*, Cornell International Law Journal Vol. 50, 2017, p. 383.
[441] *V. Supra*, to note 440.
[442] *V. Supra*, to note 440.
[443] Agreement on Principles of Settlement of the Georgian-Ossetian Conflict, Sochi, 24 June 1992. Available in English at: *https://peacemaker.un.org/sites/peacemaker.un.org/files/GE%20RU_920624_AgreemenOnPrinciplesOfSettlementGeorgianOssetianConflict.pdf*
[444] *V. Supra*, to note 443.
[445] Agreement on Further Development of Georgian-Ossetian Peaceful Settlement Process and Joint Control Commission, 31 October 1994. Available in English at: *https://peacemaker.un.org/sites/peacemaker.un.org/files/GE_941031_AgreementFurtherDevelopment.pdf*

the reconstruction of South Ossetian economy that had been damaged by the long blockade (Economic Reconstruction Programme - ERP)[446].

Also in Abkhazia disorders began in the *perestroika* era. While South Ossetian Soviet experience had been marked by interactions and intermarriages, the one of Abkhaz had been characterized by discriminatory policy under Stalin and demographic pressures that contributed to the exacerbation of the nationalistic feeling at the end of USSR[447]. On 24 and 25 August 1990 the Abkhazian Supreme Soviet declared its independence from Georgia and adopted the Declaration on State Sovereignty of Abkhazia and the Resolution on Legal Guarantees of State Sovereignty Protection, declaring the merger with Georgia in 1931 as "void and illegal"[448]. This of course produced a reaction in the Georgian side which, in the meanwhile was also affirming its own independence from USSR. When, in February 1992, the Georgian authorities restored the Georgian Democratic Republic and the pre-Soviet Constitution of 1921, the minority authorities perceived this as an infringement of their autonomous status[449] and in response, on 23 July 1992, Abkhaz authorities declared its own independence[450]. Georgia troops were displaced on Abkhaz territory in August 1992 and took control of the eastern and western part of the territory, while Abkhaz took control of the central part[451].

A first cease-fire Agreement, the so-called was signed on 3 September 1992 between Georgia, Russia, the Abkhaz Government and the leaders of the North Caucasus Republics of Russia. This agreement affirmed the territorial integrity of Georgia and called for the withdrawal of the forces, for the freedom of movement and for actions of peacebuilding and assistance by the international community[452]. Nevertheless, this agreement was soon dismissed because in 1993 started the Abkhaz counter-offensive, supported by outside assistance of Russia and of the Confederation of Mountain people of Caucasus, thanks to which they retook the capital Sukhumi [453]. A further ceasefire agreement was signed on 27 July 1993 that forbade the introduction of other forces into the area and provided for a "trilateral Georgian Abkhaz-Russian interim monitoring group" whose task was to supervise the ceasefire[454]. Moreover, it was established a Joint Commission on the

[446] S. FISHER, *The Conflict over Abkhazia and South Ossetia in Light of the Crisis of Ukraine*, in S. FISHER, *Not Frozen!*, SWP Research Paper, Berlin: Stiftung Wissenschaft und Politik German Institute for International and Security Affairs, September 2016, p. 45.
[447] *V. Supra*, to note 438, p. 486.
[448] F. MIRZAYEV, *Abkhazia*, in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law*, Oxford University Press, 2014, p. 192.
[449] *V. Supra*, to note 448.
[450] *V. Supra*, to note 438, p. 486. They adopted the Constitution of 1925 according to which Georgia and Abkhazia were equal partners under a common union superstructure.
[451] *V. Supra*, to note 440, p. 386.
[452] *V. Supra*, to note 440, pp. 386-387.
[453] *V. Supra*, to note 438, p. 486.
[454] See UN SC, *Agreement on a Ceasefire in Abkhazia and Arrangement to Monitor its Observance*, S/26250, 27 July 1993. Available in English at:

Settlement in Abkhazia composed on the representative of UN and CSCE[455]. It also followed a UN SC Resolution on 24 August 1993 that established a UN Observer Mission in Georgia (UNOMIG) who had to verify the compliance with Agreement of 1993[456]. However, clashes continued in the region and on 4 April 1994 Georgia, Russia, Abkhaz separatist, the UN and the CSCE adopted the Declaration on Measures for a Political Settlement of the Georgian–Abkhaz Conflict[457]. Finally, on 14 May 1994 the Georgia and Abkhazia adopted an Agreement on a Ceasefire and Separation of Forces that formalized the one of 4 April, established a security zone between the territories of 24 kilometres in total and provided for the deployment of CIS (Commonwealth of Independent States) peacekeeping force and military observers and included provisions that treat Russia as a "third party"[458]. The UN Resolution 937 adopted on 21 July 1994 welcomed the Agreement and affirmed that the UNOMIG had to cooperate with the CIS peacekeeping forces and to monitor on the implementation of the Agreement[459].

Both the conflicts stabilized after the ceasefires, but the signs left by the wars were evident, especially from a demographic and ethnic point of view. The last Soviet census of 1989 showed that in South Ossetia the total population was of 98,000 people, of which 66% were Ossetians and 29% Georgians (with a 2% minority of Russians), while the large majority of ethnic Ossetians lived in North Ossetia (56% of the total Ossetians population living in the Soviet Union that amounted to 600,000 people)[460]. The secession war costed about one thousand lives and a number of refugees and internally displaced persons (IDPs) between 40,000 and 100,000[461]: the total population of South Ossetia had decreased to approximately 82,000 people[462]. Also Abkhazia knew a large decrease of its population: the last Soviet census of 1989 counted only a 17,8% of Abkhaz and a large majority, 46%, of Georgians[463]. Nevertheless, during the war almost the entire

https://peacemaker.un.org/sites/peacemaker.un.org/files/GE_930727_AbkhaziaCeasefireAndArrangementsToMonitorObservance.pdf

[455] *V. Supra,* to note 454, par.4.

[456] UN SC Resolution 858 (1993) of 24 August 1993, S/RES/858.

[457] Declaration on measures for a political settlement of the Georgian/Abkhaz conflict signed on 4 April 1994, transmitted by Letter Dated 5 April 1994 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, S/1994/397, 5 April 1994. Available at: *https://peacemaker.un.org/sites/peacemaker.un.org/files/GE_940404_DeclarationOnMeasuresForPoliticalSettlementGeogianAbkhazConflict.pdf*

[458] Agreement on a Ceasefire and Separation of Forces, S/1994/583, 14 May 1994. Available in English at: *https://peacemaker.un.org/sites/peacemaker.un.org/files/GE_940514_AgreementCeasefireSeparationOfForces.pdf*

[459] UN SC Resolution 937 (1994) of 21 July 1994, S/RES/937.

[460] *V. Supra,* to note 438, p. 487.

[461] *V. Supra,* to note 446.

[462] H. BLAKKISRUD – P. KOLSTØ, *Dynamics of de facto statehood: the South Caucasian de facto states between secession and sovereignty*, Southeast European and Black Sea Studies, 12:2, 2012, p. 288.

[463] *V. Supra,* to note 462, p. 287.

Georgian population was obliged to flee from the Abkhaz territory, about 250,000 people, of which only about 40,000 to 50,000 have come back to their homes[464].

Apart from these huge losses, the situation seemed stable in the region, at least from a legal perspective: Abkhazia and South Ossetia lacked international recognition, while Georgia had been accepted on 31 July 1992 as member of the United Nations with the borders that overlapped with the ones of the Georgian SSR and included therefore Abkhazia and South Ossetia[465]. Things were destined to change when in 2003 with the "Rose Revolution" the regime changed in Georgia and Mikheil Saakashvili took the power[466], giving the start to a new wave of Georgian nationalism and to renewed approach with the European Union. As a matter of fact, if on the one hand Georgia became member of the Eastern European Partnership (EaP) under the European Neighbourhood Policy (ENP)[467], underlying the new European interest for the area, on the other the revolutionary government of Saakashvili aimed at the reaffirmation of the Georgian territorial integrity and in 2004 decide to deprive South Ossetians of the incomes deriving from lucrative illegal trade: "Tbilisi closed down the Ergneti market, formally to stop illegal trading, in fact to quell South Ossetia resistance as this was the main source of revenue for the de facto authorities"[468].

The policy was not very successful because the only consequences were the complete economic and military dependence of Tskhinvali from Moscow and the relight of the secessionist felling of the South Ossetians that "saw in this a new act of aggression from Georgia"[469]. This resulted in the "Five-Day War" of 2008 between Georgia and South Ossetia that represents the most important watershed for the entire question related to the independence of South Ossetia and Abkhazia. This represented a climax of several months of tensions that erupted on 7 August 2008 when Georgia launched an attacked against Tskhinvali[470]. Even if it is difficult to understand "who fired first", it is clear that this event led to an internationalization of the conflict, but above all produced a huge number of losses and IDPs:

> *"At the end, the Georgian side claimed losses of 170 servicemen, 14 policemen and 228 civilians killed and 1 747 persons wounded. The Russian side claimed losses of 67*

[464] *V. Supra,* to note 446, p. 46. Georgia describes this displacement as "ethnic cleansing", while Abkhazia has always rejected it.
[465] *V. Supra*, to note 435, p. 46.
[466] *V. Supra*, to note 438, p. 489.
[467] See more about EU-Georgia relations at: *https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/countries/georgia_en*
[468] F. VIELMENI, *The OSCE and UE Actions Towards Georgian Separatists Conflicts. The Case of South Ossetia*, in Eurasiatica, Quaderni di Studi su Balcani, Anatolia, Iran, Caucaso e Asia Centrale 12, *Armenia, Caucaso e Asia Centrale, Ricerche 2019*, ed. by G. COMAI – C. FRAPPI – G. PEDRINI – E. ROVA, directed by A. FERRARI, p. 378.
[469] *V. Supra*, to note 468.
[470] C. WATERS, *South Ossetia*, in C. WALTER - A. VON UNGERN – STERNBERG – K. ABUSHOV, *Self-Determination and Secession in International Law,* Oxford University Press, 2014, p. 178.

servicemen killed and 283 wounded. The South Ossetians spoke of 365 persons killed, which probably included both servicemen and civilians. Altogether about 850 persons lost their lives, not to mention those who were wounded, who went missing, or the far more than 100 000 civilians who fled their homes. Around 35 000 still have not been able to return to their homes"[471].

A ceasefire became of fundamental importance also at this step of the conflict and it was possible thanks to the mediation of the European Union, under the French leadership[472]. In this context were established also the Independent International Fact-Finding Mission on the Conflict in Georgia (IIFFMCG) whose task was the monitoring of the conflict[473] and the diplomatic system based on the Geneva International Discussion whose main results have been the establishment of the European Monitoring Mission (EUMM) and of the Incident Prevention and Response Mechanism (IPRM), which provides for regular meetings between security forces at the respective lines of contact[474].

The most important implication of 2008 war has been the complete engagement of Russia in the conflict that, by presidential decree, on 26 August 2008 recognized South Ossetia and Abkhazia as independent states[475]. This declaration was followed by the ones of Venezuela, Nicaragua, Tuvalu and Nauru, while OSCE, EU and NATO continued to condemn this unilateral recognition because violated the territorial integrity of Georgia[476]. Of course, the actions of Russia were in violations of international law, but they tried to find justification in self-defence and in the fact that they were the guarantors of peace in the region and that had intervened only to protect South Ossetia, in response therefore to the previous military actions against the separatist zone[477]. Russia's behaviour was conducted also by the resentment it had over West's recognition of Kosovo's independence, which had been declared a "special case" by the West in the same year[478]. President Medvedev asserted that:

"Western countries rushed to recognise Kosovo's illegal declaration of independence from Serbia. We argued consistently that it would be impossible, after that, to tell the

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[471] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, Volume I, 2009, p.5.
[472] *V. Supra*, to note 470, p. 179.
[473] All the three volumes of the Reports of the Fact-Finding Mission on the Conflict in Georgia of 2909 are available at: *https://www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm*
[474] *V. Supra,* to note 446, p. 49.
[475] See Medvedev's Statement on south Ossetia and Abkhazia, New York Times, 26 August 2008, at: *https://www.nytimes.com/2008/08/27/world/europe/27medvedev.html*
[476] *V. Supra*, to note 435, p. 47. See UN SC Resolution 1808 (2008) of 15 April 2008, S/RES/1808.
[477] C. J. BORGEN, *The Language of Law and the Practice of Politics: Great Powers and the rhetoric of self-determination in the Cases of Kosovo and South Ossetia*, Chicago Journal of International Law 10, 2009, pp. 16-17.
[478] *V. Supra,* to note 448, p. 205.

Abkhazians and Ossetians (and dozens of other groups around the world) that what was good for the Kosovo Albanians was not good for them. In international relations, you cannot have one rule for some and another rule for others"[479].

Even if they are often compared, the cases of Kosovo and the ones of Abkhazia and South Ossetia are quite different because "the Kosovo conflict was a purely ethnic conflict resulting in the genocide of the Albanian ethnic civilians residing in this region, whereas the conflicts in Abkhazia and South Ossetia had a strong political nature without intentional discrimination against any groups or crimes against humanity"[480]. Nevertheless, they offer a perfect example to show how politicized is the act of recognition, as demonstrated in the previous chapter.

The events of 2014 in Crimea have represented a new watershed in the question of Abkhazia and South Ossetia and have helped delineating the current situation. Georgia is giving its full support to Ukraine, fearing that Russia could accelerate the incorporation process also of Abkhazia and South Ossetia[481], and has also deepened its relations both with NATO and European Union[482]. The European institutions from their side are adopting towards South Ossetia and Abkhazia a policy of "Non-Recognition and Engagement" as demonstrated by the call of the European Parliament of 2011 to recognize Abkhazia and South Ossetia as "occupied territories" (as defined by Tbilisi that refers to these entities as "occupied territories" and to their authorities as "puppet regimes")[483]. If on the one side "the annexation of Crimea, definitely consolidated a *new cold war* climate across the European neighbourhood"[484], on the other has consolidated the Russian presence on these territories.

The Russian recognition of these territories has contributed to turn into official the existence of Abkhazia and South Ossetia and to include into Russian official documents and financial reports the expenses for the assistance of the "patron state" toward these territories[485]. Already in 2008 Russia set its relations with both entities concluding the Agreement on Friendship, Cooperation and Mutual Assistance, granting budget assistance, security and a help for the socio-economic

[479] D. MEDVEDEV, Why I Had to Recognize Georgia's Breakway Regions, Financial Times, 26 August 2008. Available at: *https://www.ft.com/content/9c7ad792-7395-11dd-8a66-0000779fd18c*
[480] *V. Supra*, to note 448, p. 196.
[481] *V. Supra*, to note 446, p. 49.
[482] In 2014 NATO and Georgia agreed a Substantial NATO-Georgia Package including a new military training centre and NATO exercises in Georgia and from July 2016 the relations between EU and Georgia are based on EU-Georgia Association Agreement including a Deep and Comprehensive Free Trade Area (DCFTA). Moreover, Georgian citizens have benefitted from visa-free travel to the Schengen area since 28 March 2017.
[483] *V. Supra*, to note 468, p. 382.
[484] *V. Supra*, to note 468, p. 382.
[485] G. COMAI, *Il sostegno esterno ufficiale agli stati de facto nel Caucaso del sud*, in Eurasiatica, Quaderni di Studi su Balcani, Anatolia, Iran, Caucaso e Asia Centrale 12, *Armenia, Caucaso e Asia Centrale, Ricerche 2019*, ed. by G. COMAI – C. FRAPPI – G. PEDRINI – E. ROVA, directed by A. FERRARI, pp. 352, 354.

development of these areas[486]. Moreover, the majority of the people living in these territories have a Russian passport and, in this case, they are entitled to receive a Russian pension[487]. This method has significantly enhanced the economic situation of the people living in these territories, thanks also to the direct assistance of Russia to the budget of these territories: starting from 2009 the Sukhumi budget depends for 50% on Russian assistance, while the one of Tskhinvali depends on it for more than 90%[488]. As it will be demonstrated, Russian presence is so determinant in these territories that even in the cases presented in front of the ECtHR it has been difficult to understand the decree of responsibility of Russia and Georgia for the violations committed in these territories.

To conclude, Abkhazia and South Ossetia are developing since the 90s a process of state building, that however has not led to the international recognition of these entities and to their complete independence. Even if they have their own system of elections[489] and peculiar ethnic characteristics, they are strongly dependent from Russian Federation and it is difficult to imagine these two entities separate from their patron state. This is valid especially for South Ossetia because it seems to have no desire to develop one separate-nation, but rather they strive for the reunification with North Ossetia under the auspices of Russia[490]. Abkhazia, for its part, aims more at independence and it is even more entangled with the Westerns world as demonstrated by the presence of international organization and NGOs within its borders that contribute to its budged for more than 10 million USD per year[491]. Even if they acquired a certain degree of independence, these entities cannot be considered as independent states. The Russian-Georgian conflict was not the only one: it can be affirmed that also in this case, from the point of view of international law, in the conflict between the principle of territorial integrity and the one of self-determination, the former has prevailed over the latter[492].

4.4 Crimea and the Donetsk and Luhansk People's Republics

[486] *V. Supra,* to note 446, p. 48.
[487] G. COMAI, *The External Relations of the De Facto States in the South Caucasus*, in D. Ó BEACHÁIN - G. COMAI - G. TOAL - J. O'LOUGHLIN, *Politics within de Facto States*, Caucasus Analytical Digest No. 94, 28 April 2017, p. 8.
[488] *V. Supra,* to note 487 and to note 485, pp. 355-360. See more about the Russian economic assistance in: G. COMAI, *What is the Effect of Non-Recognition? The External Relations of De Facto States in the Post-Soviet Space*, Dublin City University, January 2018.
[489] See more in D. Ó BEACHÁIN, *Electoral Politics in the De Facto States of the South Caucasus*, in D. Ó BEACHÁIN - G. COMAI - G. TOAL - J. O'LOUGHLIN, *Politics within de Facto States*, Caucasus Analytical Digest No. 94, 28 April 2017, pp. 3-7
[490] P. KOLSTØ – H. BLAKKISRUD, *Living with Non-recognition: State- and Nation-building in South Caucasian Quasi-states*, Europe-Asia Studies, Vol. 60, No. 3, May 2008, p. 503.
[491] *V. Supra,* to note 487, p. 9. UN agencies (UNICEF, UNHCR, UNDP, UNFPA), the European Union, the International Red Cross, Médecins Sans Frontières, the Danish Refugee Council, World Vision, and Action Against Hunger are among those who still sponsor or directly implement projects in Abkhazia.
[492] *V. Supra,* to note 448, p. 212.

As demonstrated by the previous case studies, the events concerning the Russian-Ukrainian conflict of 2014 have represented a watershed for all the situations studied until now:

> *"…Unlike after the Russian-Georgian War in 2008, the Crimean annexation and military support of separatists in southeastern Ukraine were a lengthy process leading to an institutionalization of the conflict. Russia's Ukraine policy hinged on a long-term process of estrangement not only between Russia and Ukraine, and between Russia and the West, but also between Russia and other post-Soviet countries"*[493].

Due to its recent history, it could seem strange to find the case of Crimea with the other conflicts born during the *perestroika*. Nevertheless, the situation in Eastern Ukraine has characteristics that put it at risk of turning into a sort of "frozen conflict"[494].

Before proceeding, even in this case, it is important to specify the terms that will be used: Russia speaks of "reunification" with Crimea, while United States and Europe speak of (illegal) "annexation" of Crimea; in this chapter I will use the more neutral term "incorporation" in order to describe the events that have led Russian Federation to (re)gain control over the Crimean Peninsula situated between the Black Sea and the Sea of Azov[495].

As for the other territories, the Crimean Peninsula and Ukraine have a long history, but this analysis has as starting point 1783, the year in which the Crimean Peninsula passed from the rule of the Tatar Golden Horde, to the one of the Russian Empire [496]. When the Russian Empire collapsed, it was reorganized as an Autonomous Soviet Socialist Republic in 1921, but its Tatar population suffered a huge suppression in the Stalin period[497]. After the second World War, the Crimean Peninsula was downgraded to the degree of Autonomous Region (*Oblast*) under the Russian Soviet Federated Socialist Republic (RSFSR) and then was transferred to the Ukrainian Soviet Socialist Republic in 1954 on occasion of the 300 jubilees of the unity between Ukraine and Russia [498]. The reasons behind this "present" given to Ukraine by Khrushchev are not clear

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[493] M. MINAKOV, *Does Ukraine Still Matter?,*in ISPI, *Putin's Russia: Really Back?,* Edited by A. FERRARI, Milan, July 2016, p. 94.
[494] T. D. GRANT, *Frozen Conflicts and International Law*, Cornell International Law Journal Vol. 50, 2017, p. 363, 405.
[495] S. DE VIDO, *Di Autorità, Poteri Sovrani e Iurisdictio: l'incerta Situazione della Crimea nei Procedimenti Innanzi a Corti Internazionali, Regionali e a Tribunali Arbitrali,* Ordine Internazionale e Diritti Umani, 2020, p. 782.
[496] See more about the detailed history of Ukraine and Crimea at: *https://www.britannica.com/place/Ukraine/History*
[497] See more at: *https://www.britannica.com/place/Crimea/History*
[498] G. SHINKARETSKAIA, *A Requirement of Conformity with International Law in Cases of State Succession*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 122. In 1654 it had been signed the Pereyaslav

even today: it could seem part of a plan for the implementation of the relations between Ukraine and the Soviet power or a simple strategy to bring the Russian population of Crimea into the Ukrainian territory in support of the Soviet regime[499]. Whichever was the reason, the choice of Khrushchev is at the basis of the current conflict: when in August 1991 Ukraine declared its independence from the Soviet Union, Crimea remained a Ukrainian peninsula where ethnic Russian made up the large majority of the population[500].

In the mid-1990s Ukraine exercised direct political control over Crimea, however separatist pro-Russian groups were already organizing deteriorating the relations between the two powers[501]. Even if complications were already beginning, in 1994 Russia, Ukraine, the United States and the United Kingdom signed the Budapest Agreement through which they affirmed the respect for the Ukraine's post-Soviet borders and the transfer of the nuclear arms of Ukraine to Russia[502]; moreover, in 1997, with the Treaty of Friendship, Cooperation and Partnership, Crimea was reaffirmed as part of the Ukrainian territory[503]. In the same year, another heat question was resolved: after the collapse of the Soviet Union, Ukraine and Russia had faced the problem of how to divide the Black Sea Fleet stationed at Sevastopol and with the signature of the Black Sea Fleet Agreement was finally decided that a part of the Fleet was to be transferred to Russia, while 25,000 Russian troops could station in the Crimean territory, but were required to respect the sovereignty of Ukraine[504].

If the situation seemed stable after the Agreements of the 90s, the cultural and geopolitical internal division of Ukraine re-flourished in 2004-2005 with the Orange Revolution[505] and in 2010 during

Agreement with whom Ukraine submitted itself to the Russian Rule; see more at: *https://www.britannica.com/event/Pereyaslav-Agreement*

[499] J. KOCH, *The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia*, Boston College International and Comparative Law Review, Vol.39, 2016, p. 167.

[500] *V. Supra*, to note 499. See more about the percentages of ethnic Russians in Crimea at: *https://www.bbc.com/news/world-europe-26387353*

[501] *V. Supra*, to note 498, p. 168.

[502] See the text at: *http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_1994_1399.pdf*

[503] See the official text in Russian, Ukrainian and English at: *https://treaties.un.org/doc/Publication/UNTS/No%20Volume/52240/Part/I-52240-08000002803e6fae.pdf* See more in D.B. STEWART, *The Russian-Ukrainian Friendship Treaty and the Search for Regional Stability in Eastern Europe*, Naval Postgraduate School, Monterey, California, December 1997. Available at: *https://archive.org/details/russianukrainian00stew/mode/2up*

[504] *V. Supra*, to note 503, D. B. STEWART, pp. 50-53. According to the Agreement Russia paid Ukraine's cash-strapped government $526 million in compensation; Kyiv also agreed to lease Crimean naval facilities to the Russian portion of the fleet for $97 million annually. The leasing agreement was renewed in 2010 and expires in 2042. See more at: *https://www.dw.com/en/bound-by-treaty-russia-ukraine-and-crimea/a-17487632*

[505] The Orange Revolution consisted of a series of protests following the presidential election of 2004 when, in the dispute between the pro-Western candidate Victor Yushchenko and the pro-Russian candidate Victor Yanukovych, the latter won. A wave protests began due to the fraudulent character of the elections: the first run-off was annulled and the second one was declared "free and fair" and set forth the victory of

the presidential elections between Victor Yanukovych – supported by the Russian Federation of Putin – and Yulia Tymoshenko – supported by the Western states: "the oblasts that voted for Yanukovych were those with the highest Russian populations in the east and south of Ukraine, and those oblasts that voted for Tymoshenko were primarily comprised of native Ukrainian speakers, located in central and western Ukraine"[506]. With the victory of Yanukovych, a pro-Russian policy was adopted by the government that culminated in the abandonment of the Ukraine's project to join the NATO and, above all, in the announcement on 21 December 2013 that the country would have not move forwards with a huge association agreement between Ukraine and the European Union, that had been formulated to strengthen economic and political relations between the parties and that Yanukovych abandoned eight days before the expected signature[507]. This move, led probably by the threats of economic sanctions moved from Putin to Ukraine, led to a huge wave of protests in Kiev (the so-called *Euromaidan*, from the name of the main square of Kiev)[508]. Demonstrations escalated provoking dozens of deaths and wounded[509] until February 2014 when Yanukovych fled the country before an impeachment vote and "the interim Parliament issued a warrant against Yanukovych for the mass murder of the protesters"[510].

At the same time, pro-Russian protesters were organizing in the eastern regions of Ukraine and in Crimea. After Yanukovich fled, Pro-Russian gunmen seized the Crimean Parliament in Simferopol and a pro-Russian prime minister was installed in Crimea[511]. Moreover, unmarked military forces (turn out later to be Russian soldiers[512]) seized airports and transport infrastructures and, as it will be demonstrated, caused a huge problem for the competing sovereignty of the territory[513]. In March Russia's Parliament approved the use of force its own troops in order to protect the Russian interest (and citizens) in Crimea[514]. This led directly to the "Declaration of Independence of Crimea" on 11 March 2014[515] that paved the way for the subsequent referendum of 16 March 2014 through which 97% of the Crimean population supported the integration of Crimea with Russia[516]. On 18 March 2014 Putin signed a bill to annex the Crimean Region and

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Yushchenko. See more about the Orange revolution at: *https://www.britannica.com/place/Ukraine/The-Orange-Revolution-and-the-Yushchenko-presidency#ref275923*

[506] *V. Supra*, to note 499, p. 168.

[507] *V. Supra*, to note 499, p. 169.

[508] *V. Supra*, to note 499, p. 169-170.

[509] See more about the escalation of the conflict and the timeline of the events at: *https://www.bbc.com/news/world-middle-east-26248275*

[510] *V. Supra*, to note 499, p. 170.

[511] *V. Supra*, to note 499, p. 170 and to note 494.

[512] See the admission of Putin at: *https://www.pbs.org/newshour/world/putin-admits-unmarked-soldiers-ukraine-russian-optimistic-geneva-talks*

[513] M. S. BOBICK, *Separatism redux, Crimea, Transnistria, and Eurasia's de facto States*, Anthropology Today, Vol.30 No. 3, June 2014, p. 6.

[514] *V. Supra*, to note 511.

[515] See more at: *https://www.rt.com/news/crimea-parliament-independence-ukraine-086/*

[516] *V. Supra*, to note 513. Usually the referendum format proposes a choice between "yes" and "no", while the text of the Crimean Referendum proposed also two options between which the voter had to choose and

Sevastopol as new units of the Russian Federation and ratified this decision on 21 March 2014 [517].

The Russian takeover of Crimea had several consequences both at regional and international level. First of all, pro-Russian demonstrations raised also in the *Oblasts* of Donetsk and Lugansk. These territories in the famous Donbass Region were fighting for their independence in order to reaffirm the tsarist project of *Novorossiya,* which included the entire Odessa Region[518]. The separatist movements were aided by Russia and, after a severe fighting that provoked several deaths, they proclaimed their independence in May 2014 as the "Donetsk People's Republic" (DPR) and "Lugansk People's republic" (LPR). Nevertheless, they have been recognized only by the other "unrecognized" territories of the post-Soviet territory and could not survive without the economic and social assistance of the Russian Federation[519].

Moreover, even in the case of Crimea and Eastern Ukraine the mediation process was long and unsuccessful for the most. With the Minsk I agreement of 5 September 2014 it was stipulated an immediate bilateral cessation for the use of weapons, a monitoring commission of OSCE and "interim" measures to be further implemented[520]. Nevertheless, this first agreement was soon violated and in February 2015 a Trilateral Contact Group formed by Ukraine, Russia and the OSCE met at Minsk and produced an implementation of the first Agreement (Minsk II)[521]. Despite these agreements the conflict has not found peace yet and in one of the last UN Reports on the human rights situations in Ukraine it has been estimated:

> *"The total number of conflict-related casualties in Ukraine (from 14 April 2014 to 15 February 2020) to be 41,000–44,000: 13,000-13,200 killed (at least 3,350 civilians, an estimated 4,100 Ukrainian forces and an estimated 5,650 members of armed groups);*

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then answer "yes" or "no": *1. "Are you for the reunification of the Crimea with Russia as a subject of the Russian Federation?"; 2. "Are you for the restoration of the Constitution of the Republic of Crimea of 1992 and for the status of Crimea as part of Ukraine?".*
See the original text of the referendum at: *https://www.bbc.com/news/world-europe-26514797*

[517] *V. Supra,* to note 494, p. 406. On 21 March 2014 Vladimir Putin signed two *ad hoc* federal laws*: Federal Constitutional Law On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol; Federal Law On Ratifying the Agreement between the Russian Federation and the Republic of Crimea on Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation New Constituent Entities.*
See more at: *http://en.kremlin.ru/events/president/news/20625*

[518] V. BAAR – B. BAAROVÁ, *De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea,* Studia z Geografii Politycznej i Historycznej tom 6, 2017, p. 272.

[519] *V. Supra,* to note 498, p. 121-122.

[520] *V. Supra,* to note 494, p. 407.

[521] *V. Supra,* to note 494, p. 408.

and 29,000-31,000 injured (approximately 7,000–9,000 civilians, 9,500–10,500 Ukrainian forces and 12,500-13,500 members of armed groups)"[522].

The tragic human rights situation of these areas will clearly emerge through the analysis of the judgements of the ECtHR in the last part, but here one last point must be stressed: the role of the international community with reference to the (non-)recognition of Crimea. Unlike the DPR and LPR that remain unrecognized, the incorporation of Crimea has received little recognition: within the United nations only North Korea, Syria, Cuba, Nicaragua and Venezuela have recognized it; while Belarus and Armenia have adopted a neutral position (they neither condemn the incorporation, neither recognize it)[523]. In general, the international community has adopted a non-recognition policy toward the referendum of the 16 March and the Russian incorporation of Crimea, considered contrary to the territorial integrity of Ukraine and obtained though the threot or use of force. The illegality of the Referendum in question, the violation of the Ukrainian Constitution and of its territorial integrity was underlined by the G-7 Leaders in a statement of 12 March 2014[524] and in the joint statement issued by the President of European Commission, José Barroso, and the President of the European Council, Herman Van Rompuy, on 16 March 2014[525]. At United Nations level, a Draft Resolution was presented to the Security Council on 15 March by about forty (predominantly Western) countries[526] calling for the non-recognition of the status of Crimea on the basis of the referendum, considered invalid, and reaffirming the territorial integrity and sovereignty of Ukraine[527]. This draft resolution failed to be adopted because of the veto imposed by Russia, which proceeded with the incorporation of Crimea in the following days. Nevertheless, the UN General assembly adopted on 27 March 2014 the Resolution 68/262[528], that was proposed by Poland, Lithuania, Germany, Canada, Ukraine and Costa Rica and was approved with 100 votes in favour, 11 against and 58 abstentions[529]. This resolution reiterated the points of

[522] OHCHR, *Report on the Human Rights Situation in Ukraine, 16 November 2019 to 15 February 2020*, March 2020, p. 8. Available at: *https://www.ohchr.org/Documents/Countries/UA/29thReportUkraine_EN.pdf*

[523] *V. Supra*, to note 518, p. 273.

[524] *Statement of G-7 Leaders on Ukraine*, Brussels, 12 March 2014. Available at: *https://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141460.pdf*

[525] *Joint statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commission, José Manuel Barroso*, Brussels, 16 March 2014. Available at: *https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141628.pdf*

[526] Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America

[527] UN SC Draft Resolution, 15 March 2014, UN Doc. S/2014/189. Available at: *https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_189.pdf*

[528] UN GA Resolution 68/262, *Territorial Integrity of Ukraine*, 27 March 2014. Available at: https://undocs.org/A/RES/68/262

[529] E. MILANO, *The Non-Recognition of Russia's Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question*, QIL, Zoom out I, 2014, p. 38.

the draft resolution tabled before the UN SC and called upon "all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means"[530]. Non- recognition is not limited to the formal act of recognition, but "it also extends to all relations, of an economic, political, diplomatic, commercial nature which imply recognition of the illegal situation"[531], as confirmed by paragraph 6 of the resolution 68/262 which calls upon "all States, international organizations and specialized agencies … to refrain from any action or dealing that might be interpreted as recognizing any such altered status"[532]. States and international organization must refrain also from those acts which could lead to an "implied recognition" of Crimea[533]. One of the most measures taken in this sense have been the non-recognition of Russian passports issued in Crimea after the date of annexation[534]. As a matter of fact, the right to citizenship of the inhabitants of Crimea has been violated after the incorporation due the Russian adoption of a law[535] that automatically rendered all the inhabitants of Crimea Russian citizens, with the exception of those who wished to retain their Ukrainian citizenship and had to register themselves[536].

Non-recognition, even the implied one, has been therefore one of the two international law "techniques" adopted toward the incorporation of Crimea by the international community; the other one has been the western imposition of sanctions[537]"meant to hurt the target country's economy through restrictions or bans on the trade of certain goods and services, severance of

[530] UN GA Resolution 68/262, par. 2.
[531] *V. Supra*, to note 529, p. 51.
[532] UN GA Resolution 68/262, par. 6.
[533] *V. Supra*, to note 529, p. 52. Measures taken in this sense have been: a) ensure that Russian-badged exports from Crimea (or circumvented elsewhere) do not benefit from preferential Ukrainian trade tariffs and are prevented from entering national markets, including the EU market; b) adopt legislation preventing exports into Crimea if Russia was to impose Eurasian Customs Union regulatory requirements; c) ensure that visa application processes continue to respect Ukrainian sovereignty, by simply continuing to follow pre-annexation rules; d) refuse recognition of Russian passports issued in Crimea after the date of annexation; e) refuse recognition under international law of Russia's claims to the territorial waters and exclusive economic zone off the coast of Crimea; f) refuse to negotiate new agreements and apply existing ones with Russia including Crimea in their territorial scope of application.
[534] *V. Supra*, to note 529, p. 52 and to note 199, p. 797.
[535] According to Article 4 of Law No. 6, Federal Constitutional Law: *«From the day on which the Republic of Crimea joins the Russian Federation and new constituent territories are formed within the Russian Federation, citizens of Ukraine and stateless persons who are permanently resident on this day on the territory of the 'Crimean peninsula' shall be recognized as citizens of the Russian Federation, with the exception of persons who, within one month after this day, declare that they wish to retain the different citizenship that they and/or their children who are minors have or to continue to be stateless persons*». Quoted in S. DE VIDO, *Di Autorità, Poteri Sovrani e Iurisdictio: l'incerta Situazione della Crimea nei Procedimenti Innanzi a Corti Internazionali, Regionali e a Tribunali Arbitrali,* Ordine Internazionale e Diritti Umani, 2020, p. 797.
[536] See more in Directorate-General for External Policies - Policy Department, *The frozen conflicts of the EU's Eastern Neighbourhood and their impact on the respect of human rights*, European Parliament, 2016, p. 12.
[537] *V. Supra*, to note 529, p. 36.

financial ties, or an all-out embargo, sanctions are used when diplomacy fails, while military options appear too drastic"[538]. Starting from March 2014, and implementing them in successive waves,[539] 37 countries - including all EU countries, the United states and Japan - have imposed sanctions on Russian Federation[540]. After six years from the beginning of the conflict, the sanctions are still in function and include different types of restrictions: individual sanctions that comprise the asset freeze and a travel ban for 177 people and 48 entities alleged of having undermined with their actions Ukraine's territorial integrity, sovereignty and independence[541]; restrictions on economic relations with Crimea and Sevastopol such as an import ban on good from Crimea and Sevastopol, the ban on investment by EU companies in Crimea, the prohibition to supply tourism services and an export ban for certain goods and technologies[542]; other diplomatic measures and economic sanction targeting directly the exchanges and the economic (and diplomatic) cooperation with the Russian Federation[543]. Russia, from its side, imposed in august 2014 an embargo on certain food and agricultural products in order to provoke damage to western countries[544].

The economic impact of these sanctions, even if very interesting, will not be analysed further[545], but it can be concluded that the utilisation and implementations of the sanctions and the signature of the DCFTA Agreements with Moldova, Ukraine[546] and Georgia "have significantly changed the geo-economic situation in the European part of the post-Soviet space"[547]. Even if the case of Crimea differs from the ones previously analysed - because after its declaration of independence has been actually incorporated by Russia[548] – and from the one of Kosovo – because the Kosovar

[538] M. CROZET – J. HINZ, *Friendly Fire: the Trade Impact of the Russia sanctions and Counter-Sanctions,* Economic Policy, January 2020, pp. 99-100.
[539] See the *Timeline – Eu restrictive measures in response to the Crisis in Ukraine*, at *https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/history-ukraine-crisis/*
[540] *V. Supra*, to note 538, p. 100.
[541] See the complete list of persons and entities under Eu restrictive measures at: *https://eur-lex.europa.eu/eli/dec/2014/145(1)/*
[542] See more about the specific sanctions at: *https://www.consilium.europa.eu/en/policies/sanctions/ukraine-crisis/*; and at: *https://eeas.europa.eu/headquarters/headquarters-Homepage/37464/eu-non-recognition-policy-crimea-and-sevastopol-fact-sheet_en*
[543] *V. Supra*, to note 542.
[544] *V. Supra*, to note 538, p. 100. See more about the Russian import ban on Eu products at: *https://ec.europa.eu/food/safety/international_affairs/eu_russia/russian_import_ban_eu_products*
[545] See more in M. CROZET – J. HINZ, *Friendly Fire: the Trade Impact of the Russia sanctions and Counter-Sanctions,* Economic Policy, January 2020, pp. 97–146; and in ISPI, *Fact Checking: Russia e Sanzioni*, 31 January 2019, available at: *https://www.ispionline.it/it/pubblicazione/fact-checking-russia-e-sanzioni-22134*
[546] See more about the EU-Ukraine relations at*: https://eeas.europa.eu/headquarters/headquarters-homepage/1937_en*
[547] *V. Supra*, to note 518, p. 268.
[548] S. DE VIDO, *Di Autorità, Poteri Sovrani e Iurisdictio: l'incerta Situazione della Crimea nei Procedimenti Innanzi a Corti Internazionali, Regionali e a Tribunali Arbitrali*, Ordine Internazionale e Diritti Umani, 2020, p. 807.

referendum had not been retained in violation of international law[549] – the analysis of this case study will prove to be of fundamental importance for the last part of this chapter, given the high percentage of applications presented from Ukrainians in front of the ECtHR and for the five *inter-state* applications presented in front of the Court in question.

[549] *V. Supra*, to note 548, p. 807. In his address on Crimea to the Duma on March 18, 2014, Russian President Vladimir Putin described Kosovo as *"a precedent our western colleagues created with their own hands … when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities*" quoted in J. O'LOUGHLIN – V. KOLOSSOV – G. TOAL, *Inside the post-Soviet de facto states: a comparison of attitudes in Abkhazia, Nagorny Karabakh, South Ossetia, and Transnistria,* Eurasian Geography and Economics, 55:5, 2014, p. 424.

CHAPTER 3

LOCUS STANDI AND *JUS STANDI*: ACCESS TO JUSTICE IN FRONT OF INTERNATIONAL COURTS

ABSTRACT: 1. *Locus standi* and *jus standi:* opening remarks – 1.1 The broader concept of "access to justice" – 1.2 Individuals' presence in international law – 1.3 The affirmation of individuals as "subjects" of international law: bearers of legal personality and human rights - 2. The importance of individual petition under international law - 2.1 The development of individual petition under the European Convention on Human Rights – 2.2 Analysis of Articles 34 and 35 of the European Convention on Human Rights - 3. Other available mechanisms of protection of human rights: a comparison with the ECHR system – 4. Inter-state cases under Article 33 of the ECHR

1. *Locus standi* and *jus standi:* opening remarks

After these two chapters in which it has been deeply explained the area on which this dissertation focuses, it is now time to turn on the second fundamental concept at the basis of this analysis: the right to access to justice. As a matter of fact, this work does not want to be a simple analysis of the contested territories of the post-Soviet area: this dissertation aims indeed at analysing how the mechanism of access to justice works in these self-proclaimed authorities of Eastern Europe. Before getting into the heart of the matter with analysis of the jurisprudence in the last chapter, it is necessary to understand how the justice apparatus works all over the world and how individuals have gained the right to access to justice.

In particular, this chapter will turn around the concept of *locus standi*, a Latin expression that means "a place for standing", that in law is used to indicate the right or ability to bring a legal action to a court of law or to appear in a court[550], the right of a party to appear and be heard before a court[551], the capacity of a party to bring suit in court[552]. The term "standing" has been defined in many ways by writers on domestic legal procedure and is

[550] Definition of the Cambridge Dictionary. Available at: *https://dictionary.cambridge.org/it/dizionario/inglese/locus-standi*
[551] Definition of the Collins English Dictionary. Available at: *https://www.collinsdictionary.com/it/dizionario/inglese/locus-standi*
[552] Definition of the Legal Information Institute [LII], Cornell Law School. Available at: *https://www.law.cornell.edu/wex/standing*

essentially synonymous with "being a party to a proceeding"[553]. Thus, *locus standi* is difficult to define, as it has been used to refer to different factors that affect a party's right to claim relief from a civil court[554]. In the first instance, the term is used to refer to the capacity of a party to litigate[555] and it would be less confusing if this concept were referred to as "capacity to sue" rather than "locus standi"[556]. Secondly, the term is used to refer to a plaintiff's or an applicant's right to claim the relief which he or she seeks[557]. Therefore, *locus standi* is also the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case[558]; it indicates the sufficiency and directness of a litigant's interest in proceeding which warrants his or her title to prosecute the claim asserted and it should be one of the first things to establish in a litigation matter[559]. Essentially, if a particular applicant is found to have standing then he/she will be permitted to have his/her request heard (though determining that an applicant has *locus standi*, will not necessarily mean that they will be successful in their final application); on the other hand, if the applicant is not found to have standing to bring the action, the court will not hear his or her complaint[560].

In this work, the expression *locus standi in judicio* will be used to indicate who can bring a claim in front of an international court, or better, the procedural capacity of individuals as subject of international law. It is important to note that, even if they are often used as interchangeable terms, the expressions *locus standi* and *jus standi* have a slightly different meaning. The former is used in order to indicate the right of participation in the proceeding and the representation of the victims or their relatives in the procedure before a court, while the latter indicates the right of direct access of individuals before a court[561]. The difference is subtle, but it is very important in a comparative analysis to understand to what extent individuals can be parties before different international tribunals and mechanisms of protection. In the next sections it will be shown how this right has

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[553] A. DEL VECCHIO, *International Courts and Tribunals, Standing*, Max Planck Encyclopedias of International Law [MPIL], November 2010.
[554] C. LOOTS, *Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation*, 104 S. African L.J., 1987, p.131.
[555] *V. Supra*, to note 554.
[556] A. BECK, *Locus Standi in Judicio or Ubi Ius Ibi Remedium*, 100 SALJ, 1983, pp. 278-283.
[557] *V. Supra*, to note 554.
[558] Definition of USLegal.com. Available at: *https://definitions.uslegal.com/l/locus-standi/*
[559] Definition of Cliffe Dekker Hofmeyr (CDH), by Jonathan Witths and Elizabeth Sonnekus, 27 February 2019. Available at: https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-*resolution-27-february-back-to-basics-locus-standi-in-litigation.html*
[560] *The Basic Idea of Locus Standi*, Law Teacher. Available at: *https://www.lawteacher.net/free-law-essays/administrative-law/basic-idea-of-locus-standi.php*
[561] See A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford University Press, 2011; See also D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice*, University of Manitoba, 2010.

strengthen under different legal systems, especially with reference to the evolution of the right of individual petition.

1.1 The broader concept of "access to justice"

It is essential to keep in mind that the terms *locus* and *jus standi* can be encompassed in the broader macro-area of "access to justice". "The words *access to justice* are admittedly not easily defined, but they serve to focus on two basic purposes of the legal system - the system by which people may vindicate their rights and/or resolve their disputes under the general auspices of the state: first, the system must be equally accessible to all; second, it must lead to results that are individually and socially just"[562]. In its ordinary usage, the term 'access to justice' is a synonym of judicial protection[563]. Thus, "from the point of view of the individual, the term would normally refer to the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law"[564].

Even if this definition implies the concept of rule of law and the constitutional separations of powers and thus may appear a feature of the Western legal tradition[565], it is worth to mention in this sense the evolution and transformation of this concept since the appearance of the liberal, *bourgeois* society of the late eighteenth century. In this era dominated by individualistic philosophers, the theory was that "while access to justice was a "natural right," natural rights did not require affirmative state action for their protection"[566]. The state thus remained passive with respect to such problems and *justice,* like other commodities in the *laissez-faire* system, could be purchased only by those who could afford its costs[567].

The things changed with the welfare state reforms that provided individuals with new rights that required the affirmative action of the state for the enjoyment of these revolutionary individual and social rights[568]. In this context gained importance the "effective access to justice" since "the possession of rights is meaningless without mechanisms for their effective vindication"[569]. As it will be demonstrated in the next paragraphs, this is even more relevant with respect to the process

[562] B. G. GARTH – M. CAPPELLETTI, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, Buffalo Law Review, 1978, p. 182.
[563] F. FRANCIONI, *Access to Justice as a Human Right*, Oxford University Press, 2007, p. 3.
[564] *V. Supra*, to note 563.
[565] *V. Supra*, to note 563.
[566] *V. Supra*, to note 562.
[567] *V. Supra*, to note 562.
[568] *V. Supra*, to note 562, p. 184.
[569] *V. Supra*, to note 562, p. 185.

that has led to the affirmation of the right of individual petition and the acceptance of individuals as subjects of international law: without the individuals' access to international justice, human rights treaties would become "dead letters" because international law would recognize duties and rights toward individuals, but would not grant them the means to seek the proper application of these norms[570]. "Effective access to justice can thus be seen as the most basic requirement of a modern, egalitarian legal system which purports to guarantee, and not merely proclaim, the legal rights of all"[571].

Access to justice is both a process and a goal, it enables individuals to protect themselves against infringements of their rights, to remedy civil wrongs, to hold executive power accountable and to defend themselves in criminal proceedings; it is an important element of the rule of law and cuts across civil, criminal and administrative law[572]. Due to the fact that there is no a standardised concept of access to justice, this notion is related to a number of terms that at times are used interchangeably or to cover particular elements, such as access to court, effective remedies, fair trial, due process, judicial protection and adequate redress[573]. Thus, access to justice encompasses several core human rights and it is also an enabling right that helps individuals enforce other rights[574].

Explicit reference to these notions can be found yet in Article 8 of the Universal Declaration of Human Rights (UDHR) of 1948 that states that *"Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law"*[575] and in Article 10 that affirms that *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him"*[576].

Also in the Covenant on Civil and Political Rights (ICCPR) the topic is touched in different points, such as in article 2.3 with reference to the right to an effective remedy: "*Each State Party to the present Covenant undertakes:(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has*

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[570] D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice*, University of Manitoba, 2010, p. 68.
[571] *V. Supra*, to note 562, p. 185.
[572] FRA - European Union Agency for Fundamental Rights, *Handbook on European Law relating to Access to Justice*, Publications Office of the European Union, Luxembourg, 2016, p. 16. Available at: *https://fra.europa.eu/sites/default/files/fra_uploads/fra-ecthr-2016-handbook-on-access-to-justice_en.pdf*
[573] FRA - European Union Agency for Fundamental Rights, *Access to Justice in Europe: an Overview of Challenges and Opportunities*, Publications Office of the European Union, Luxembourg, 2011, p. 14-15. Available at: *https://fra.europa.eu/sites/default/files/fra_uploads/1520-report-access-to-justice_EN.pdf*
[574] *V. Supra*, to note 572.
[575] UN General Assembly, *Universal Declaration of Human Rights*, Resolution 217 A(III), UN Document A/810 at 71 (1948), Article 8.
[576] *V. Supra*, to note 575, Art. 10.

been committed by persons acting in an official capacity;(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;(c) To ensure that the competent authorities shall enforce such remedies when granted"[577]. Article 9.4 of ICCPR guarantees the right to take proceeding before a court: *"Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful"*[578]. Finally, in Article 14.1 it is possible to find mention of the right to fair and public hearing: "*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law"*[579]*;* whereas in Article 14.3 are mentioned all the minimum guarantee of which is entitled any person charged with a crime[580].

In the American Convention on Human Rights (ACHR) it is possible to find reference to the right to a fair trial at Article 8.1:*"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature"*[581]*;* while in Article 25.1 is enshrined the right to judicial protection: *"Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties"*[582].

In the African Charter on Human and People's Rights the topic of access to justice is touched in article 7.1 that claims that *"Every individual shall have the right to have his cause heard"*[583].

In the European human rights law, the notion of access to justice is enshrined in Article 6 of the European Convention on Human Rights (ECHR) that guarantees the right to a fair trial in

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[577] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976), Art. 2.3.

[578] *V. Supra*, to note 577, Art. 9.4.
[579] *V. Supra*, to note 577, Art. 14.1.
[580] *V. Supra*, to note 577, Art. 14.3.
[581] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art. 8.1.
[582] *V. Supra*, to note 581, Art. 25.1.
[583] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter"),* 27 June 1981, Art. 7.1.

paragraph 1: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…"*[584]*;* whereas Article 13 contains the right to an effective remedy*: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity"*[585].

The expression access to justice is not expressly used in the ECHR, while the Treaty of Lisbon has introduced a direct reference to this notion with article 67.4 of the Treaty of Functioning of the European Union (TFEU) that affirms that: *"The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters"*[586]. Also in the Charter of Fundamental Rights of the European Union (CFR) the term "access to justice" is mentioned in the third paragraph of Article 47 that covers also the guarantees of the right to an effective remedy and fair trial: *"1) Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article 2) Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented 3) Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice"*[587].

Having seen that the access to justice comprises other fundamental human rights, it becomes clear that the right of access to justice, endowed with a juridical content on its own, means *lato sensu*, the right to obtain justice[588]. Moreover, with the analysis of the respective case-law of the different courts, it will become clear that, even if following different paths of evolution, they have come to a similar result: enhancing the right of access to justice[589].

1.2 Individuals' presence in international law

[584] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 6.1.
[585] *V. Supra*, to note 584, Art. 13.
[586] European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, Art. 67.4.
[587] European Union, *Charter of Fundamental Human Rights of the European Union*, 26 October 2012, Art. 47.
[588] A. A. CANÇADO TRINDADE, S*eparate Opinion in the case of the Massacre of Pueblo Bello before the IACtHR*, Judgment, 31 January 2006 in A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford University Press, 2011, p. 71.
[589] *V. Supra*, to note 588, p.75.

As it can be inferred from these two introductory paragraphs in which an effort has been made in order to clarify the recurring vocabulary of this area, the main focus of the present thesis is on the rights of individuals to start legal proceeding and obtain justice. Nowadays, as it will be shown in the following sections, the right of individual petition is covered by the most important mechanisms of protection of human rights. Nevertheless, this must be regarded as an achievement of the contemporary society.

The first thing that has to be highlighted, is that international law is broadly divided into two major categories: *public international law* that deals with states - and recently in some cases with individuals - and *private international law* that deals with conflict of individuals from different jurisdictions or states[590]. Public law is further divided into traditional and emerging fields: it traditionally includes states responsibilities, law of treaties and the sea, whereas the modern or emerging fields, deals with individual international criminal responsibilities, human rights and the environment[591]. The student learning international law for the first time is simply told that international law is primarily an inter-state law, that the individual may benefit indirectly, however, from treaties made specifically for his/her advantage and that, in a few isolated areas, inter-national law is beginning to acknowledge that he/she has certain direct rights and duties[592]. Following the classical definition of H. Kelsen *"International law or the Law of Nations is the name of a body of rules which – according to the usual definition - regulates the conduct of the States in their intercourse with one another"*[593]. To a certain extent, international law has been defined in contra-distinction to domestic law: national law is the law valid in a state, binding on individuals who are subject to that state's jurisdiction, while, as seen, international law is the law that is binding upon states[594].

This distinction emerged in 1780 when Jeremy Bentham in its *Introduction to Principles of Morals and Legislation* invented the adjective "international" in order to differentiate the law that regulates the relations between states (international law) and the one that regulates the internal affairs of the state (national law)[595]. Bentham stated that: *«These (persons) may be considered either as member of the same state, or as member of different state: in the first case, the law may*

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590 Z. MUHAMMAD - U. S. JAHUN, *An Examination of Article 38 (1) of the Statute of the International Court of Justice 1945 as a Source of International Law,* International Journal of Scientific and Research Publications, Volume 7, Issue 8, August 2017, p. 427.
591 *V. Supra,* to note 590.
592 R. HIGGINS, *Conceptual Thinking about the Individual in International Law,* British Journal of International Studies, Cambridge University Press. Apr., Vol. 4, No. 1, 1978, p. 2.
593 H. KELSEN, *Principles of International Law*, London, 1966 (2nd Edition), p. 3.
594 *V. Supra*, to note 492.
595 See J. BENTHAM, *Introduction to Principles of Morals and Legislation, published in 1780 and first printed in 1789*, ed. J.H Burns and H.L.A. Hart, The Athlone Press, 1970.

be referred to the head of "internal", in the second case to that of "international" jurisprudence»[596]. This distinction made by J. Bentham implies that "international law was exclusively about the rights and obligations of states inter se and not about rights and obligations of individuals"[597]. Bentham continued stating that *«The word "international"… is a new one… It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the "Law of Nations" … What is commonly called "droits des gens" ought rather to be termed "droits entre les gens" »*[598]. As a matter of fact, before this distinction, the terms used to indicate international law were *jus gentium*[599], *droit des gens* or *völkerrecht* that meant the "law of people": indeed, since the early developments of the law of nations, scholars had accepted or at least admitted the possibility that individuals were subjects of international law[600]. Yet Thomas Aquinas (1225- 1274) in its *Summa Theologica* (1265-1274) considered the *Jus Gentium* as something that "sought to regulate human relations by the existence of a common logic of all nations based on ethical grounds aimed at achieving the common good"[601].

The so called "founding-fathers" of international law followed the same idea and it became clearer for them – even if the academic discussion is still open - that international law ruled not only the intercourse of independent states, but that it was also binding on individuals without the intermediation of their states[602].

Francisco de Vitoria, in his book *Relecto de Indis - Prior* (1538-1539) observed that *jus gentium* is a law for all - individuals and States - and he affirmed that it applies to all peoples even without their consent because this area of law is established by natural law principles (*lex praeceptiva*)[603]. He argued that the legal order binds everybody (the rulers and the ruled) and that the international community (the *totus orbis*) has primacy over the individual will of States because *jus gentium* was the legal fundament of the *totus orbis* and would seek the common good based on a natural law that is not bound to a will, but to the *recta ratio* (the human reason inherent to humankind)[604].

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[596] *V. Supra*, to note 595.
[597] M. W. JANIS, *Jeremy Bentham and the Fashioning of "International Law"*, The American Journal of International Law, Vol. 78, No. 2, April 1984, p. 409.
[598] *V. Supra*, to note 595.
[599] Latin expression, having originally applied among citizens, and in their relations with foreigners, jus gentium was subsequently – with Cicero - identified as the law common to all peoples, ultimately as the law common to all mankind. See A. A. CANÇADO TRINDADE, *International Law for Humankind, Towards a New Jus Gentium*, Martinus Nijhoff, 1 July 2010, p. 9.
[600] D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice*, University of Manitoba, 2010, p. 37.
[601] See J. P. RENTTO, *Jus Gentium: A Lesson from Aquinas*, 3 Finnish Yearbook of International Law, 1992, pp. 121-122.
[602] M. ST. KOROWICZ, *The Problem of the International Personality of Individuals*, The American Journal of International Law, Vol. 50, No. 3, July 1956, p. 434.
[603] *V. Supra*, to note 600, p. 38.
[604] *V. Supra*, to note 600, p. 38.

Also Alberico Gentili in its *De Jure Belli* of 1598 maintained that law governs the relationships between the members of the universal *societas gentium*[605] and advanced that the law of nations is established among all humans and observed by all humankind[606]. Similarly, Francisco Suárez in 1612 sustained in its treaty *De Legibus ac Deo Legislatore* that the law of nations discloses the unity and universality of humankind and regulates the States in their relations as members of the universal society[607]. Moreover, for him the law of nations was part of human law and it is brought into being through the free will and consent of peoples[608].

Hugo Grotius, following the same line, in 1625 wrote the *De Jure Belli ac Pacis* in which he defined the state as "a complete association of free men, joined together for the enjoyment of rights and for their common interest"[609]. His conception maintained that *societas gentium* comprises the whole of humankind, and the international community cannot pretend to base itself on the *voluntas* of each State individually; human beings – occupying a central position in international relations – have rights vis-à-vis the sovereign State, which cannot demand obedience of their citizens in an absolute way (the imperative of the common good), as the so-called *'raison d'État'* has its limits, and cannot prescind from Law[610]. From the work of Grotius it is possible to deduce two important ideas: the individual occupies the central position of the international relations system and States are not above law because "the international community cannot exist without the law"[611].

Other three authors of the end of the 17th and beginning of the 18th century that must be mentioned are for sure Samuel Pufendorf, Christian Wolff and Cornelius Van Bynkershoek. Pufendorf exposed his theory in *De Jure Naturae et Gentium* (1672) affirming that States and rulers were to subordinate themselves to institutional authority structures that possessed the coercive power machinery as adequate for the meaningful enforcement of the rights and duties which applied to them[612]. Wolff, author of *Jus Gentium Methodo Scientifica Pertractatum* (1749), pondered that, just as individuals ought – in their association with the State – to promote the common good, the State in turn has the correlative duty to seek its perfection[613], while Bynkershoek affirmed in his books *De Foro Legatorum* (1721) and *Questiones Juris Publici – Libri Duo* (1737) that the

[605] A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford University Press, 2011, p. 2.
[606] A. GENTILI, *De Jure Belli Libri Tres*, H. Milford, London, 1933, p. 8.
[607] *V. Supra*, to note 605.
[608] C. COVELL, *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel*, Palgrave Macmillan, New York, 2009, p. 47.
[609] H. GROTIUS, *De Jure Belli ac Pacis*, quoted in J. CRAWFORD, *The Creation of States in International Law*, Oxford University Press, 2006 (Second Edition), p. 6.
[610] *V. Supra*, to note 605.
[611] *V. Supra*, to note 600, p. 39.
[612] *V. Supra*, to note 600, p. 39.
[613] *V. Supra*, to note 605.

subjects of *jus gentium* were mainly nations (*gentes*), but also peoples and what he named "people of free will" (*inter volentes*)[614].

These theories that saw international law composed both by Nations and individuals, were quickly abandoned with the affirmation of the modern theory of state in international law, developed by Emmerich de Vattel in 1758 in its *Le Droit des Gens ou Principes de la Loi Naturelle Appliquée à la Conduite et aux Affaires des Nations et des Souverains* (*The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns).* He was a writer of the early positivist period and affirmed that *"Nations or States are political bodies, societies of men who have united together and combined their forces, in order to procure their mutual welfare and security"*[615]. The key element of his doctrine is that nations are sovereign States (have absolute power over a territory) and, in contrast with individual citizens, each State is absolutely free and independent to all peoples and other nations as long as it has not voluntarily submitted to them[616]. The theory of Vattel was pursued by Hegel. He thought that States had absolute power and, contrary to the doctrines of the "founding fathers" of the law of nations, he established the idea of State superiority over international law[617]. With Vattel and Hegel the positivistic concept of international law became the prevailing theory. This state-centred theory viewed international law as a law subordinated to states and it denied the international legal personality of individuals envisaging an international law that was not above, but below states[618].

This positivistic view was the one that dominated the scene of international law until the outbreak of the two World Wars. The atrocities committed at the beginning of the twentieth century marked the starting point for a new era in international law in which also individuals were subjects of international law. It had become clear that the already existing system had not been able to protect human beings during the conflict and, as we will see in the next paragraph, from the aftermath of the Second World War were created new treaties on human rights and new system of protection that gave also to individuals legal personality and, as a consequence, the opportunity to seek justice.

1.3 The affirmation of individuals as "subjects" of international law: bearers of legal personality and human rights

[614] *V. Supra,* to note 600, p. 40.
[615] E. DE VATTEL, *Le Droit des Gens ou Principes de la Loi Naturelle Appliquée à la Conduite et aux Affaires des Nations et des Souverains,* 1758.
[616] T. TWISS, *The Law of Nations Considered as Independent Political Communities: on the Rights and Duties of Nations in Time of Peace,* London, 1861.
[617] G.W.F. HEGEL, *Elements of the Philosophy of Right (1820),* Cambridge University Press, New York, 1991, p. 366.
[618] *V. Supra,* to note 600, p.41.

As demonstrated above, the issue of the role of individual in international law has been a part of the debate over the nature of the international legal system for centuries[619]. However, for much of this time, the dominant view was that individuals had no effective independent role in the international legal system: their role was wholly determined by states and was entirely subject to state's consent[620]. The precedent section has demonstrated that the international system has been dominated by the positivistic theories, that individuals had no place in international law, and that a State-centric international society ruled by values of self-interest could not protect its nationals to the fullest[621]. The famous statement of Oppenheim "since the Law of Nations is a Law between States only and exclusively, States only and exclusively are subjects of the Law of Nations"[622], is a perfect example that let us imagine a state-based system in which state sovereignty was supreme. But what does it mean being "subject" of international law and when individuals have started to be considered "subjects" of it? The developments in international law into the twenty-first century have been the main reason why the issue of the role of individuals in the international legal system has again come to prominence[623].

To be a legal person, or a subject of a legal system, is to have rights and duties under that system[624]. In international law "subjects" is the term used to describe those elements bearing, without the need for municipal intervention, rights and responsibilities[625]. A subject of the international legal system has direct rights and responsibilities under that system, can bring international claims and, it is argued, is able to participate in the creation, development, and enforcement of international law[626]. To sum up, the subjects of international law may be defined as "persons to whom international law attributes rights and duties directly and not through the medium of their states"[627].

The place of individuals in this system of international law has traditionally been identified by reference to whether they are properly to be regarded as subjects of international law[628]. Historically, under the dominant view of the positivism, any role of the individual in the

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[619] R. McCORQUODALE, *The Individual and the International Legal System*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 259.
[620] *V. Supra*, to note 619.
[621] D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice*, University of Manitoba, 2010, Introduction.
[622] L. OPPENHEIM, *International Law, Vol.1*, Longmans, London, 1905, p. 341.
[623] *V. Supra*, to note 619, p. 260.
[624] R. HIGGINS, *Conceptual Thinking about the Individual in International Law*, British Journal of International Studies, Cambridge University Press. Apr., Vol. 4, No. 1, 1978, p. 1.
[625] *V. Supra*, to note 624, p. 3.
[626] *V. Supra*, to note 619, p. 260.
[627] M. ST. KOROWICZ, *The Problem of the International Personality of Individuals*, The American Journal of International Law, Vol. 50, No. 3, July 1956, p. 535.
[628] *V. Supra*, to note 624.

international legal system is purely as an "object" of that system and not as a "subject", "in the same sense as territory and rivers are objects of the system because there are (state-created) legal rules about them or in the sense that they are beneficiaries under the system"[629].

This dichotomy "object" vs. "subject" has been often criticized and it is very useful, before retracing the development of the affirmation of the individual in the international scene, to expose the important theory presented by Rosalyn Higgins in 1978[630]. In her view: *"The whole notion of "subjects" and "objects" has no credible reality, and, in my view, no functional purpose. We have erected our own choosing and then declared it to be an unalterable constraint"*[631]. She sustained her will to return to a conception of international law as a decision-making process, a dynamic process in which there are no subjects or objects, but rather participants. In this alternative approach, individuals are "participants" along with governments, international institutions, and private groups[632]. This argument for considering individuals as participants in the international legal system, rather than as objects or subjects, is a compelling practical one: "participation as a framework for considering the role of individuals in the international legal system is flexible and open enough to deal with developments in that system over the centuries, and it is not constricted to a state-based concept of that system or to appearances before international bodies"[633].

As told in the final part of paragraph 1.2, individuals started to be "subject" or "participant" of the international system after the two global conflicts. The horrors of the two World Wars established that the positivistic system of international law that relegated individuals to the status of "objects" could not satisfactorily protect human rights and after the conflicts was recognized that individuals had rights and duties under international law[634]. Theorists invoked many reasons for asserting international personality of the individual under international law: these reasons have been mainly based on considerations, such as the nature of international law, the progressive development of international legal order, including the increasing incorporation of humanitarian values and principles, the primacy of international law over domestic law, and the direct regulation of the individual's rights and duties by international law[635].

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[629] *V. Supra*, to note 619, p. 260.
[630] See R. HIGGINS, *Conceptual Thinking about the Individual in International Law*, British Journal of International Studies, Cambridge University Press. Apr., Vol. 4, No. 1, 1978 and R. HIGGINS, *Problems and Process: International Law and how we Use it*, Oxford University Press, 1994.
[631] *V. Supra*, to note 630.
[632] R. HIGGINS, *Conceptual Thinking about the Individual in International Law*, British Journal of International Studies, Cambridge University Press. Apr., Vol. 4, No. 1, 1978, p. 5.
[633] R. McCORQUODALE, *The Individual and the International Legal System*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 263.
[634] *V. Supra*, to note 621.
[635] A. ORAKHELASHVILI, *The Position of Individual in International Law*, 31 California Western ILJ 241, 2001, p. 244.

In a monograph published back in 1931, the Russian jurist André Mandelstam argued "the necessity of a juridical minimum – with the primacy of international law and of human rights over the State legal order – below which the international community should not allow the State to fall"[636]. In his vision, the 'horrible experience of our time' demonstrated the urgent need for acknowledgement of this juridical minimum, to put an end to the 'unlimited power' of the State over the life and the freedom of its citizens, and to the 'complete impunity' of the State in breach of the 'most sacred rights of the individual'[637].

Other writers have argued that, rather than the State being the primary subject of the international legal system, the primary subject is the individual[638]. One view, promoted by the French Scholar George Scelle early in the twentieth century, considered a State, as such, as fiction and that the only real subject of international law was the individual human being[639]. In his book of 1932-1934 *Précis du Droit des Gens* he criticized the theory of international law as an inter-state law and wrote that individuals are subject both of domestic as well as of international law[640]. He elaborated also "the movement of extension of the legal personality of individual" that implies that: "*Les individus sont à la fois sujets de droit des collectivités nationales et de la collectivité internationale globale: ils sont directement sujets de droit des gens*"[641].

After the Second World War these positions were strengthened by the works of Hersch Lauterpacht, one of the most influential British international lawyers of the century. In his piece of 1950 *International Law and Human Rights* asserted that "human beings are the final subject of all law" and that there was nothing that could forbid them to become subjects of the law of nations and party in proceeding before international courts[642]. In this sense, he has noted, that: *"The various developments since two World Wars no longer countenance the view that, as a matter of positive law, States are the only subjects of international law. In proportion as the realisation of that fact gains ground, there must be an increasing disposition to treat individuals, within a limited sphere, as subjects of International law"*[643].

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[636] A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice,* Oxford University Press, 2011, p. 7.
[637] A.N. MANDELSTAM, *Les droits internationaux de l'homme, Paris*, Éds. Internationales, 1931, pp. 95–6 and 138, and cf. p. 103 in A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford University Press, 2011, p. 7.
[638] *V. Supra*, to note 633, p. 262.
[639] A. ORAKHELASHVILI, *The Position of Individual in International Law*, 31 California Western ILJ 241, 2001, p. 244.
[640] See G. SCELLE, *Précis de Droit des Gens – Principes et systématique*, Part I, Paris, Libr. Rec. Sirey, 1932 (CNRS reprint, 1984).
[641] *V. Supra*, to note 640, p.48.
[642] H. LAUTERPACHT, *International Law and Human Rights,* Stevens, London, 1950.
[643] See H. LAUTERPACHT's revision of Oppenheim Treaties, 1955

The need for individual legal personality under international law became clear for most of the lawyers and jurists of that time, such as P. Guggenheim who affirmed in 1952 that the individual is the subject of duties at the international legal level and that has legal personality recognized by customary norms of international law[644] or P. Reuter that considered individuals as subjects of international law when they became *titulaires* of rights established directly by international law and bearers of obligations sanctioned directly by international law[645]. To have legal personality means indeed to be bearer of legal rights and obligations. To have legal personality in international law means "inclusion in the international legal system as an actor, it means being subject to the law and having the right to use it; while, to be denied international legal personality means to be excluded, with ensuing deprivation of instruments such as rightsholdership, capacity to conclude treaties, *jus standi*, and legal responsibility"[646].

Even if, as it will be soon demonstrated, nowadays the international legal personality of individual is affirmed and recognized, there have been some theories that have tried to deny it[647]. These theories such as positivism (called also voluntarist theory of international law)[648], the human-object theory[649] and the theory of international legal personality of states[650], have been deeply criticized and denied[651]. In the last century has been demonstrated that international law is not based only on the will of states, but that also individuals are subject, and not only objects, of the international system. The theories that have been proposed in order to support the legal personality of individuals are the individualist theory that argue that only individuals are subjects of law, the

[644] P. GUGGENHEIM, *Les Principes de Droit International Public*, 80 Hague Academy of International Law (RCADI), 1952, pp. 116-118.
[645] See P. REUTER, *Droit international public*, 7th. ed., Paris, PUF, 1993 cited in A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice,* Oxford University Press, 2011, p. 10.
[646] C. BRÖLMANN – J. NIJMAN, *Legal Personality as a Fundamental Concept of International Law,* Amsterdam Law School Legal Studies Research Paper No. 2016-43, Amsterdam Center for International Law No. 2016-17, 2017, p. 1.
[647] See D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice,* University of Manitoba, 2010, pp. 28-33.
[648] Establishes that only sates are subject of international law and that the law of nation is based on the consent of States, while individuals are subjects only of the domestic law of states.
[649] Affirms that individuals, like planes or ships, have the status of "objects". See: G. MANNER, *The Object Theory of the Individual In International Law,* The American Journal of International Law, Vol. 46, No. 3, July 1952, pp. 428-449.
[650] Establishes that individuals do not have the same powers of states because they cannot conclude or be parties to treaties, be member of international organizations or have diplomatic relations with states; they lack of the fundamental elements that characterizes the personality of states.
[651] Traditional voluntarist theory is an incomplete explanation of the basis of international law and of who can be its subjects: international law is not born by the will of one or a common will of many States; rather, its obligatory force comes from the objective rule of the principle of the pacta *sunt servanda* created by human rationality.
The human-object theory as been denied because humans are living and rational beings, capable of asserting rights and being subject to duties, differently from fauna and flora.
The theory of international legal personality of states can be proved wrong considering individuals as the indirect parties of the treaties and taking into consideration the fact that the governmental powers to conclude treaties are delegated by individuals.

indirect-subject theory and the subject theories that argue respectively that individuals are indirectly or directly subjects of international law[652].

One of the first official document that confirmed the fact that individuals were bearers of rights under the international legal system, is the Advisory Opinion of the Permanent Court of International Justice (PCIJ) about the *Case concerning the Jurisdiction of the Court of Danzig* in which it is asserted that:

> "*It may be readily admitted that, according to a well-established principle of international law, the [treaty], being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating individual rights and obligations and enforceable by the national courts"*[653].

This was a first attempt to challenge the state-centric view of international law that had never contemplated individuals as subjects of international law. The most important document that clarified the issue of the legal personality after the Second World War, is the Advisory Opinion of the International Court of Justice (ICJ) *Reparations for Injuries suffered in the Service for United Nations* of 1949. This reparation affirms that:

> "*The subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends on the need of the community… in the Opinion of the Court, the (United Nations) Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of possession of a large measure of international personality and the capacity to operate upon international plane… That is not the same thing as saying that it is a state… What it does mean is that it is a subject of international law capable of possessing international rights and duties, and it has capacity to maintain its rights by bringing international claims"*[654].

Even if in this decision the focus is on international organizations, it is very important because it entails the idea that there are subjects in international law that are not states and it indicated that

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[652] See D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice,* University of Manitoba pp. 33-34 and R.L.SILVA, *Direito Internacional Público*, Belo Horizonte: Del Rey, 2008, pp. 422-423.
[653] *Jurisdiction of the Court of Danzig (Pecuniary Claims of Danzig Railway Officials who have Passed into the Polish Service, against the Polish Railways Administration),* Advisory Opinion, Permanent Court of International Justice (PCIJ), Advisory Opinion, Reports, Series B, No. 15, 3 March 1928, pp. 17-18.
[654] *Reparations for Injuries suffered in the Service for United Nations,* Advisory Opinion, International Court of Justice (ICJ), Reports 1949, pp. 174-179.

the international community should include states and non-states[655]. Even if this statement clashes with Article 53 of the Vienna Convention on the Law of Treaties that underlines the fact that there is "*an international community of States*"[656], the existence of the individual as subject of international law has been also reasserted in the International Covenant on Civil and Political Rights (ICCPR) that in Article 16 states that: "*Everyone shall have the right to recognition everywhere as a person before the law"*[657]. Moreover, it is very interesting also the point prosecuted by Matthew Craven and Rose Parfitt[658] that highlight the fact that the population is one of the four fundamental elements that a state has to own in order to be recognized as such[659] (this point will be developed in the next chapter). For this reason, individuals are necessary for a state, because it is only a legal fiction that need population and individuals able to act on behalf of it.

In the contemporary society it has become clear that individuals are bearers of rights and duties under international law. The area in which individual rights are most developed is for sure in relation to human rights. The post-war reconstruction of international law was based on principles that focused on the individual, such as "the importance of the realization of superior common values, the individual as the *titulaire de droits*, the collective guarantee of the realization of these rights, and the objective character of the obligations of human rights protection"[660]. The main points stressed as evidence of direct applicability of international law to individuals have been the primacy of international law over domestic law as perceived by the monistic doctrine and the language and structure of treaty obligations established for protection of the individual[661].

> "*Human rights treaties are distinct from other treaties, which are characterized by mutual and reciprocal concessions and obligations, in that human rights treaties find inspiration in considerations of a superior order, the ordre public: in creating obligations for states vis-a-vis human beings under their jurisdiction, the norms of these treaties not only require States Parties to take joint action for human rights protection but also, and*

[655] See R. McCORQUODALE, *The Individual and the International Legal System*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 261-262.
[656] United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 53.
[657] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976), Art. 16.
[658] See R. M.CRAVEn -R. PARFITT, *Statehood, Self-determination and Recognition*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), Chapter 7, pp. 177-220.
[659] *Montevideo Convention on the Rights and Duties of States* (adopted 26 December 1933, entered into force 26 December 1934), Art. 1: "*The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory ; c) government; d) capacity to enter into relations with the other states".*
[660] A. A. CANCADO TRINDADE, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 Colum. Human Rights L. Rev. 1, 1998, p. 5.
[661] A. ORAKHELASHVILI, *The Position of Individual in International Law*, 31 California Western ILJ 241, 2001, p. 264.

above all, oblige each state party to provide an internal legal order to enforce these rights, in relations between the public power and the individual"[662].

The fact that these treaties affirms that their aim is to protect human beings, but that they actually create rights and obligations for States, becomes clear with the general obligations enshrined in the most important treaties on human rights such as the Covenant on Civil and Political Rights[663], the Convention for Elimination of all Forms of Racial Discrimination[664], the Convention against Torture[665], the European Convention on Human Rights[666], the American Convention on Human Rights[667]. Along with being enshrined in treaty obligations, the rights of the individual are part of universal customary law and are recognized as part of *jus cogens*: there is no longer any doubt that the rights of the individual exist outside the domestic jurisdiction of States and that these rights concern the whole international community[668]. Any person or entity *titulaire de droits* and bearer of obligations which emanate directly from international law can be conceptualize as subject of international law: for this reason, it is impossible to deny that also individuals are

[662] *V. Supra*, to note 660, p. 3.
[663] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 (entered into force 23 March 1976), Art. 2: *1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."*
[664] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, see Art. 2- Art.7.
[665] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984*, Art. 2.1: "Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction."*
[666] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 1: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."*
[667] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art. 1: "1.*The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition 2. For the purposes of this Convention, "person" means every human being."* Art. 2: " *Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."*
[668] *V. Supra*, to note 661.

subjects of international law, because they own rights and duties that derive directly from international law and with which they are in direct contact[669].

The progressive development of international human rights law has endowed every person with the abstract capacity to invoke international law against a state, including the national state, which is responsible for violations[670]. Under specific human rights treaties, such as the European and the Inter-American Conventions, this abstract capacity has become a concrete right of access to international judicial remedies before the competent organs for the supervision and enforcement of the human rights obligations undertaken by the state parties[671]. In the next paragraph the main mechanism of protection of human rights will be analysed and it will become clear how individuals can exercise in contemporary international society their right of access to justice.

2. The importance of individual petition under international law

The fact that the access to justice is the central issue of this work has already been clarified, but it is now time to understand how this right can be practically exercised by individuals. Having already understood the background of the area of "access to justice", next paragraph will go deep in detail in understanding why individual petition is so important in this field and how it has developed under different systems with different *nuances* and consequences.

The first example of a dispute-settlement machinery that included individuals is the Central American Court of Justice[672] established in 1907 that gave individuals standing in order to claim against states (other than the national state of the claimant) and, therefore, enabled individuals to be part of the international legal process[673].

Other early examples of the inclusion of individuals in the international dispute settlement mechanism are the International Prize Court contemplated by the Hague Convention XII of 1907

[669] A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice,* Oxford University Press, 2011, p. 16.
[670] F. FRANCIONI, *Access to Justice as a Human Right*, Oxford University Press, 2007, p. 6.
[671] *V. Supra,* to note 670.
[672] The Central American Court of Justice (Corte Centroamericana de Justicia) is an international tribunal of general jurisdiction, created in the interest of promoting peace and regional unity, under the auspices of the Central American Integration System. The Central American Court of Justice sits in Managua, Nicaragua and has four Member States: Guatemala, Honduras, El Salvador and Nicaragua. It does not have competence to hear individual complaints of alleged violations of the American Convention on Human Rights. See: International Justice resource Center, at: *https://ijrcenter.org/regional-communities/central-american-court-of-justice/*
[673] F. O. VICUÑA, *Individuals and Non-State Entities before International Courts and Tribunals*, Max Planck Yearbook of United Nations Law, Volume 5, 2001, p. 55.

that gave individual the right to appeal a national decision before an international tribunal[674] and the mixed arbitral tribunals established to adjudicate war compensation claims in the post-First World War treaties[675]. While the International Prize Court has never been ratified and for this reason is only of historical importance[676], the mixed tribunals of the post-conflict period are of great importance for this issue. Even if they were a bit complicated and costly, they had the competence (thanks to Article 304 of the Treaty of Versailles) to adjudicate a variety of claims lodged by citizens of the allied and associated powers against Germany[677] and they gave a great contribution to development of the individual access to international justice.

The fact that individuals owned the right to appeal an international body, became clear also through the mechanism for the protection of minorities under the League of Nations, under the dispute mechanisms of the International Labour Organization (ILO) and in the context of the Trusteeship Council Established by the Charter of United Nations. The League of Nations system for the international protection of minorities originated at the Paris Peace Conference of 1919: the Allied and Associated Powers, that had won the war, obliged the new states of East Central Europe (like Poland, Czechoslovakia, and Yugoslavia), states that had increased their territory (like Romania and Greece), and states that had been subjugated (like Austria, Hungary, and Bulgaria) to sign agreements granting religious and political equality as well as some special rights to their minority peoples[678].

As regards the settlement of dispute within ILO, it is important to highlight the fact that since its creation in 1919 the ILO owned two methods that enabled the settlement of disputes relating to the implementations of conventions by states which had ratified them[679]. The first one is enshrined in Article 24 of the ILO Constitution and it is an informal and political representation: "*In the event of any representation being made to the International Labour Office by an industrial association of employers or of workers that any of the Members has failed to secure in any respect the effective observance within its jurisdiction of any Convention to which it is a party, the Governing Body may communicate this representation to the government against which it is*

[674] *V. Supra*, to note 673, p. 54.
[675] F. FRANCIONI, *Access to Justice as a Human Right*, Oxford University Press, 2007, p. 16.

[676] Proposals for the creation of an international prize court had been made since the 18th century. The International Prize Court provided for the Convention has never been established because the Convention failed to secure any ratifications. The Court would have served as a court of appeals against judgments of national prize courts. Neutral Powers as well as neutral and enemy nationals would have been entitled to bring appeals. See: D.SCHINDLER - J.TOMAN, *The Laws of Armed Conflicts*, Martinus Nijhoff Publishers, 1988, pp.825-836.
[677] *V. Supra*, to note 675.
[678] C. FINK, The League of Nations and the Minorities Question, World Affairs, Vol. 157, No. 4, Woodrow Wilson and the League of Nations: Part One, Spring1995, pp. 197.
[679] F. MAUPIN, *The Settlement of Disputes within the International Labour Office, Oxford University Press, Journal of International Economic Law*, 1999, p. 273.

made, and may invite that government to make such statement on the subject as it may think fit"[680]. The second one is illustrated in Article 26 of the Constitution and it refers to a more formal, judicial complaint procedure: "*1. Any of the Members shall have the right to file a complaint with the International Labour Office if it is not satisfied that any other Member is securing the effective observance of any Convention which both have ratified in accordance with the foregoing articles…"*[681]. These mechanisms were further implemented in 1926 with the establishment of the Committee of Experts for the Application of Conventions and Recommendations, a body composed of independent experts that had a very practical role and had to assist the General Conference in the analysis of the Reports submitted by the States[682], as required at Article 22 of the Convention[683]. These systems were further implemented after in 1950 with the introduction of the Committee on Freedom of Association and were actually put into practice only after the Second World War, but they were of fundamental importance for the role and responsibilities they attributed to non-governmental actors, such as employers' and workers' organizations[684].

Regarding the Trusteeship System, it can be said that, taking the steps from the "Mandate System of the League of Nations" created in 1919, it was then encapsulated in the UN Charter of 1945 on the premise that colonial territories taken from countries defeated during the world conflicts should be administered by a trust country under international supervision (in order to avoid the annexation by the victorious powers)[685]. It was created in order *" to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence…; to encourage respect for human rights and for fundamental freedoms for all without distinction … and to encourage recognition of the interdependence of the peoples of the world"*[686]. Article 77 of the Charter of the United Nations explains to which territories it has to be applied:

> *1. The trusteeship system shall apply to such territories in the following categories as may be placed thereunder by means of trusteeship agreements: a) Territories now held under mandate (established by the League of Nations after the First World War); b) Territories which may be detached from enemy states as a result of the Second World War; and c) Territories voluntarily placed under the system by states responsible for their*

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680 International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, Art. 24.
681 *V. Supra*, to note 680, Art. 26.
682 *V. Supra*, to note 679, p. 276.
683 International Labour Organization (ILO), *Constitution of the International Labour Organisation (ILO)*, 1 April 1919, Art. 22: "*Each of the Members agrees to make an annual report to the International Labour Office on the measures which it has taken to give effect to the provisions of Conventions to which it is a party. These reports shall be made in such form and shall contain such particulars as the Governing Body may request".*
684 *V. Supra*, to note 679.
685 See Encyclopaedia Britannica at: *https://www.britannica.com/topic/Trusteeship-Council*
686 United Nations, *Charter of the United Nations*, 24 October 1945, Article 76

administration. 2. It will be a matter for subsequent agreement as to which territories in the foregoing categories will be brought under the trusteeship system and upon what terms[687].

All the eleven territories administered by this system[688] have become independent and therefore it ceased its operations in 1994 when Palau, the last remaining United Nations territory, became independent[689]. However, it is very important to nominate this kind of mechanism because the Trusteeship Council, the main supervisory organ of this system, had the power to examine petitions deriving from the Trust territories[690].

The ones that have just been listed, were the first mechanisms of protection that enabled individuals to assert claims in front of international bodies. In the second half of the twentieth century or better, as already said, after the atrocities committed during the world conflicts, a series of international human rights supervisory bodies were established and enabled individuals to access directly to these mechanisms of protection. The right of individual petition, through which the direct access to justice at international level is granted to individuals, forms integral part of the evolution of international human rights law[691] because it is by the free and full exercise of the right of individual petition that the direct access of individual at international level is safeguarded[692]. In the second part of this chapter will be shown in detail how the human rights treaties and other instruments at international and regional level have crystallized the right of individual petition.

Before proceeding it is essential to keep in mind some important elements that are common to all systems of protection under international human rights law. First of all, an individual can bring a claim against a state that is alleged of having committed a violation, only if that state has ratified the treaty in question or the article of the treaty that authorises the individual petition[693]. Moreover, an international claim can be brought by an individual only if he or she has exhausted all the domestic remedies in the state concerned[694]. The right of individual petition at international level

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[687] United Nations, *Charter of the United Nations*, 24 October 1945, Article 77.
[688] Western Samoa, Tanganyika, Rwanda-Urundi, Cameroons under British administration, Cameroons under French administration, Togoland under British administration, Togoland under French administration, New Guinea, Nauru, Strategic Trust Territory/ Trust territory of the Pacific Islands, Italian Somaliland.
[689] See *https://www.un.org/en/sections/about-un/trusteeship-council/*
[690] United Nations, *Charter of the United Nations*, 24 October 1945, Article 87.
[691] A. A. CANCADO TRINDADE, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 Colum. Human Rights L. Rev. 1, 1998, p. 5.
[692] A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford University Press, 2011, p. 18.
[693] R. McCORQUODALE, *The Individual and the International Legal System*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 269.
[694] *V. Supra*, to note 693, p. 270.

represents indeed the last chance for those who did not find justice at national level[695]. Moreover, it is not necessary to establish a link between the nationality and the ability to bring claims, because what matters now is "jurisdiction"[696]: this means that a claim can be brought by an individual against a state that has jurisdiction over him or her and that has ratified the relevant human right treaty or a number of them[697]. Finally, even if the procedural capacity of individuals to bring international claims is dependent on state consent, the fact that individuals now have this right does have important consequences because, once the decision is taken by an international court, the states are required to implement that decision at domestic level and to take all possible measures in order not to commit that violation again[698]. Each mechanism of protection of human rights, as it will be demonstrated, has helped in strengthening the individual procedural capacity of individuals at international level, transforming the right of individual petition in the "mechanism *par excellence* of the emancipation of the individual vi-à-vis its own state"[699].

2.1 The development of individual petition under the European Convention on Human Rights

In the next paragraphs some aspects already emerged during this dissertation will be clarified, such as the fact that "it is only through the *locus standi in judicio* of the alleged victims before the international courts of human rights that individuals will attain international legal personality and full procedural capacity to vindicate their rights, when national bodies are incapable of securing justice"[700].

The first system of protection of human rights that will be analysed is the one enshrined in the European Convention on Human Rights and put into practice by the European Court of Human Rights. This analysis will prove to be very important for the development of the entire work, because the judgements that will be examined in the last part concern almost completely the

[695] *V. Supra*, to note 692, p. 29.
[696] See Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 1: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".*
[697] *V. Supra*, to note 693, p. 270.
[698] *V. Supra*, to note 693, p. 270 - 271.
[699] A.A. CANÇADO TRINDADE, *A Emancipação do Ser Humano como Sujeito do Direito Internacional e os Limites da Razão de Estado*, 6/7 Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro, 1998–1999, pp. 425–34 quoted in A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford University Press, 2011, p. 28.
[700] A. A. CANCADO TRINDADE, *The Consolidation of the Procedural Capacity of Individuals in the Evolution of the International Protection of Human Rights: Present State and Perspectives at the Turn of the Century*, 30 Colum. Human Rights L. Rev. 1, 1998, p. 16.

jurisprudence of the European Court of Human Rights. Moreover, the European Convention on Human Rights is considered to be a "living instrument" in the field of the international human rights law that has largely contributed to the development of legislation and policy in this field, thanks also to its binding enforcement mechanism which earns it the title of being one of the most successful mechanisms of protection of human rights in the world[701].

First of all, it is important to have in mind that the articles of the Convention that will be taken into considerations in this context are Articles 34[702] and 35[703] that enshrine respectively the standing requirements for individual applications and the admissibility criteria for lodging an application in front of the Court. These provisions, that will be analysed in a while, guarantee the *jus standi in judicio* of individuals – namely the direct access of individuals to the Court. However, they have not always been the same, but they have been the result of the development of the international human rights law that has met, as demonstrated, an ever deeper need of seeing the legal personality of individuals and their right of individual petition recognized and protected.

Indeed, when it was adopted in 1950 by the Council of Europe, the European Convention on Human Rights established a double system of protection composed by the European Commission of Human Rights (established in 1954) and the European Court of Human Rights (established in 1959) and recognized the right of individual petition under Article 25 that affirmed as follows:

> "*The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties*

[701] P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 8.

[702] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 34: "*The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".*

[703] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35: *"1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings".*

of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right"[704].

As it can be inferred, there are some crucial differences from the current version of the Convention: first of all, the applications had to be submitted to the Commission that had a sort of intermediary role between the applicants and the Court. Moreover, the Commission could accept only individual complaints lodged against member States that had expressly accepted the competence of the Commission.

These obstacles were overcome in 1990 with the adoption of Protocol No. 9 to the Convention that enabled individuals to refer a case directly to the Court without the intermediation of the Commission in certain circumstances[705]. This Protocol gave individuals a certain degree of *locus standi* before the Court and created a direct link between the Court and the individual complainant, but it did not secure them an "*égalité des armes*" with the respondent states and the full capacity of utilizing the system of the ECHR for the defence of their rights[706].

The huge change in the system occurred in 1998 with the adoption of Protocol No. 11 to the Convention that eliminated the two-tier system constituted by the Commission and the Court and created a full-time permanent Court to which individuals could directly access without the intermediation of the Commission and without the declaration of the State for the acceptance of individual petition[707]. With the entry into force of this important Protocol No.11 was granted to individuals the direct access to an international tribunal, or *jus standi*, that endowed individual applicants with full juridical capacity[708]. Nevertheless, the application of this protocol brought a series of important consequences, such as the fact that the total number of applications submitted to the Court increased exponentially.

As a matter of fact, whereas the Commission and the Court had given a total of 38,389 decisions and judgements in the forty-four years up to 1998, the single Court had given 61,633 in five

[704] Article 25.1 of the *Original Version of the Convention for the Protection of Fundamental Freedoms and Human Rights*, 4 November 1950, available at: https://www.echr.coe.int/Documents/Archives_1950_Convention_ENG.pdf
[705] *Protocol N. 9 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* Rome, 6 November 1990.
[706] A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice,* Oxford University Press, 2011, p. 33.
[707] *Protocol N. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* 11 May 1994.
[708] *V. Supra*, to note 706, p. 35.

years[709] (between the adoption of Protocol No. 11 in 1998 and 2003 when the *"Survey of Activities 2003"* - from which these data are taken - was produced by the European Court of Human Rights). The Court delivered its first judgement on 4 November 1960 *(Lawless v. Ireland[710])* and between that moment and the adoption of Protocol No. 11 had delivered 837 judgements, while only in 1999 – the year after the adoption of the Protocol - has been able to deliver 177 judgements (See TABLE.2 below). In the same period of forty years between the entry into force of the Convention and the entry into force of the Protocol, as demonstrated by TABLE.1, the Court had received 45,000 applications, while in the year after the adoption of Protocol No. 11 has received 8,400 applications (here are considered only the valid ones, received by the Court in a correctly completed form). These two tables below represent the clearest way to show how the workload of the Court has increased after 1998, reaching a peak in 2009 with 57,100 applications received and 1,625 judgements delivered.

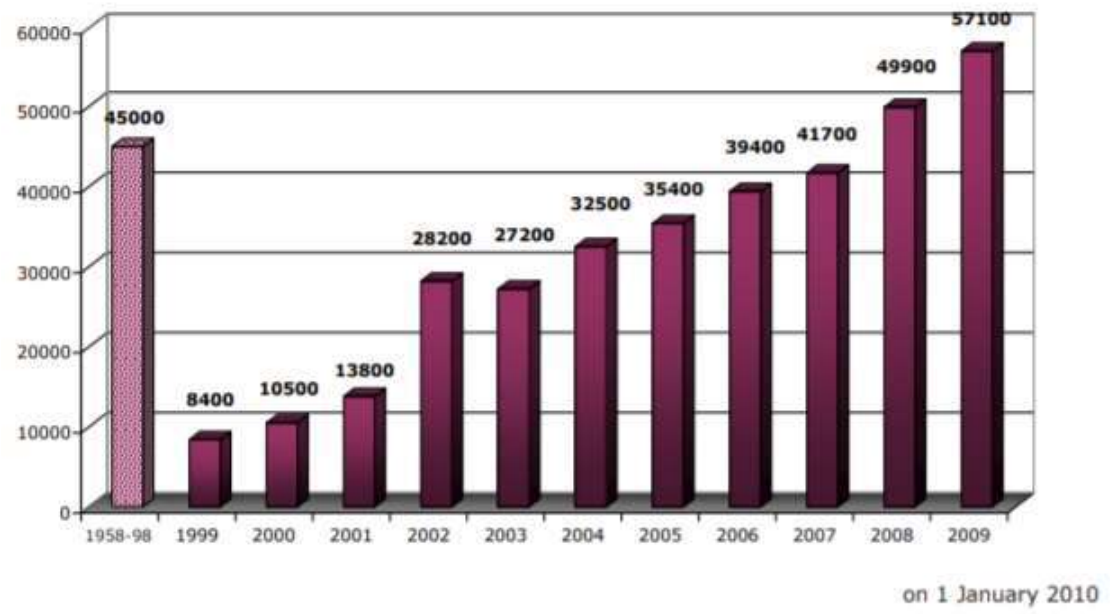

TABLE. 1 – Applications allocated to a judicial formation (1959 – 2009).

Source: ECHR, *50 Years of Activity: European Court of Human Rights - Some Facts and Figures*, Strasbourg, April 2010, p. 4. Available at: Available at: *https://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf*

[709] *Explanatory report to Protocol No. 14, to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, CETS 194, Strasbourg, 13 May 1994, para. 5.
[710] ECtHR, *Lawless v. Ireland* (Application no. 332/57), Chamber, 14 November 1960.

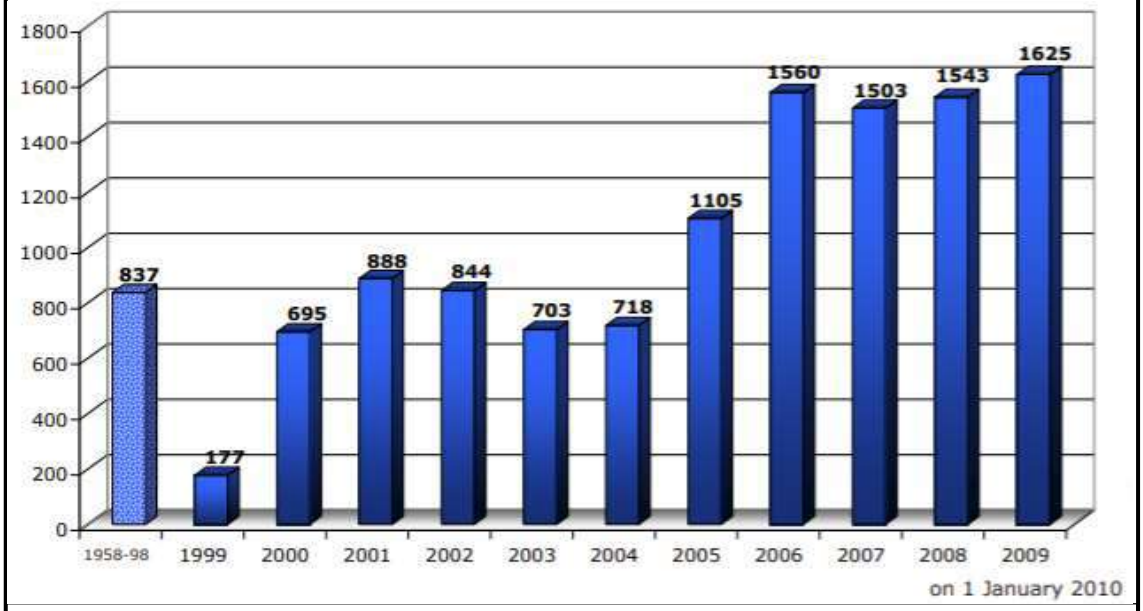

TABLE.2 – Judgements delivered by the Court (1959 – 2009).

Source: ECHR, *50 Years of Activity: European Court of Human Rights - Some Facts and Figures*, Strasbourg, April 2010, p. 5. Available at: *https://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf*

The incredible increase of these numbers was due primarily to the fact that the Council of Europe in those years had been opening the door to an ever-increasing number of States and, as a consequence, to an ever-increasing number of possible applicants: the demise of the communist regimes in Eastern Europe led to Hungary's accession in 1990, Poland's in 1991, Bulgaria's in 1992 and Estonia, Lithuania, Slovenia and Romania in 1993; that of the Czech Republic and the Slovak Republic replaced Czechoslovakia's accession from 1991 in 1993; Latvia joined the Council of Europe on 10 February, Moldova and Albania on 13 July and Ukraine and the former Yugoslav Republic of Macedonia on 9 November 1995; the Russian Federation acceded on 28 February, Croatia on 6 November 1996; Georgia on 27 April 1999; Armenia and Azerbaijan on 25 January 2001, Bosnia and Herzegovina on 24 April 2002; Serbia and Montenegro on 3 April 2003[711].

The European system of protection of human rights at the end of 2004 was open to 800 million people and for this reason, even if the procedure for the allocation of the applications had been simplified by Protocol No. 11, the massive influx of applications of those years seriously endangered the effectiveness, the credibility and the authority of the Court[712]. It is important to underline the fact that the situation in the Caucasus at the centre of our analysis was exploding in those years and would have been at the origin of the increase of the applications; furthermore,

[711] More information available at: *https://www.coe.int/en/web/yerevan/the-coe/about-coe/overview*
[712] *V. Supra*, to note 709, para. 5-6.

certain new-added states were (and still are) the ones from which originated a large majority of the applications: the figure in TABLE.3 shows that of the overall 119,300 applications that were pending before a decision body at the beginning of 2010, 33,550 derived from Russia, 10,000 from Ukraine and 9,800 from Romania, reaching a percentage 56% with the addition of the 13,100 applications of Turkey.

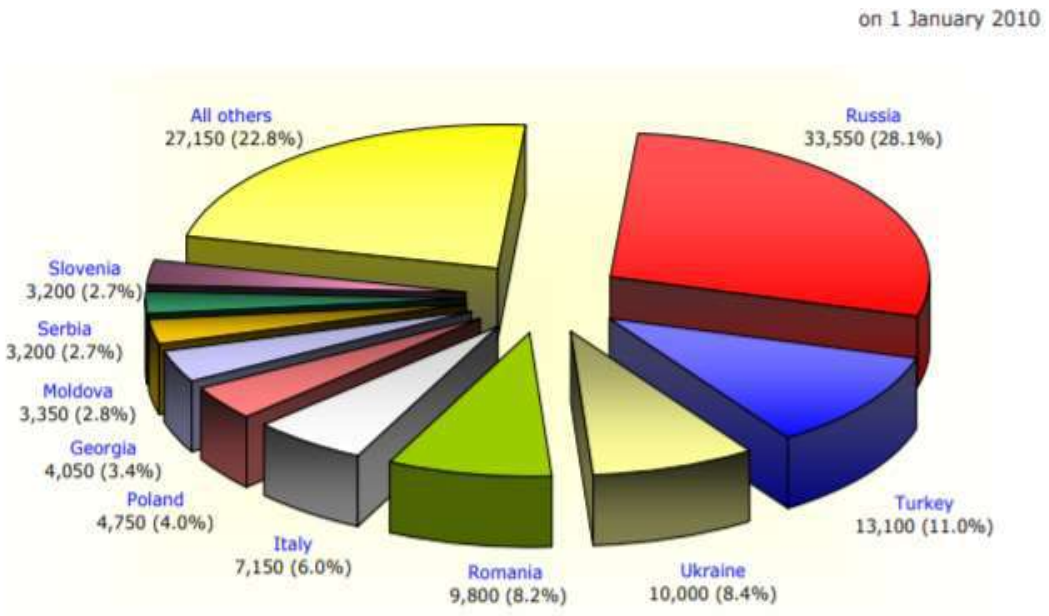

TABLE.3 – Pending allocated cases (1959 – 2009).

Source: ECHR, *50 Years of Activity: European Court of Human Rights - Some Facts and Figures*, Strasbourg, April 2010, p. 4. Available at: *https://www.echr.coe.int/Documents/Facts_Figures_1959_2009_ENG.pdf*

The excessive caseload of the Court was due also to two important factors: first of all, even if more than 90% of the applications resulted inadmissible they had to be in any case examined and processed before the merits; the second factor is linked to the time spent in order to process repetitive applications related to violations already elaborated in a previous judgement[713] (the so-called "pilot judgement"[714]).

[713] *V. Supra*, to note 709, para. 7.

[714] When the Court receives a significant number of applications deriving from the same root cause, it may decide to select one or more of them for priority treatment. In dealing with the selected case or cases, it will seek to achieve a solution that extends beyond the particular case or cases so as to cover all similar cases raising the same issue: the resulting judgment will be a pilot judgment. The main idea behind this procedure is to reduce the case-load of the Court and reduce the pending time of the applications (especially if urgent). The Court used this procedure for the first time in 2004 in the judgement *Broniowski v. Poland* (No. 31443/96, 22.06.04), connected to a series of cases known as *The Bug River Cases from Poland.*

As pointed out by the President of the European Court of Human rights, Mr. Jean-Paul Costa, in the opening speech of the seminar held on 13 October 2008 in Strasbourg *"Ten Years of the "New" European Court of Human Rights: 1998-2008, Situation And Outlook",* the entry into force of Protocol No. 11 had enhanced the right of individual petition of the single applicants, but had created at the same time an immense "bottleneck" at the Court that was not able to decide on the cases in a useful time:

> *"In 2007 the number of cases allocated to a judicial body stood at 41,700, and the number of applications disposed of at 28,792, leaving a deficit of almost thirteen thousand; in the first nine months of 2008 the number of cases allocated to a judicial body stood at 37,550, which is a not inconsiderable increase, and the number of applications disposed of at 22,073, leaving a deficit of over fifteen thousand"*[715].

Also from TABLE.4 and TABLE.5 taken from the *Annual Report of 2009*, it is possible to notice the incessant increase in the number of applications and the fact that of the total 119,300 applications pending in front of the Court, in 2009 only 57,100 were allocated to a judicial formation and only 35,460 were processed: 33,065 of these were declared inadmissible, whereas a judgement was delivered for 2,395 applications (in total were delivered 1,625 judgement because a judgement or a decision may concern more than one application).

[715] ECHR, *Ten Years of the "New" European Court of Human Rights: 1998-2008, Situation And Outlook,* Strasbourg, 13 October 2018, p.13.

1. **Applications allocated to a judicial formation** Committee/Chamber (round figures [50])	**2009**	**2008**	**+/-**
Applications allocated	**57,100**	49,850	15%

2. **Interim procedural events**	**2009**	**2008**	**+/-**
Applications communicated to respondent Government	**6,197**	4,416	40%

3. **Applications decided**	**2009**	**2008**	**+/-**
By decision or judgment*	**35,460**	32,043	11%
– by judgment delivered	**2,395**	1,880	27%
– by decision (inadmissible/struck out)	**33,065**	30,163	10%

4. **Pending applications** (round figures [50])	**31/12/2009**	**1/1/2009**	**+/-**
Applications pending before a judicial formation	**119,300**	97,300	23%
– Chamber (7 judges)	**44,400**	33,850	31%
– Committee (3 judges) and single judge	**74,900**	63,450	18%

5. **Pre-judicial applications** (round figures [50])	**31/12/2009**	**1/1/2009**	**+/-**
Applications at pre-judicial stage	**20,000**	21,450	-7%
	2009	**2008**	**+/-**
Applications disposed of administratively (applications not pursued)	**11,650**	14,800	-21%

* A judgment or decision may concern more than one application.

TABLE.4 – Events in Total (2008-2009).

Source: ECHR, *Annual Report 2009*, Registry of the European Court of Human Rights, Strasbourg, 2010, p. 139. Available at: *https://www.echr.coe.int/Documents/Annual_report_2009_ENG.pdf*

Applications processed in 2009	**Section I**	**Section II**	**Section III**	**Section IV**	**Section V**	**Grand Chamber**	**Total**
Applications in which judgments were delivered	690	650	278	354	396	27	**2,395**
Applications declared inadmissible (Chamber/Grand Chamber)	90	82	62	120	243		**597**
Applications struck out (Chamber/Grand Chamber)	165	200	390	304	152		**1,211**
Applications declared inadmissible or struck out (Committee)	8,457	3,419	5,581	5,002	6,568		**29,027**
Applications declared inadmissible or struck out (single judge)	245	73	367	437	1,108		**2,230**
Total	**9,647**	**4,424**	**6,678**	**6,217**	**8,467**	**27**	**35,460**
Applications communicated*	1,318	2,258	1,026	694	901		**6,197**
Judgments delivered**	335	444	234	313	281***	18	**1,625**
Interim measures (Rule 39) granted	21	68	94	372	99		**654**
Interim measures (Rule 39) refused	91	110	151	890	164		**1,406**
Interim measures (Rule 39) refused – falling outside the scope	31	53	35	166	54		**339**

* Including applications communicated for information and without requesting observations. Applications may concern several States.
** One judgment may concern several applications.
*** Including two judgments delivered by a Committee of three judges.

TABLE.5 – Applications processed in 2009.

Source: ECHR, *Annual Report 2009*, Registry of the European Court of Human Rights, Strasbourg, 2010, p. 139. Available at: *https://www.echr.coe.int/Documents/Annual_report_2009_ENG.pdf*

From these five tables has emerged that at the end of the first decade of the XXI Century the situation of the workload of the European Court of Human Rights had become unsustainable and for this reason a solution had to be found. As pointed out by the Lawyer Mrs Sylvie Saroléa in its intervention at the seminar already mentioned for the tenth anniversary of Protocol No. 11 it was necessary *"to arrive at a situation where individual petition is sustainable and useful"*[716] because the very last objective had to be *"the protection of human rights, not the protection of the Court vis-à-vis individual applications"*[717].

A "reform of the reform" had already been planned at European level to face this emergency of applications: in February 2001, the Committee of Ministers' Deputies had established an Evaluation Group whose task was "to consider ways of guaranteeing the effectiveness of the Court"[718]. The Evaluation Group submitted its Report in September 2001[719] recognizing the existing problems and making some proposals that were elaborated – also with the help of the Steering Committee for Human Rights (CDDH) - leading to the adoption, in May 2004, of Protocol No. 14[720]. The main purpose of this Protocol was to improve the functioning of the system "*giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination*"[721]. The main areas on which the Protocol had to work on were the reinforcement of the filtering capacity of the Court, the introduction of a new admissibility requirement and measures for dealing with repetitive cases[722] in order *"to ensure that the Court can continue to play its preeminent role in protecting human rights in Europe*"[723].

Some of the most significant changes introduced by Protocol No. 14 are now listed below[724]:

- In certain cases, a single judge may decide on inadmissible applications, although not in resect of their own state (Art. 26 and 27 of the Convention);

[716] *V. Supra*, to note 715, p. 32
[717] *V. Supra*, to note 715, p. 25.
[718] *Explanatory report to Protocol No. 14, to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, CETS 194, Strasbourg, 13 May 1994, para. 21.
[719] *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, Strasbourg, Council of Europe, 27 September 2001, available at: *https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804f3d0b*
[720] *Protocol N. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms,* Amending the Control System of the Convention, Strasbourg, 13 May 2004.
[721] *V. Supra*, to note 718, para. 35.
[722] *V. Supra*, to note 718, para. 36.
[723] *V. Supra*, to note 720.
[724] See P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), pp. 10-11.

- A committee of three judges can decide on the admissibility and the merits of an application where the underlying question in the case, concerning the application of the Convention, is already the subject of a well-established case-law of the Court (Art. 28.1 of the Convention) in order to speed up the analysis of repetitive applications derived from the same violation;

- The Committee of Ministers is enabled to bring infringement proceeding before the Court where a state refuses to comply with a judgement (Article 46.4 of the Convention);

- Judges are elected for a single, nine-year term (Article 23.1 of the Convention);

- The Council of Europe Commissioner for Human Rights is entitled to intervene in cases as a third party (Art. 36.3 of the Convention);

- The European Union may accede to the European Convention (Article 59.2 of the Convention).

Nevertheless, the most important – and the most controversial – change brought by Protocol No. 14 was the introduction of a new admissibility criterion to Article 35, that comprised a threefold test for the admissibility of the applications. Under article 12 of the Protocol was stated that:

> *"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that : a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal"*[725].

This new admissibility criterion met a strong opposition because it seemed to narrow, rather than enlarge the right of individual petition of individuals[726], it seemed indeed to undermine the *pro victima* approach adopted until that time by the European Court of Human Rights[727]. For this reason, Protocol No. 14 was adopted in 2004 but did not enter into force immediately because it had encountered the opposition of Russian Federation. Pending the final ratification of the Protocol, in 2009 the Council of Europe intervened with the elaboration of Protocol No. 14*bis* that contained only the provisions regarding the single-judge procedure and the new powers of

[725] *V. Supra*, to note 720, Art. 12.
[726] D. R. F. RIBEIRO, *Prospects for Jus Standi or Locus Standi of Individuals in Human Rights disputes before International court of Justice,* University of Manitoba, 2010, p. 105.
[727] A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice,* Oxford University Press, 2011, p. 36.

the three-judge committees[728]. This new protocol entered into force in October 2009 but ceased to have effect on 1 June 2010 when Protocol No. 14 finally entered into force thanks to the ratification of the Russian Federation.

The standing and admissibility criteria enshrined in article 34 and 35 of the Convention already presented at the beginning of this section will now be analysed more in detail, but before proceeding it is necessary to conclude the analysis on the number of applications allocated in front of the Court. As it can be noticed from TABLE. 6 and TABLE.7 below, it has been made a huge progress in reducing the bottleneck of the court: even if the number of applications allocated to the court has continued to increase after the application of Protocol No. 14, the important thing to underline is the fact that the number of pending application in front of a judicial formation has constantly decrease after the entry into force of the Protocol, thanks to the introduction of the single-judge procedure and the application of the pilot-judgement procedure[729]. It is interesting to make a comparison between the red sections of TABLE.8 and TABLE. 4 to see how, in 10 years of work, the Court has been able to decrease the total number of pending applications from 119,300 to 59,800 and how the other data have changed during a decade.

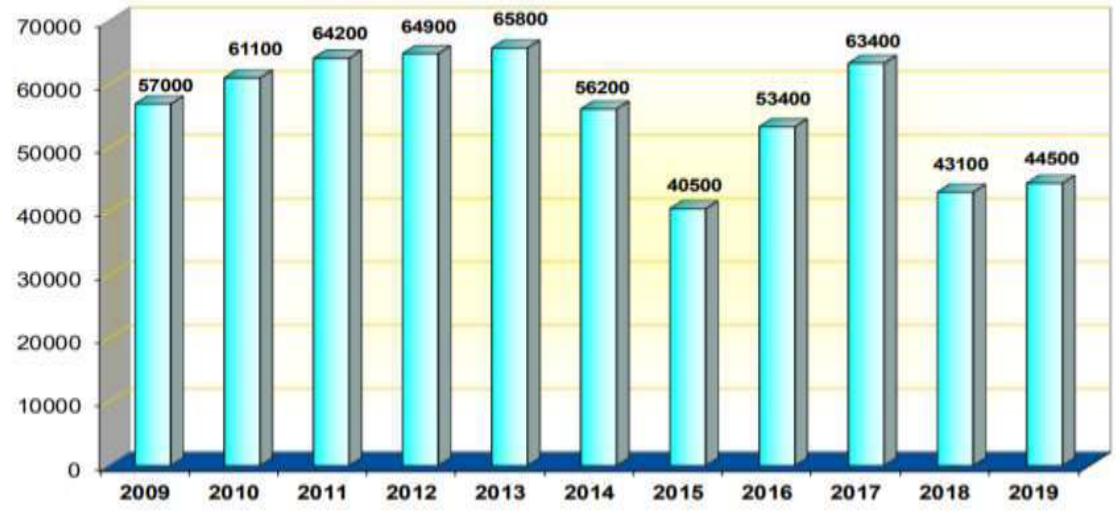

TABLE.6 - Allocation of applications to a judicial formation per year.

Source: ECHR, *Analysis of Statistics 2019*, Strasbourg, January 2020, p. 7. Available at: *https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf*

[728] *Protocol N. 14bis to the Convention for the Protection of Human Rights and Fundamental Freedoms,* Strasbourg, 27 May 2009.
[729] ECHR, *Annual Report 2015*, Strasbourg, 2016, p.32 (Speech given by Mr. Dean Spielmann, President of the European Court of Human Rights on the occasion of the opening of the judicial year, 30 January 2015), quoted in P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 18.

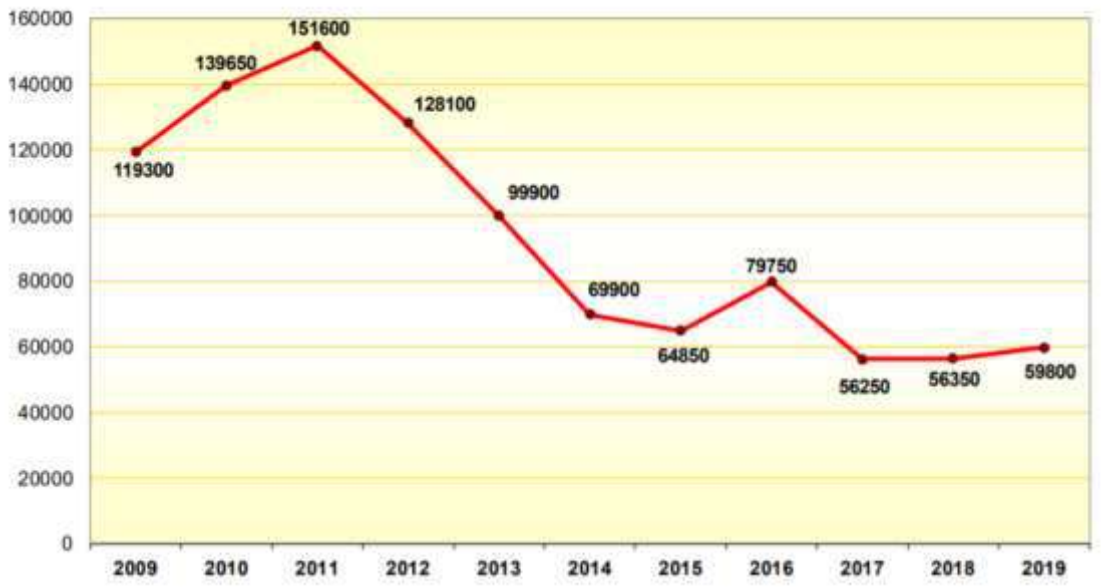

TABLE.7 - Applications pending before a judicial formation.

Source: ECHR, *Analysis of Statistics 2019*, Strasbourg, January 2020, p. 7. Available at: *https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf*

Allocated applications*	2019	2018	+/–
Total	**44,500**	43,100	3%

Communicated applications	2019	2018	+/–
Total	**6,442**	7,646	– 16%

Decided applications	2019	2018	+/–
Total	**40,667**	42,761	– 5%
by judgment delivered	**2,187**	2,739	– 20%
by decision (inadmissible/struck out)	**38,480**	40,022	– 4%

Pending applications*	31/12/19	01/01/19	+/–
Total	**59,800**	56,350	6%
Chamber and Grand Chamber	**20,050**	22,250	– 10%
Committee	**34,600**	29,350	18%
Single-judge formation	**5,150**	4,750	8%

Pre-judicial applications*	31/12/19	01/01/19	+/–
Total	**8,800**	9,750	– 10%

Applications disposed of administratively	2019	2018	+/–
Total	**20,400**	19,550	4%

* Round figures [50]

TABLE.8 - Events in total (2018-2019).

Source: ECHR, *Annual Report 2019*, Strasbourg, 2020, p.127. Available at: *https://www.echr.coe.int/Documents/Annual_report_2019_ENG.pdf*

2.2 Analysis of Articles 34 and 35 of the European Convention on Human Rights

After all the changes brought to the Convention during its seventy years of life, individual applicants can now bring a claim directly to the Court as provided by Article 34 of the Convention[730]. In order to have the right to take a legal action to the European Court of Human Rights, an applicant must meet two conditions: must fall into one of the categories of petitioners

[730] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 34: "*The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right".*

mentioned in the Article (any person, nongovernmental organisation or group of people under the jurisdiction of one of the States that have ratified the Convention) and must demonstrate that he or she is a victim of a violation of the Convention[731]. The presence of the "victim" requirement under Article 34 establishes that the Court must ascertain that the applicant has been "personally or directly affected" by the alleged violation of the Convention and that there must be a sufficiently direct link between the applicant and the harm he/she has suffered[732]. Even if the Court does not accept applications of deceased people, it is well established that a case can be brought in front of the Court by a close relative or heir of the deceased person, where they are considered to have a sufficient or legitimate interest, or when there is a wider general interest which justifies the continuation of the case[733].

In the case in which the applicant dies while the case is already pending before the Court, this can be continued by the close relatives or heirs of the applicant, if she/he has a legitimate interest or if the Court is satisfied that the complaints is of general importance[734]. Beyond these cases concerning "indirect victims", there can be also cases regarding "potential victims": even if Article 34 does not contemplate abstract challenges (*actio popularis*) or complaints *in abstracto* alleging a violation of the Convention, it allows in certain specific circumstances applications from potential applicants: even if there has been no specific measure implemented against them, in these cases victims must demonstrate that there is a real personal risk of being directly affected by the violation and must be able to produce reasonable and convincing evidence of the likelihood that a violation affecting him/her personally will occur[735]. Moreover, any applicant can lose the "victim status" when the national authorities have acknowledged that there has been a violation of the Convention (expressly or in substance) or when the applicant has been provided with redress[736].

Furthermore, it is important to point out that the Court can declare an application inadmissible at any stage of the proceeding[737]. Here, the main features of the admissibility criteria listed under

[731] European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Strasbourg, 30 April 2020.
[732] P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 128.
[733] See more in P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 124 and in European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Strasbourg, 30 April 2020, pp. 14-15.
[734] *V. Supra*, to note 732, p. 126.
[735] See more in P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), pp. 131-134 and in European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Strasbourg, 30 April 2020, p. 14.
[736] The Court has laid down this double test in the judgement *Eckle v. Germany* (No. 8130/78), 15 July 1982, para. 66.
[737] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35.4: "*The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings".*

Article 35 will be generally examined in order to have some useful instruments for the analysis of the judgements that will be taken into consideration in the third chapter of this work and that belong, for the most part, to the jurisprudence of the European Court of Human Rights. The most important admissibility criterion is the requirement to exhaust all domestic remedies[738], according to the generally recognized rules of international law (Article 35.1). This rule has to be applied "with flexibility and with no excessive formalism" because it is being applied in the field of the protection of human rights and for this reason the circumstances of every case will be examined separately and cannot be applied automatically[739]. Applicants are only required to exhaust domestic remedies which are available in theory and in practice at the relevant time and which they can directly institute themselves, that means remedies that are accessible, capable of providing redress in respect of their complaints and offering reasonable prospect of success[740].

If a case is declared inadmissible for failure of domestic remedies, because the application has been lodged prematurely with the Court, the applicants have the opportunity to lodge again the complaint with the Court once domestic remedies have been actually exhausted[741]. Moreover, an applicant is required to pursue only remedies that are available (the applicant must be able to initiate the proceeding directly, without the intermediation of a public body or official), effective and sufficient (it has to provide redress for the applicant in respect of the alleged violation of the Convention, not only in terms of compensation, but it has also to guarantee that the right in question is secured; also the length of the proceeding is an important parameter for the effectiveness of the remedy)[742]. When a government can demonstrate that there was an appropriate and available remedy for the applicant, it is the applicant that has to show that that remedy has in fact been used or that it was for some reasons inadequate and ineffective in the particular circumstances of the case[743].

In Article 35.1 is also stated that the Court may deal only with matters submitted within six months of the final decision taken in the domestic proceeding. This time usually runs from the day in which the judgment (at domestic level) is given, but if the judgment in not given publicly, it starts from the moment in which the applicant's representatives receive notification of the decision; when there are no applicable domestic remedies, the application should be presented to the Court

[738] It is important to note that an application can be submitted to the Court before the domestic remedies are exhausted, provided that they are exhausted before the admissibility decision is made. See *Luberti v. Italy* (Application no 9019/80), 7 July 1981.
[739] *V. Supra*, to note 735, respectively p. 144 and p.25.
[740] *V. Supra*, to note 735, respectively p. 142 and p. 27.
[741] P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 144.
[742] *V. Supra*, to note 735, respectively pp. 145-153 and pp. 28-30.
[743] European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Strasbourg, 30 April 2020, p. 32.

within six months of the incidents or decision complained of or alleged act in breach of the Convention[744]. This rule, unlike the previous one, must be strictly applied.

In Article 35.2 it becomes clear that an application, in order to be declared admissible, does not have to be anonymous[745]. It states also that an application won't be considered admissible by the Court if it *"is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information"*[746]. For this reason, repeated applications brought to the Court by the same applicant will be declared inadmissible, unless they bring new relevant information and applications already presented to another procedure of investigation or settlement, such as for example a petition to the Human Rights Committee established by the International Convention on Civil and Political Rights, will not be considered if a decision has not already been taken[747].

In Article 35.3(a) of the Convention, it can be read that an application must be declared inadmissible if it "is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application"[748]. Starting from the end of this provision, the concept of "abuse of the right of individual petition" is to be intended in its ordinary meaning according to general legal theory:

> *"namely, the harmful exercise of a right for purposes other than those for which it is designed. Accordingly, any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application"*[749].

Under this provision will be declared inadmissible vexation petitions, petitions written in offensive language, applications under false identity, falsified documents, cases in which are deliberately concealed relevant information to the Court or when there is an international breach of the duty of confidentiality of friendly-settlement negotiations[750].

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[744] *V. Supra*, to note 741, pp. 160-161. It is important to note that in "continuing situations", such as detention, the application must be presented within six months from the end of the situation complained for, that means from the moment in which the violation cease to have a continuing effect.
[745] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35.2 (a).
[746] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35.2 (b).
[747] P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), pp. 172 – 173.
[748] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35.3 (a).
[749] *V. Supra*, to note 743, p. 48.
[750] *V. Supra*, to note 735, respectively p. 184 and pp. 48-50.

Moreover, it is also important to find out if the application is manifestly ill-founded: this procedure corresponds to a sort of preliminary merits test in order to filter the cases. The Court declares an application ill-founded if it does not "disclose *prima facie* grounds that there has been a breach of the Convention" for example when the applicant is not able to "adduce any evidence in support of the application"[751].

Lastly, this paragraph of the Convention affirms that an application should be declared inadmissible if it is incompatible with the provisions of the Convention or the Protocols. This provision has four grounds of applications[752]:

1. *Ratione loci*: the violation must have occurred within the jurisdiction of the respondent state. This first principle will prove to be the fundamental one for our analysis because it is not only a territorial question, but it refers also to territories on which the state exercises "effective control", to territories that through invitation, consent or acquiescence have invited that state to exercise all or some public powers normally exercised by the Government or when the State has made a declaration under Article 56 of the Convention with the purpose of including under its jurisdiction a "dependent territory"[753].
2. *Ratione materiae*: the complaints must be about rights that are protected by the Convention or by the Protocols thereto and that fall within the scope of the articles of the Convention, otherwise they will be declared inadmissible[754].
3. *Ratione temporis*: In accordance with the general rules of international law, the so-called principle of non-retroactivity of treaties, "the provisions of the Convention do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the Convention in respect of that Party"[755]. Therefore, following this jurisdiction principle, will be considered only the acts committed in the period after the ratification of the Convention (and of the Protocols) by the respondent State.
4. *Ratione personae*: it is required that the complaints are directed against one or more contracting parties. For this reason, if the alleged violation has not been committed by a Contracting State or is not attributable to it, the application will be considered inadmissible. An application will therefore be declared inadmissible under this ground of

[751] *V. Supra*, to note 747, p. 183.
[752] Here the four ground of application will be briefly touched, in order to analyse them directly through the jurisprudence of our interest in Chapter 3 of this work.
[753] For further information about jurisdiction see ECHR, *Guide on Article 1 of the European Convention on Human Rights, Obligation to Respect Human Rights – Concept of "Jurisdiction" and Imputability*, Strasbourg, updated 31 December 2019. Available at: *https://www.echr.coe.int/documents/guide_art_1_eng.pdf*
[754] *V. Supra*, to note 735, respectively p. 176 and pp. 64-65.
[755] *V. Supra*, to note 743, p. 59.

jurisdiction if the applicant lacks standing or is unable to show that he/she is victim of the violation, if the application is brought an individual or an international organization that has not acceded to the Convention or if the applications regards a Protocol that has not been ratified by the High Contracting Party in question[756].

As already noted above, the provision enshrined in Article 35.3(b)[757] has been introduced by Protocol No.14 to the Convention in 2010. This provision is based on a three-fold test. First of all, it necessary to understand if the applicant has suffered a "significant disadvantage", that means that a violation should attain a minimum level of severity to warrant consideration by an international court (the significant disadvantage may be based on the financial impact of the matter or the importance of the case)[758]. Obviously, the minimum standard is assessed every time because it depends on the circumstances of the specific case and on the subjective perception of the applicant in relation to the objective elements of the case[759]. Once it has been established by the Court whether the applicant has suffered "significant disadvantage" or not, the two "safeguard clauses" will be taken into consideration. The first one affirms that even if the applicant has not suffered significant disadvantage, the application cannot be declared inadmissible if respect for human rights (as declared in the Convention and in the protocols) requires an examination on the merits; while the second one, in order to avoid a denial of justice for the applicant, declares that an application cannot be rejected under the admissibility requirement if the case has not been duly considered by a domestic tribunal[760]. The introduction of this new Protocol was not uncontroversial because, as already seen, it seemed to undermine the right of individual petition.

3. Other available mechanisms of protection of human rights: a comparison with the ECHR system

Great importance has been given to the system of protection of human rights established by the European Convention on Human Rights because it will be the main reference system for our work and because it is almost the only mechanism that guarantees under its provisions *jus standi* to

[756] *V. Supra*, to note 743, pp. 52-53.
[757] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35.2(b): *"The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal".*
[758] *V. Supra*, to note 743, p. 75.
[759] *V. Supra*, to note 743, p. 75.
[760] *V. Supra*, to note 743, pp. 81-82.

individuals in an effective way. Nevertheless, it is appropriate to give a look to the ways in which in individuals can access to justice under the other most important mechanisms of protection worldwide and the interconnections or differences they have with the ECHR system.

The most important mechanism of protection of human rights beyond the ECHR is the American Convention on Human Rights of 1969 that enshrines the right of individual petition in Article 44: *"Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party"*[761]. The first thing to notice is the absence in this provision of the "victim requirement" that seemed to be so fundamental in the CoE's system: all the legal subjects of the OAS nominated by the article are entitled to exercise the right of petition[762]. The Organization of American States (OAS) was created in 1948 at the Ninth American Conference in Bogotà[763] with the purpose of promoting the respect of human rights. For this reason, the member States of the OAS decided in 1967 to establish, with the Buenos Aires Protocol, the Inter-American Commission on Human Rights as the main organ of the Organization[764].

As a body of the OAS the competence of the Commission is extended to all the States of the Organization and as an organization of the American Convention on Human Rights it has competence on the States parties to the Convention[765]; whereas the Inter-American Court of Human Rights formally established in 1979 by the American Convention on Human Rights[766] has jurisdiction on those states members of the OAS that have not only ratified the Convention, but that have also declared the recognition of the binding contentious jurisdiction of the Court[767]. Moreover, as it can be inferred from Article 44 of the Convention already reported above, individuals have the right to bring individual petitions only in from of the Commission that has thus an intermediary role between the individual applicants and the Court: as asserted in Articles 61 of the Convention only member states and the American Commission can bring cases directly

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761 Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art. 44.
762 A. A. CANÇADO TRINDADE, *The Access of Individuals to International Justice,* Oxford University Press, 2011, p. 22.
763 Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948.
764 Organization of American States (OAS), *Protocol of Amendment To The Charter of The Organization Of American States (B-31) "Protocol Of Buenos Aires"*, 27 February 1967. Available at: *http://www.oas.org/dil/treaties_B-31_Protocol_of_Buenos_Aires.htm*
765 See Chapter VII of the *American Convention on Human Rights.*
766 See Chapter VIII of the *American Convention on Human Rights.*
767 Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art. 62. See the state of signatures and ratifications of the American Convention on Human Rights here: *https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights_sign.htm*

to the Court[768]. Here the greater difference with the system of protection of the Council of Europe emerges: in the American system it is granted to individuals only *locus standi in judicium* and not *jus standi*, meaning that they cannot have direct access to the Court without having previously submitted an application to the Commission which can then refer the case to the Court following its Rules of Procedure; on the contrary, in the European system, it is granted *jus standi* to individuals because, as we have seen, they can access directly to the Court without intermediaries. A change has taken place in 2009 with the introduction of the Rules of Procedure of the Inter-American Court of Human Rights that, even if they it did not establish *jus standi* for individuals, strengthened their position and participation in front of the Court[769]. Furthermore, it is important to underline the fact that the Commission is not a judicial organ and can emit only recommendations; in contrast, judgements of the Inter-American Court exerts not only moral and political persuasion, but also juridical force just like the ones of the European Court of Human Rights, enabling in this way a stronger and more effective protection of human rights.

Needless to say that the other system of protection worth to mention is the one covered by the African Charter of Human and People's Rights[770] that enshrines the right of individual petition under Article 5.3 of the Burkina Faso Protocol to the Convention: *"The Court may entitle relevant Non-Governmental Organizations (NGOs) with observers status before the Commission, and individuals to institute cases directly before it, in accordance with Article 34(6) of this Protocol"*[771]. This Protocol aimed at the establishment of an African Court on Human and Peoples' Right in order to complement the mandate of the Commission[772]. The decisions of the Court are final and binding, like the ones of the American and European Court on Human Rights. Nevertheless, the Court's jurisdiction can be exerted only on those states that have ratified the Court's Protocol and that have accepted through a declaration the competence of the Court, as it

[768] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, Art. 61.1: *"Only the States Parties and the Commission shall have the right to submit a case to the Court".*

[769] OAS, Inter American Court of Human Rights, *Rules of Procedure of the Inter-American Court of Human Rights*, approved by the Court during its LXXXV Regular Period of Sessions, held from 16 to 28 November 2009, entered into force in January 2010. Available at: *https://www.corteidh.or.cr/sitios/reglamento/nov_2009_ing.pdf*

[770] Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981. Available at: *https://www.achpr.org/legalinstruments/detail?id=49#:~:text=The%20African%20Charter%20on%20Human,freedoms%20in%20the%20African%20continent*

[771] Organization of African Unity (OAU), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African court on Human and Peoples' Rights*, Ouagadougou, Burkina Faso, 9 June 1998 (entered into force on 25 January 2004), Art 5.3. Available at: *https://au.int/sites/default/files/treaties/36393-treaty-0019_-_protocol_to_the_african_charter_on_human_and_peoplesrights_on_the_establishment_of_an_african_court_on_human_and_peoples_rights_e.pdf*

[772] See more about this at: *https://www.achpr.org/afchpr/#:~:text=The%20Protocol%20on%20the%20Establishment,protective%20mandate%20of%20the%20Commission.*

can be read at Article 34.6 of the Protocol: *"At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the Court to receive cases under article 5(3) of this Protocol. The Court shall not receive any petition under article 5(3) involving a state Party which has not made such a declaration"*[773]. It is interesting to notice the fact that also in this system is not present the "victim requirement", but that to individuals is granted *jus standi*, demonstrating that also in this more recent system individuals can present cases directly in front of the Court obtaining a greater degree of protection.

Furthermore, it is important to mention in this section the systems of protection at UN level. Even if at global level does not exist an equivalent of the judicial system of the ECHR, the UN system offers mechanisms of protection through quasi-judicial[774] monitoring bodies that contribute to make justice more accessible[775]. The human rights treaty bodies are committees of independent experts that monitor implementation of the core international human rights treaties[776]. Nowadays there are nine human rights international treaties: the Convention on the Elimination of All Forms of Racial Discrimination 1965 (ICERD), the International Covenant on Civil and Political Rights (ICCPR) 1966, the International Covenant on Economic Social and Cultural Rights (ICESCR) 1966, the Convention on the Elimination of Discrimination Against Women (CEDAW) 1979, the Convention Against Torture (CAT) 1984, the Convention on the Rights of the Child (CRC) 1989, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICMW) 1990, International Convention for the Protection of All Persons from Enforced Disappearance (ICPED) 2006, Convention on the Rights of Persons with Disabilities (CRPD) 2006[777]. These conventions are respectively protected by the Committee on the Elimination of Racial Discrimination (CERD), the Human Rights Committee (UN HRC for the CCPR), the Committee on Economic Social and Cultural Rights (CESCR), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee Against Torture (CAT) the Committee on the Rights of the Child (CRC), the Committee on Migrant Workers (CMW), the Committee on Enforced Disappearances (CED), the Committee on the Rights of Persons with Disabilities (CRDP)[778]. Of these nine committees only seven (namely UN

[773] Organization of African Unity (OAU), *Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African court on Human and Peoples' Rights*, Ouagadougou, Burkina Faso, 9 June 1998 (entered into force on 25 January 2004), Art 34.6.
[774] *Judicial dispute settlement* at the international level refers to dispute settlement by a body of formally elected judges on the basis of evidence submitted by the parties, according to the applicable law, where a legally binding judgment is delivered. *Quasi-judicial dispute settlement* is understood to be dispute settlement by a body of independent experts who consider the evidence and arguments of the parties by reference to law and delivers findings which the parties have not expressly accepted as legally binding.
[775] FRA - European Union Agency for Fundamental Rights, *Access to Justice in Europe: an Overview of Challenges and Opportunities*, Publications Office of the European Union, Luxembourg, 2011, p. 25.
[776] See more at: *https://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx*
[777] For further information see:
https://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx
[778] See more at: *https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx*

HRC, CERD, CAT, CEDAW, CRPD, CED and CESCR) can receive, under certain conditions, individual complaints.

If an individual claims to be victim of a violation under a treaty, he or she can bring a complaint in front of the relevant Committee only if the domestic remedies have been exhausted and, above all, if the State against whom the application has been brought, has ratified the Convention and has accepted the competence of the Body to receive and consider individual petitions[779]. The right of individual petition is granted under Article 22.1 of the CAT[780], under the Optional Protocol to the ICCPR[781], under Article 31.1 of the ICPED[782], under the Optional Protocol to the CEDAW[783], under Article 14 of the ICERD[784], under the Optional Protocol to the ICERS[785] and under the Optional Protocol to the CRPD[786]. Under the articles here listed and under the Optional Protocols mentioned, it is possible to notice the fact that the "victim requirement" is present in all the documents of the UN bodies, that the admissibility criteria to satisfy in order to bring a claim in front of one of the Committees are very similar to the ones of the ECHR and that the complaint mechanisms are designed to be accessible directly to the layperson[787]. The condition of the "double acceptance" of the Convention and of the jurisdiction of the Committee over individual complaints is very important because when the status of ratification of these documents is analyzed, it becomes clear that there is a great discrepancy between the number of States that

[779] See more at: *https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/IndividualCommunications.aspx*
[780] UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Art. 22.1: " *A State Party to this Convention may at any time declare under this article that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction who claim to be victims of a violation by a State Party of the provisions of the Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration".*
[781] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966 (entered into force 23 March 1976).
[782] UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Art. 31.1*:" A State Party may at the time of ratification of this Convention or at any time afterwards declare that it recognizes the competence of the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation by this State Party of provisions of this Convention. The Committee shall not admit any communication concerning a State Party which has not made such a declaration".*
[783] UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, 6 October 1999.
[784] UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, Art 14.1: "*A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration".*
[785] UN General Assembly, *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 5 March 2009.
[786] UN General Assembly, *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, 13 December 2006.
[787] See more at: See more at: Human Rights - Office of the High Commissioner, *Individual Complaint Procedures Under the United Nations Human Rights Treaties,* United Nations, Fact Sheet no. 7/Rev. 2, 2013. Available at: *https://www.ohchr.org/Documents/Publications/FactSheet7Rev.2.pdf*

have ratified the Convention and the number of States that have accepted the competence of that Committee to analyze individual applications. For instance, the Covenant on Civil and Political Rights has been ratified by 173 States, whereas the Optional Protocol has been ratified by 116 States; the Covenant on Economic, Social and Cultural Rights has been ratified by 171 States, whereas only 24 States have ratified the Optional Protocol[788].

Making a final comparison between the number of application brought in front of the ECHR and, taking the most known and meaningful mechanism of protection, in front of the Human Rights Committee, it can be noticed that the difference is disproportionate: in 2009 when the number of cases brought in front of the ECHR was reaching a peak of 60,000 only in that year, the UN HRC had received a total of 2,000 applications since it had started to receive cases in 1977[789]. This numbers are the clearest indicator of the fact that the difference lays in the final decisions of the two organs: if the ECHR issues judgements that are binding upon the State, the UN treaty based bodies issue views that are not binding and for this reason, even if the EU states are part of both the European Convention on Human Rights and of a large majority of the UN Bodies, the individual applicants may prefer the CoE's system because of its enforcement and binding mechanism that seems to provide a more effective access to justice[790].

In order to conclude this overview, it is necessary to keep in mind that individuals cannot obtain justice through applications in front of the International Court of Justice (ICJ) because, as stated in Article 34.1 of the Statute of the Court, *"only States may be parties in cases before the Court"*[791].

4. Inter-state cases under Article 33 of the ECHR

Following this line of reasoning introduced thanks to this brief mention to the ICJ, it is important to conclude this chapter with a little, but very important remark: even if the focus of this work is on the right of individual petition, for the purpose of the final analysis of the jurisprudence in the last Chapter, it is necessary to devote time to the importance assumed by the inter-state cases in the context of the Council of Europe. It is behoved to remind indeed that also States formally have the right under Article 33 of the ECHR to bring to the Court claims against another state party to the Convention: *"Any High Contracting Party may refer to the Court any alleged breach of the*

[788] See more about the ratification status of the other Conventions and Protocols at: *https://indicators.ohchr.org/*
[789] *V. Supra*, to note 775, p. 24.
[790] F. FRANCIONI, *Access to Justice as a Human Right*, Oxford University Press, 2007, pp. 135-137.
[791] United Nations, *Statute of the International Court of Justice, 18 April 1946, Art 34.1.*

provisions of the Convention and the Protocols thereto by another High Contracting Party"[792]. Through inter-state applications usually States challenge other contracting states' systemic failures, broad violations of the Convention, or human rights abuses[793]. The inter-state applications presented to the Court are therefore very significant and often are the edge of a conflict or a war protracted between two States. For this reason, the CDDH has proposed to the Chamber to relinquish "as quickly as possible" the inter-state cases to the Grand Chamber due to their "priority and sensitive nature"[794].

The procedure related to the inter-state applications is explained under rules 46, 48,51 and 58 of the Rules of Court[795]: any State intending to bring a case before the Court against another State must lodge an application, setting out a statement of facts and alleged violations, with relevant arguments; then the Court communicates it to the respondent State, that is invited to submit written observation, and assigns it to one of the Sections[796]. Then the usual procedure of a communicated case follows with the admissibility decisions and the judgement on the merits, two stages that with reference to inter-state applications can be joined by the Court in exceptional cases, as stated in Article 29.2 of the Convention[797].

With regard to the admissibility requirements for inter-state applications it must be said that they are relatively low, but some of them can raise issues. The six month-rule does not apply to situations of continuing violations as in for individual applications and the requirement of exhaustion of domestic remedies is dispensed with if the applicant State alleges that legislation contravenes the Convention, even absent a specific individual victim[798]. In order to establish the facts, the Court will not rely on the fact that the case has raised from a government but will analyse all the material at disposal; in this case the mere existence of a large number of individual applications originated from the applicant state could be used as an indicative proof about the

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[792] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 33.
[793] J. KOCH, *The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia*, Boston College International and Comparative Law Review, Vol.39, 2016, p. 174.
[794] Steering Committee for Human Rights (CDDH), *Proposals for a more Efficient processing of inter-State cases*, Para. 19, Council of Europe, 6 June 2029. Available at: *https://rm.coe.int/steering-committee-for-human-rights-cddh-proposals-for-a-more-efficien/168094e6e1*
[795] ECtHR, *Rules of Court*, Strasbourg, New Edition entered into force on 1 January 2020. Available at: *https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf*
[796] ECtHR, *Q & A on Inter-State Cases*, Press Unit, January 2021. Available at: *https://www.echr.coe.int/Documents/Press_Q_A_Inter-State_cases_ENG.pdf*
[797] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 29.2: *"A Chamber shall decide on the admissibility and merits of inter-State applications submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise".*
[798] G. ULFSTEIN – I. RISINI, *Inter-State Applications under the European Convention on Human Rights: Strengths and Challenges*, EJIL:Talk!, 24 January 2020. Available at: *https://www.ejiltalk.org/inter-state-applications-under-the-european-convention-on-human-rights-strengths-and-challenges/*

exhaustion of domestic remedies[799]. The rule of article 35.2(b) of the convention regarding the possibility to present the case in front of other fora, does not apply to inter-state cases; instead it must be taken into account Article 55 of the Convention on the exclusion of other means of dispute settlement which establishes that: *"The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention"*[800].

After this brief general analysis about the procedural aspects, it must be reminded that this inter-state practice has been underused by States: as a matter of fact, only twenty-eight inter-state cases can be counted since the establishment of the Convention[801]. In comparison with the huge amount of individual applications presented in front of the ECtHR since its establishment, it seems very small; however, these cases must be considered with great attention because "when a state decides to invoke the inter-state process, the case is almost invariability of some considerable political importance"[802]. Moreover, when an inter-state application is presented to Court, it will for sure have an impact on a large number of individuals[803].

This strict correlation between the protection of individual human rights and the conflict situation behind inter-state applications has been highlighted also in the message of the ex-President of the European Court of Human Rights for the 60th anniversary of the Court in which he remarked that: *"…A number of State conflicts have been brought before the Court. Most cases have concerned situations of crisis or conflict. In addition to these inter-State cases there are thousands of individual applications before the Court related to conflict situations…"*[804]. Nevertheless, the Convention does not provide a formal way to deal with overlapping inter-state and individual applications, but the core concept at the basis of the analysis of the Court is the fact that the beneficiary is always the human being because also the inter-state cases are about the individual rights and not about the rights of the States involved[805].

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[799] *V. Supra*, to note 798.
[800] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 55.
[801] ECtHR, *Inter-State Applications – by date of introduction of the applications*, 23 February 2021. Available at: *https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf*
[802] P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 14.
[803] *V. Supra*, to note 798.
[804] ECtHR, *The European Court of Human Rights marks 60 years of work for peace, democracy, and tolerance*, Speech of Linos-Alexandre Sicilianos, President of the European Court of Human Rights, 2019. Available at: *https://www.echr.coe.int/Documents/Speech_20190930_Sicilianos_60_years_ECHR_ENG.pdf*
[805] *V. Supra*, to note 798.

For the purpose of this work, it is very important to mention Article 33 of the Convention because the inter-state complaint procedure has often been used in connection with cases regarding contended territories, especially the ones of the post-Soviet area of our interest. As a matter of fact, there have been three waves that have considerably increased the number of inter-state application: 2008 after the Georgian-Russian war, 2014 after the Crimean crisis and 2020 after the re-opening of the conflict between Armenia and Azerbaijan. All the clashes behind these inter-state cases will be deeply analysed further, but for the moment it is essential to keep in mind that the more representative cases that will be analysed in the last chapter are: the four applications brought by Cyprus against Turkey[806]; the four ones concerning the cycle *Georgia v. Russian Federation*, especially the case *Georgia v. Russian Federation (II)* on which a judgement has been recently delivered[807]; the five complaints presented by Ukraine against Russian Federation after the incorporation of Crimea, especially the one *Ukraine v. Russian Federation (re Crimea)* - taken jointly with *Ukraine v. Russian Federation (II)* - that have been recently declared partially admissible[808] and the three concerning the re-opening of the conflict in Nagorno-Karabakh in 2020[809].

Before proceeding, the main peculiar aspect for our analysis is the fact that the breaches to which is made references in Article 33 must have been committed "by a High Contracting Party" and for this reason the separatist areas of our interest cannot be brought directly to the Court because they are not States and they cannot therefore be taken to the Court as "High Contracting Parties" of the Convention. This topic will be further discussed in the last Chapter, but it is maybe the most relevant feature around which turns the entire work.

[806] ECtHR, *Cyprus v. Turkey* (I, no. 6780/74), (II, no. 6950/75), (III, no. 8007/77), (IV, no. 25781/94).
[807] ECHR, *Georgia v. Russian Federation* (I, no. 13255/07), (II, no. 38263/08), (III, no. 61186/09), (IV, no. 39611/18). The III has been struck off the list.
[808] ECtHR, *Ukraine v. Russian Federation* (re Crimea, no. 20958/14), (re Eastern Ukraine, no. 8019/16), (III, no. 49537/14), (II, no. 4380014), (VII, 38334/18), (VIII, no. 55855/18). Note that the III (no. 49537/14) has been struck off the list and that no. 20958/14 and no. 8019/16 were originally a unique application that has been separated by the Court following geographical criteria..
[809] ECtHR, *Armenia v. Azerbaijan* (no. 42521/20), *Armenia v. Turkey* (no. 43517/20), *Azerbaijan v. Armenia* (no. 47319/20).

CHAPTER 4

RIGHT TO JUSTICE IN THE *SELF-PROCLAIMED* AUTHORITIES OF THE POST-SOVIET AREA

ABSTRACT: 1. Introductory remarks - 1.1 Access to justice at domestic level: limits of the legal systems in the *de facto* entities of the post-Soviet area – 2. *Contested territories* under the ECHR: membership vs. non-recognition – 2.1 Effectiveness of the ECHR with respect to the concurrent applications derived from the *de facto* regions – 2.2 Admissibility criteria – 2.2.1. Exhaustion of domestic remedies – 2.2.2 Other procedure of international investigation or settlement – 2.2.3 Compatibility with the provisions of the Convention – 3. The fundamental issue of jurisdiction – 3.1 Extra-territorial jurisdiction and effective control over an area – 3.2 Exercise of extra-territorial jurisdiction in the *de facto* entities: analysis of the ECtHR jurisprudence – 3.2.1 Cases concerning TRNC – 3.2.2 Individua cases concerning Transnistria – 3.2.3 Individual cases concerning Nagorno-Karabakh - 3.2.4 Inter-state cases: Georgia and Ukraine vs. Russian Federation

1. Introductory remarks

It is now the moment to deal with the matter that has been behind the entire research, to show therefore the ways through which people living in the post-Soviet contested territories can obtain justice. All the theoretical concepts studied until now will merge in this last chapter: as a matter of fact, the principles of *locus standi* and individual petition will prove to be as useful as the ones of statehood and recognition for the purpose of this chapter. Also the analysis of the historical and geopolitical context of the single case studies is of fundamental importance for the analysis of the jurisprudence that is following because each case and each application make reference to the conflict and to the history of that specific contested territory.

The main point of the following chapter is the fact that the contested territories analysed are not recognized as states and for this reason cannot become officially part of the Council of Europe and of the European Convention on Human Rights. Their obligations and responsibilities, as it will be shown, are therefore re-addressed to the patron and parent states that are officially parts of these two organs. The efficiency of the ECHR is measured in this context with the ability not to leave juridical vacuum in these areas that are under its jurisdiction. This last concept of

"jurisdiction" will assume a fundamental role in the entire game and will be therefore accurately analysed in order to clarify all its aspects and branches.

Before proceeding it is necessary to remark that part of the jurisprudence that will be analysed is in continuous evolution and that therefore it is still impossible to draft conclusions because the last word is obviously left to the Court.

1.1 Access to justice at domestic level: limits of the legal systems in the *de facto* entities of the post-Soviet area

As understood from the previous chapters, the human rights situations in the *de facto* regions depicted is not rosy. Almost thirty years of instability and the alternation of several conflicts have worsened the conditions of the inhabitants of these territories. Nevertheless, this work will not focus on the human rights violations themselves, but rather on the methods and instruments people own in order to seek justice in these areas. Here it is presented a brief overview of the main challenges encountered at local level in this field, for a better understanding of the judgements proposed in the last part.

Before proceeding with the analysis of the single situations, it is interesting to note that a problem shared by all the conflicts is the one of the Internally Displaced Persons (IDPs). Therefore, a lot of cases involving internally displaced persons have been presented in front of the ECtHR, but it is important to keep in mind that in 1998 it has been created an *ad hoc* instrument in order to address this problem: the Guiding Principles on Internal Displacement[810]. This text provides a description of this category of people:

> *"For the Purpose of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of an armed conflicts, situations of generalized violence, violations of human rights or natural or human-made disaster, and who have not crossed an internationally recognized State border"*[811].

Moreover, for the purpose of our analysis, it is important to stress that Principle 1 affirms that "internally displaced persons shall enjoy, in full equality, the same rights and freedoms under

[810] See *Guiding Principle on Internal Displacement*, 1998. Available at: https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html
[811] *V. Supra,* to note 810, p. 1, para.2.

international and domestic law as do other persons in their country"[812]. Even if not binding, these 30 Guiding Principles presented by the then Representative of the UN Secretary General on IDPs, M. Francis Deng, to the UN Commission on Human Rights, represent a milestone in the protection of IDPs and have gained a considerable importance since their adoption: even the UN General Assembly has recognized their importance and has encouraged all states to use them in situations concerned with internal displacement[813].

The human rights situation in Transnistria has been reported by the Senior UN Human Rights Expert and Commissioner for the Human Rights in the Council of Europe Thomas Hammarberg in his Report of 2013[814] and in its follow-up of 2018[815]. As noted above and as it will emerge from the judgements, a peculiar violation occurring in Transnistria concerns the language or better, the use of Latin and Cyrillic script. In Transnistria, the Cyrillic script is a fundamental defining feature and for this reason in 2004 the so-called Romanian schools (teaching in Moldovan with the Latin script) have suffered a temporary closure that has attracted international attention[816] and from which have arisen some important case in front of the ECtHR[817]. Nowadays, there are 163 state schools of which 114 use Russian as the language of instruction, 32 Moldovan (with Cyrillic script), 12 mixed Russian/Moldovan, two Ukrainian and three mixed Russian-Ukrainian; in these statistics are not included the eight school that teach Moldovan in the Latin script, that are registered as private institutes and are supported by the Ministry of education in Chisinau[818]. These schools are still facing several difficulties, even if the Transnistria Constitution consider at equal level Moldovan, Russian and Ukrainian[819]. As a matter of fact, the Constitution of Transnistria contains explicit references to the protection of human rights and since 2006 is also present an Ombudsman on the territory[820]. Nevertheless, the multi-ethnicity of this territory is constantly violated, and the authorities and the institutional-legal framework created seem to be more useful for the survival and stability of the regime, rather than to the protection of human

[812] *V. Supra,* to note 810, p. 2, Principle 1.
[813] See more at *IDMC, Internal Displaced Monitoring Centre*, available at: https://www.internal-*displacement.org/internal-displacement/guiding-principles-on-internal-displacement#:~:text=The%20Guiding%20Principles%20state%20that,other%20persons%20in%20their%20country.*
[814] T. HAMMARBERG, *Report on Human Rights in the Transnistrian Region of the Republic of Moldova*, 14 February 2013. Available at: *https://childhub.org/en/system/tdf/library/attachments/1583_Senior_Expert_Hammarberg_Report_TN_Human_Rights_original.pdf?file=1&type=node&id=6287*
[815] T. HAMMARBERG, *Follow-up Report on Human Rights in the Transnistrian Region,* 2018.
[816] G. COMAI – B. VENTURI, *Language and education laws in multi-ethnic de facto states: the cases of Abkhazia and Transnistria,* Nationalities Papers, Vol. 43 Issue 6, November 105, p. 887.
[817] ECtHR, *Catan and Others v. Moldova and Russia (*Applications nos. 43370/04, 8252/05 and 18454/06), Grand Chamber, 19 October 2012.
[818] *V. Supra,* to note 816, p. 893.
[819] Constitution of The Pridnestrovskaia Moldavskaia Respublica, 1995, Art. 12: *"Status of official language on an equal basis is given to the Moldavian, Russian, and Ukrainian languages".*
[820] Directorate-General for External Policies - Policy Department, *The frozen conflicts of the EU's Eastern Neighbourhood and their impact on the respect of human rights,* European Parliament, 2016, pp. 16-17.

rights[821]. There is therefore a lack of will of the *de facto* authorities to administer justice, while, from its side, Chisinau "has limited freedom of movement because an institutionalised cooperation with the separatists … could be interpreted as *de facto* recognition of the overall legitimacy and validity of their legal system"[822]. Political and business group have a strong influence of the legislative system that is therefore marked by widespread corruption and for this reason victims of human rights violations can rely on the assistance of regional human rights organ or on the action of activists and organisations of the civil society[823].

Human rights violations occur on a daily basis also in Nagorno-Karabakh, marked by a "non-frozen" conflict since the dissolution of the Soviet Union and whose situation has been exacerbated by the recent conflict of 2020 that has caused other missing, deaths and, especially, displaced persons[824]. Nevertheless, due to its isolated position, both from a geographical and political point of view, it has always been very difficult for the people living in this region to seek justice: due to the widespread corruption and the continuous war, there are few legal professionals to which victims can turn in order to receive help[825]. As a matter of fact, also in this case corruption, nepotism and favouritism affect the justice system of this territory that is dependent on powerful political-security and business group that exercise a strong influence over it[826]. Moreover, even if provided with its own Constitution[827], in Nagorno-Karabakh has taken place the so-called phenomenon of "law shopping": they have extensively borrowed the legislative scheme and the legislation of their metropolitan State, Armenia[828]. Therefore, even if 43 articles of the Constitution of Artsakh touch human rights and freedoms and even if there is the important presence of an Ombudsman on the territory - termed as the Human Rights Defender of the Republic of Nagorno-Karabakh[829] - the situation is still very difficult also in this region.

In Abkhazia and South-Ossetia the most serious human rights violations have taken place after the conflict of 2008 and have been mainly described by an OSCE Report of November 2008 and in one by Human Rights Watch that has concentrated on the atrocities committed in South

[821] *V. Supra*, to note 820.
[822] *V. Supra*, to note 820, pp. 17-18.
[823] *V. Supra*, to note 820, p. 18
[824] See the situation one month after the cease-fire at*:* *https://reliefweb.int/report/azerbaijan/nagorno-karabakh-conflict-operational-update-december-2020* and the situation of the displaced persons of the last war at: *https://oc-media.org/features/weve-left-our-hearts-there-displaced-by-war-in-nagorno-karabakh/*
[825] *V. Supra*, to note 820, p. 27.
[826] *V. Supra*, to note 820, p. 26.
[827] Constitution of the Republic of Artsakh, 20 February 2017, translation of the text available at: *http://president.nkr.am/media/documents/constitution/Constitution-eng2017.pdf*
[828] C. WATERS, *Law in Places that Don't Exist*, 34 Denv. J. Int'l L. & Pol'y, Vol. 34:3, 2006, p. 409. Also the training of lawyers and ministries and the assistance to courts is provided by Armenia.
[829] See Human Rights Ombudsman of the Republic of Artsakh at: *https://artsakhombuds.am/en*

Ossetia[830]. Nevertheless, the situation is still very difficult in the region due especially to the violations of the freedom of movement and the "borderization" question[831]. Another problem in the region concerns the IDPs, or better the ethnic Georgians that were forced to live the territories of Abkhazia and South Ossetia[832]. Nevertheless, these obstacles seem insurmountable due to lack of communication and cooperation between the separatist entities and even between Russia and Georgia: there is the inability on the part of the *de jure* and *de facto* authorities to conduct proper investigations, rendering almost impossible to citizens to gain access to justice[833]. Thus, in turning to local authorities, people do not have great expectations due to the length of the proceedings and the high risk of pre-trial detention[834]. Moreover, it has been highlighted above that in Abkhazia it is flourishing a strong web of NGOs able to influence the political choices of the government, while South Ossetian legal system is biased in favour of the ruling elites producing a high degree of incoherence[835]. Moreover, South Ossetia, as Nagorno-Karabakh, has recurred to the legal importation of its laws from Russian Federation and there are few legal professionals active on the territory[836]. Also in this case it is evident therefore that, even if human rights are nominated in the Constitutions of the two entities and even if have been created basic frameworks in order to imitate a western background[837], this is done in large part in order to obtain legitimization at international level, rather than to actually implement human rights at local level[838].

The last case is again the one of Crimea, whose developments in the human rights field are more recent and even more severe. The situation has been constantly monitored by the Office of the High Commissioner for Human Rights (OHCHR) that has periodically issued reports about the human rights condition in Ukraine[839]. Even if the situation is still ongoing, it is important to note that the most affected ethnic group is (and has always been) the one of the Crimean Tatars; the

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[830] See OSCE, *Human Rights in the War-affected Areas Following the Conflict in Georgia*, Warsaw, 27 November 2008, available at: *https://www.osce.org/files/f/documents/d/6/35578.pdf*. See also, HUMAN RIGHTS WATCH, *Up in Flames, Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia*, 23 January 2009, available at: *https://www.hrw.org/report/2009/01/23/flames/humanitarian-law-violations-and-civilian-victims-conflict-over-south*

[831] See Amnesty International, *Behind Barbed Wire, Human Rights Toll of "Borderization" in Georgia*, 3 July 2019, available at: *https://www.amnesty.org/download/Documents/EUR5605812019ENGLISH.PDF*

[832] *V. Supra*, to note 820, p. 22.

[833] *V. Supra*, to note 820, pp. 21-22.

[834] *V. Supra*, to note 820, p. 21.

[835] *V. Supra*, to note 820, pp. 21-22.

[836] *V. Supra*, to note 828, pp. 410, 415.

[837] Abkhazia has a Human Rights Commissioner and in south Ossetia the position of Presidential Commission of Human rights was created. The territories are provided also with the Ombudsmen who, however, have different roles: in Abkhazia he can communicate with his partner in Georgia, while in South Ossetia he does not have the possibility to do so.

[838] *V. Supra*, to note 816, p. 20.

[839] See all the OHCHR Reports on the human rights situation in Ukraine from April 2014 since December 2020 at: *https://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx*

incorporation of Crimea has further worsened the possibilities of victims to obtain justice and fair trials: as a matter of fact, the Ukrainian institutional system of protection of human rights has ceased to function in Crimea and on 7 April 2014 the regional Crimea Office of the Ombudsman of Ukraine was closed down[840]. Even the language issue has obviously been affected: Russian law prescribes both Ukrainian and Crimean Tatar as state languages alongside with Russian, but the number of schools where Crimean Tatar and Ukrainian is taught has been severely reduced, provoking a limitation to the right of education of these ethnic groups that are still living in the Crimean territory[841]. In this situation legal professionals and civil society actors, along with regional instruments of protection, have become therefore the only forum to which victims of human rights violations can turn[842].

Actually, in all the cases proposed, it is evident that few claims are presented in front of national courts because "both the incumbent State and the state sponsoring the separatists are likely to deny jurisdiction over the separatist entity"[843]. It is therefore under the jurisdiction of a regional human rights organ that these claims are heard and, as noted above, it is especially in front of the European Court of Human Rights that these claims are brought.

2. *Contested territories* under the ECHR: membership vs. non-recognition

As understood from this brief analysis, violations of human rights law occur on a daily basis in all the areas analysed, but it is very difficult for victims to obtain justice at local or even at national level. Nevertheless, fundamental human rights are now considered to be *erga omnes* rights that must be always respected[844], also in these "grey zones" of international law. After having showed which place the *de facto* entities of the post-Soviet area occupy in the international arena, it is therefore time to recompose the entire puzzle and understand which means have the people living there in order to obtain justice at international, or better at regional level.

As a matter of fact, for the purpose of our analysis, the focus will be on the jurisprudence of the European Court of Human Rights (thereinafter ECtHR) because the overwhelming majority of the cases arisen from the *de facto* regions of our interest are brought in front of this Court.

[840] *V. Supra*, to note 820, p. 11.
[841] *V. Supra*, to note 820, p. 13.
[842] *V. Supra*, to note 820, p. 15.
[843] T. D. GRANT, *Frozen Conflicts and International Law*, Cornell International Law Journal Vol. 50, 2017, p. 404.
[844] H-J. HEINTZE, *Are De Facto Regimes Bound by Human Rights?*, IFSH (ed.), OSCE Yearbook 2009, Baden-Baden 2010, p. 275.

Moreover, as shown in the previous chapter, the European Convention on Human Rights (thereinafter ECHR) has one of the most effective systems for the protection of human rights that allows victims to bring individual petitions directly in front of the Court, guaranteeing the *jus standi in judicio* of individuals under Article 34[845].

It is Article 59.1 of the ECHR that establishes which entities can be considered members of the Convention affirming that *"This Convention shall be open to the signature of the members of the Council of Europe"*[846]. In order to understand which entities can be part of the Council of Europe it must be taken as reference Article 4 of the Statute of the Council of Europe that establishes that *"Any European State … may be invited to become a member of the Council of Europe by the Committee of Ministers*"[847]. It is here that lays the problem at the basis of the entire work: the *de facto* regions cannot be considered as "High Contracting Parties" of the Convention because they are not recognized as States and, as a consequence, people living in there meet several obstacles in the path toward justice. This difficult situation has been underlined also in a Report of 2003 of the Council of Europe Parliamentary Assembly on the "areas where the European Convention on Human Rights cannot be applied"[848] in which where mentioned the obstacles that can exist in the application of the ECHR in certain geographical areas such as

> *"armed conflict or emergency situations, occupation of part of a state's territory, or intervention by one state on the territory of another, or even the effective absence of control by a state over part of its territory … difficulties – sometimes insurmountable - to submit individual applications, either through lack of awareness of the ECHR or for practical reasons … war crimes or crimes against humanity, and to which even thousands of individual applications would fail to do justice"*[849].

In this report where mentioned several cases arisen from the *de facto* regions studied below and this is the proof of the difficult application of the Convention in these areas.

To sum up, all the contested territories in question are not recognized as States (and do not act like real state): for this reason cannot be part of the Council of Europe and, consequently, of the ECHR. The ability of people living in the *de facto* regions to enjoy the rights included in the Convention, even the one that guarantee the right to individual petition, can therefore be addressed

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[845] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 34.
[846] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 59.1.
[847] *Statute of the Council of Europe*, CETS 1, London, 5 May 1949. Available at: *https://rm.coe.int/1680306052*
[848] EUR. PARL. ASS., *Areas where the European Convention on Human Rights cannot be implemented*, Doc. 9730, 11 March 2003. Available at: *https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=10095&lang=EN*
[849] *V. Supra*, to note 848, para. 4-6.

only from the perspective of the territorial or the patron states, that are the States parties of the Council of Europe and of the Convention[850]. As a direct consequence, the contested territories cannot even be held directly responsible for the alleged violations of the cases because they are not "High Contracting Parties" of the Convention: the responsibility of the acts is attributed to the patron or the parent states that as members of the Conventions have duties and obligations.

The opportunity to seek justice also in these areas is given by the fact that, fortunately, all the patron and mother states in question are members of the Council of Europe: Azerbaijan[851] and Armenia[852] since 25 January 2001, Georgia since 27 April 1999[853], the Republic of Moldova since 13 July 1995[854] and Ukraine since 9 November 1995[855]. Also Russian Federation is part of the Council of Europe since 28 February 1996[856], but its presence in the Council, that has always been as fundamental as controversial[857], has dramatically deteriorated after the Crimean events of 2014. As a matter of fact, after the incorporation of Crimea, on 10 April 2014 the Parliamentary Assembly of the Council of Europe (PACE) with a Resolution adopted by 145 votes in favour, 21 against and 22 abstentions suspended the voting rights of the Russian Federation, its right to be presented in the Assembly's leading Bodies and its right to participate in election observation missions[858]. On its part, Russian Federation has refused to contribute to the budget of the Council of Europe from June 2017 until June 2019[859]. The Russian rights have been restored on 25 June 2019 with another PACE Resolution adopted with 188 votes in favour, 62 against and 10 abstentions[860]: on the one hand this decision has met strong criticism by Ukraine, but on the other has allowed Russian citizens to continue bringing claims in front of the ECtHR, without further endangering the already fragile human rights situation in the country[861].

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[850] A. CULLEN – S. WHEATLEY, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, Human Rights Law Review, 13:4, 2013, p. 702.
[851] See the actions of Council of Europe in Azerbaijan at: *https://www.coe.int/en/web/portal/azerbaijan*
[852] See the actions of the Council of Europe in Armenia at: *https://www.coe.int/en/web/portal/armenia*
[853] See the actions of the Council of Europe in Georgia at: *https://www.coe.int/en/web/portal/georgia*
[854] See the actions of the Council of Europe in the Republic of Moldova at: *https://www.coe.int/en/web/portal/republic-of-moldova*
[855] See the actions of the Council of Europe in Ukraine at: *https://www.coe.int/en/web/portal/ukraine*
[856] See the actions of the Council of Europe in the Russian Federation at: *https://www.coe.int/en/web/portal/russian-federation*
[857] See an in-depth analysis in L.MÄLKSOO - W. BENEDEK, *Russia and the European Court of Human Rights*, Cambridge; New York: Cambridge University Press, 2017.
[858] Parliamentary Assembly, Resolution 1990 (2014), *Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation*, 10 April 2014. Available at: *http://www.assembly.coe.int/LifeRay/APCE/pdf/Communication/2014/20140410-Resolution1990-EN.pdf*
[859] S. DE VIDO, *Di Autorità, Poteri Sovrani e Iurisdictio: l'incerta Situazione della Crimea nei Procedimenti Innanzi a Corti Internazionali, Regionali e a Tribunali Arbitrali,* Ordine Internazionale e Diritti Umani, 2020, p. 803.
The Council of Europe's budget for 2020 was € 496M and the contribution of the Russian Federation has been € 33,155,579.
[860] See more at: *https://neweasterneurope.eu/2019/07/10/russias-return-to-pace/*
[861] See more at: *https://globalriskinsights.com/2019/10/russia-returns-to-the-council-of-europe/*

All the states mentioned have indeed obligations to protect human rights because they all have ratified the European Convention on Human Rights: Armenia on 26 April 2002, Azerbaijan on 15 April 2002, Georgia on 20 May 1999, the Republic of Moldova on 12 September 1997, Ukraine on 11 September 1997 and Russian Federation on 5 May 1998[862]. The membership of these states in the ECHR constitute a relevant element because from these territories have arisen in the last years a high number of claims that have been brought in front of the ECtHR. Obviously, the most striking numbers in this sense have emerged with reference to the Russian Federation: since its establishment in 1959 the Court has delivered 22,535 judgements of which 2,699 have concerned Russian Federation; moreover, of the total number of applications pending before a judicial formation on 31 December 2019 (59,800), a quarter of these had been lodged against Russian Federation (15,071)[863]. Furthermore, of the 44,482 applications allocated to a judicial formation in 2019, 12,782 were against Russian Federation and of the total 2,187 applications in which a judgement has been delivered, 445 concerned this State[864]. Also Ukraine has a relevant position in this sense because in 2019 have been allocated to a judicial formation 3,991 applications concerning Ukraine; moreover, even if in 2019 the number of judgements delivered concerning the country has been relevantly low (187), in 2017 have been delivered 12,438 judgements concerning Ukraine[865].

Of all these applications, an important number derived from the *de facto* regions of our concern, first of all due the high degree of vulnerability of the people living in these areas that are continuingly oppressed by human rights violations and, secondly, because these people see in the ECHR a binding and effective mechanism of protection that represents the unique alternative to the domestic instruments unable to offer effective remedies[866]. In 2017 the number of pending applications before the ECtHR from the *de facto* regions of the post-Soviet area was: 12 from Abkhazia, 88 from Transnistria, 1,951 from South Ossetia, 2,175 from Nagorno-Karabakh, and 3,684 from Crimea and Eastern Ukraine; to these there must be added the 6 application from Northern Cyprus[867], another separatist area already analysed that has been of fundamental importance for the development of the ECtHR jurisprudence concerning the *de facto* regions. Nowadays, the most striking numbers concern Crimea because the Court has reported that in

[862] See the status of signatures and ratifications of the European Convention on Human rights at: *https://www.coe.int/it/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=fn2iOxNX*
[863] European Court of Human Rights, *The ECHR in facts and figures 2019*, February 2020, pp. 3-4. Available at: *https://www.echr.coe.int/Documents/Facts_Figures_2019_ENG.pdf*
[864] *V. Supra*, to note 863, p. 7. See also ECHR, *Analysis of Statistics 2019*, Strasbourg, January 2020, p. 51. Available at: *https://www.echr.coe.int/Documents/Stats_analysis_2019_ENG.pdf*
[865] ECHR, *Analysis of Statistics 2019*, Strasbourg, January 2020, p. 60.
[866] A. BERKES, *Concurrent Applications before the European Court of Human Rights: Coordinated Settlement of Massive Litigation from Separatist Areas*, 34 Am. U. Int'l L. Rev. 1, 2018, pp.3-4.
[867] *V. Supra*, to note 866, p. 4. The cases originated from Norther Cyprus are brought against Turkey that is member of the Council of Europe since 13 April 1950 and has ratified the ECHR on 18 May 1954.

February 2020 there were more than 6,500 individual applications pending before a judicial formation concerning this region[868]. Moreover, it must be taken into consideration also the quite high number of inter-state applications originated from these areas and presented in front of the Court following Article 33 of the Convention that affirms that *"Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party"*[869]. Of the almost thirty inter-state cases presented in front of the Court since its establishment[870], four have been brought by Cyprus against Turkey[871], four concern the cycle *Georgia v. Russian Federation* began after the war of 2008[872], five complaints have been presented by Ukraine against Russian Federation after the incorporation of Crimea in 2014[873] and three concern the re-opening of the conflict in Nagorno-Karabakh in 2020[874].

2.1 Effectiveness of the ECHR with respect to the concurrent applications derived from the *de facto* regions

The amount of applications, both individual and inter-state, arisen from these areas is therefore very high because there are not only victims, but also relatives of the victims and territorial states that bring claims in front of the court[875]. Nevertheless, all these applications concern the same systemic or structural violations occurred always in a specific areas: "reparation for the unlawful expropriation of property (Northern Cyprus), the investigation and remedies for enforced disappearance cases, unlawful practices of arrest, detention and criminal procedures (Transnistria), denial of educational rights of linguistic minorities (Transnistria, Crimea), death or injury of civilians and destruction of property in the course of an armed conflict (Nagorno-Karabakh, South Ossetia, Eastern Ukraine), remedies for internally displaced persons (Nagorno-Karabakh, South Ossetia, Crimea, Ukraine)"[876]. Due to their reiterated character, these

[868] *V. Supra,* to note 859, p. 803.
[869] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 33.
[870] ECHR, *Inter-State Applications – by date of introduction of the applications*, 16 December 2020. Available at: *https://www.echr.coe.int/Documents/InterState_applications_ENG.pdf*
[871] ECtHR, *Cyprus v. Turkey* (I, no. 6780/74), (II, no. 6950/75), (III, no. 8007/77), (IV, no. 25781/94).
[872] ECHR, *Georgia v. Russian Federation* (I, no. 13255/07), (II, no. 38263/08), (III, no. 61186/09), (IV, no. 39611/18). The III has been struck off the list.
[873] ECtHR, *Ukraine v. Russian Federation* (re Crimea, no. 20958/14), (re Eastern Ukraine, no. 8019/16), (III, no. 49537/14), (II, no. 4380014), (VII, 38334/18), (VIII, no. 55855/18). Note that the III (no. 49537/14) has been struck off the list and that no. 20958/14 and no. 8019/16 were originally a unique application that has been separated by the Court following geographical criteria. See more to note 303, p. 803.
[874] ECtHR, *Armenia v. Azerbaijan* (no. 42521/20), *Armenia v. Turkey* (no. 43517/20), *Azerbaijan v. Armenia* (no. 47319/20).
[875] *V. Supra,* to note 866, p. 46.
[876] *V. Supra,* to note 866, p. 46 (see the footnote 213 in the text).

applications can be defined as "concurrent applications" because there are simultaneously acting applicants that bring the case often against more than one respondent State before parallel dispute settlement for a "multiplying the pending applications concerning the same broader factual background on the separatist conflict"[877]. Notwithstanding the profusion and complexity of the cases, the States parties to the Convention have reaffirmed *"their strong attachment to the right of individual application to the European Court of Human Rights as a cornerstone of the system for protecting the rights and freedoms set forth in the Convention"*[878]. Even if the high influx of concurrent and simultaneous applications deriving from the *de facto* regions sharpens the risk of backlog of cases and jeopardizes the quality and consistency of the Court's judgements and authority, the effectiveness of the Convention remains of the main essential goals that need to be pursued with any means[879].

There are several techniques that the Court has used in order not to protract the time lapse between the submission of an application to the Court and the delivery of the judgement, in order to therefore to maintain effective its mechanism. It can decide to group concurring applications joining two or more cases with a similar factual and legal background or through their simultaneous examination[880]. This second technique has been applied for example in the cases *Chiragov v. Armenia*[881] and *Sargsyan v. Azerbaijan*[882] that were both related to the denial of access to homes of displaced persons in Nagorno-Karabakh after the conflict of 1992, but that represented "two facets of the same highly politicized frozen conflict"[883]. In the case of Chiragov six Azerbaijani nationals alleged that *"they were prevented from returning to the district of Lachin, located in a territory occupied by the government, and thus unable to enjoy their property and homes there, and that they had not received any compensation for their losses"*[884]*;* in the case of Sargsyan the applicant alleged instead *"the denial of his right to return to the village of Gulistan and to have access to his property there or to be compensated for his loss"*[885]. Due to the similarity of the cases, the Court decided to assign to both cases the same composition of the Grand Chamber[886] in order to give equal weight to the two judgements and to take an impartial

[877] *V. Supra*, to note 866, p. 6.
[878] *Draft Copenhagen Declaration*, 5 February 2018, quoted in A. BERKES, *Concurrent Applications before the European Court of Human Rights: Coordinated Settlement of Massive Litigation from Separatist Areas*, 34 Am. U. Int'l L. Rev. 1, 2018, pp. 9-10. Available at: http://www.grocjusz.edu.pl/Materials/js_sem_20180309.pdf
[879] *V. Supra*, to note 866, pp. 14-16.
[880] *V. Supra*, to note 866, pp. 47-49.
[881] ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015.
[882] ECtHR, *Sargsyan v. Azerbaijan* (Application no. 40167/06), Grand Chamber, 16 June 2015.
[883] *V. Supra*, to note 866, p. 50.
[884] *V. Supra*, to note 881, para. 3.
[885] *V. Supra*, to note 882, para. 3.
[886] *V. Supra*, to note 881 and 882, para. 6.

position that could prevent the further exacerbation of the tensions between Armenia and Azerbaijan[887].

Another technique that can be applied by the Court in order to guarantee its effectiveness notwithstanding the huge number of concurrent applications, is the prioritization of a concurrent application above the others and decide about the other applications in conformity with the prioritized one[888]. In June 2009 the Court has adopted a priority policy that enables "speeding up the processing and adjudication of the most important, serious and urgent cases"[889]. If the first category of this policy included urgent applications involving for example risk to life or health of the applicant or his/her deprivation of liberty, it is the second category that result very important for the *de facto* regions because includes *"Applications raising questions capable of having an impact on the effectiveness of the Convention system (in particular a structural or endemic situation that the Court has not yet examined, pilot-judgment procedure) or applications raising an important question of general interest (in particular a serious question capable of having major implications for domestic legal systems or for the European system)"*[890]. As a matter of fact, the systemic human rights violations and the continuous conflict situation in the areas of our concern, could have an "impact on the effectiveness of the convention"[891].

Another technique, already mentioned in chapter one, that has resulted very useful for avoidance of repetitive cases has been the one of the "pilot judgement", adopted for the first time in 2004[892]. In order to be identified as a "full" pilot judgement, it must satisfy three main criteria: the explicit application by the Court of the pilot judgement procedure, the identification by the Court of a systemic violation of the Convention and to point out the general measures the respondent state is required to develop"[893]. This procedure is applied where the nature of the structural or systemic problem (and the subsequent remedial measure to adopt) are identified and to this application is given a priority treatment in order to avoid the repetition of the same findings in other similar cases[894]. Nevertheless, the only case derived from a *de facto* entity in which it has been applied the pilot judgement procedure, even if not in the strict sense, it has been *Xenides-Arestis v. Turkey*[895], filed by a Cypriot national of Greek-Cypriot origin who alleged that "the Turkish

[887] *V. Supra,* to note 866, p. 50.
[888] *V. Supra,* to note 866, p. 55.
[889] ECHR, *The Court's Priority Policy*, available at: https://www.echr.coe.int/Documents/Priority_policy_ENG.pdf
[890] *V. Supra,* to note 889, Category II.
[891] *V. Supra,* to note 866, p. 57.
[892] The Court used this procedure for the first time in 2004 in the judgement *Broniowski v. Poland* (No. 31443/96, 22.06.04), connected to a series of cases known as *The Bug River Cases from Poland.*
[893] P. LEACH, *Taking a case to the European court of Human Rights*, Oxford University Press, 2017 (Fourth Edition), p. 88.
[894] *V. Supra,* to note 893.
[895] ECtHR, *Xenides-Arestis v. Turkey* (Application no. 46347/99), Third Section, 22 December 2005.

military forces were preventing her from having access to, using and enjoying her home and property in the area of Famagusta, in Northern Cyprus"[896] after the Turkish invasion of 1974 and thanks to which the Court has identified the general measures that turkey has to take also with reference to the other 1400 proceeding pending before the Court and regarding property issues brought by Greek Cypriots against Turkey[897].

Moreover, the Court could decide to employ the technique of the "leading decision", that is a judgement in which the Court decides in a general way that make it possible to apply the decision to similar applications pending in front of the Court, avoiding possible backlogs thanks to the fact that the Court will not have to deal with the same question of admissibility and merits in future similar cases[898]. In the following section it will be therefore dealt only with the leading cases derived from the *de facto* regions of our interest in order to understand the entire ECtHR jurisprudence related to this area.

2.2 Admissibility criteria

Besides all the mechanism just illustrated and employed to guarantee the effectiveness of the Convention, also the admissibility criteria must be taken into consideration as useful methods to make an initial selection of the cases that will be further analysed by the Court. As illustrated in the previous chapter, Article 35 of the Convention affirms that an application could be rejected at any stage of the proceeding if considered inadmissible under the provisions of the Article[899].

It is not necessary to remind entire Article in question already analysed above, but, as it will be illustrated, some of the admissibility criteria have resulted of fundamental importance for the development of the jurisprudence related to the *de facto* regions and for an efficient management of the concurrent applications derived from these areas.

2.2.1 Exhaustion of domestic remedies

First of all, the Court may deal only with cases in which the applicant has exhausted all the domestic remedies. As a matter of fact, the main guiding principle of the Convention is the one

[896] *V. Supra,* to note 895, para. 3.
[897] *V. Supra,* to note 866, pp. 60-61.
[898] *V. Supra,* to note 866, pp. 63-64.
[899] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 35.

of "subsidiarity". This principle aims at the protection of the autonomy of the States parties to the Convention, which have a primary role in the settlement of disputes, while Strasbourg should intervene only when the domestic authorities have failed to fulfil their obligations[900]. Usually the Court promotes this principle, but it has emerged that the local and national authorities of the *de facto* regions are often unable to offer proper protection for human rights violations and effective remedies to the victims: when the domestic remedies result ineffective, the ECtHR functions as Court of first instance[901] because the existence of domestic remedies must be "sufficiently certain not only in theory, but also in practice"[902].

Even if in the majority of the cases concerning the *de facto* entities the Court has intervened as Court of first instance, the evaluation of effectiveness and availability of domestic remedies must always be determined on the basis of the particular circumstances of the single case[903] and sometimes it has found effective domestic remedies also in separatist areas. This was the case of the Turkish Republic of Northern Cyprus in which the Court has found that there were effective domestic remedies to be exhausted before seizing the mechanism of the Convention. If in one of the first and most important cases concerning TRNC, *Loizidou v. Turkey*[904], the Court had decided for the applicant without considering the possibility for the local Court to provide effective remedies and had refused to declare legally valid the Constitution[905], there has been an evolution in the jurisprudence related to this *de facto* entity. As a matter of fact, in the more recent case of *Cyprus v. Turkey*[906], the Court has arrived at another conclusion: it has established that the remedies available in TRNC could be regarded as the domestic remedies of the respondent state and that in principle they should be exhausted before bringing a case in front of the Court of Strasburg, unless their inexistence or ineffectiveness could be proved[907]. The seven judges who voted in favour of this decision[908] justified their choice in the following way:

> *"Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of*

[900] European Court of Human Rights, *Practical Guide on Admissibility Criteria*, Strasbourg, 30 April 2020, p. 7.
[901] *V. Supra,* to note 866, p. 4.
[902] *V. Supra,* to note 900, p. 28.
[903] *V. Supra,* to note 900, p. 28.
[904] ECtHR, *Loizidou v. Turkey* (Application no. 15318/89), Grand Chamber, 18 December 1996.
[905] A. CULLEN – S. WHEATLEY, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, Human Rights Law Review, 13:4, 2013, p. 712.
[906] ECtHR, *Cyprus v. Turkey* (Application no. 25781/94), Grand Chamber, 10 May 2001.
[907] *V. Supra,* to note 905, pp. 708-709 and to note 893 p. 158.
[908] *V. Supra,* to note 906, see Preliminary Issues, para. 5.

all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled''[909].

Nevertheless, it is very interesting to take into consideration the partly dissenting opinion of Judge Palm (joined by other five judged of the seventeen Judges of the Grand Chamber)[910] who sustained that a consequence of the decision of the majority could bring the Court to recognize as legally valid the Constitution of TRNC and the judgements of its Courts[911] and that "notwithstanding the utility of the local courts in the TRNC, the ECtHR should not require applicants to exhaust the remedies offered by an occupying authority before accepting that it had jurisdiction to examine their complaints"[912]. Notwithstanding this important dissenting opinion, the position of the Court was reiterated in the case *Demopoulos v. Turkey*[913] in which the necessity of exhaustion of domestic remedies within the TRNC was reaffirmed: the Court was called to decide upon the effectiveness of the Immovable Property Commission (IPC), an organ set up by the TRNC Parliament after the adoption of the pilot judgement *Arestis v. Turkey*[914], which had the task to decide about property claims arisen after the Turkish occupation of Northern Cyprus in 1974[915]. Noting that this Commission had fulfilled its task of compensation, restitution and exchange of property, the Court declared inadmissible (because they had failed to exhaust domestic remedies) all the cases that had been brought against the effectiveness, impartiality and accessibility of the Commission[916]. In this way the Court reaffirmed its subsidiary role and obtained a remarkable decrease of the applications regarding property issues derived from Greek Northern Cypriots, who directed their claims directly to the IPC[917].

2.2.2 Other procedure of international investigation or settlement

Another criterion of admissibility that has resulted very important for the management of the concurrent applications derived from the *de facto* regions, has been the one expressed in article 35.2 (b): "*The Court shall not deal with any application submitted under Article 34 that is*

[909] *V. Supra*, to note 906, para. 96.
[910] *V. Supra*, to note 906, See Partly Dissenting Opinion of Judge Palm, Joined by Judges Jungwiert, Levits, Panţîru, Kovler and Marcus-Helmons.
[911] *V. Supra*, to note 893, p. 158.
[912] *V. Supra*, to note 905, p. 709.
[913] ECtHR, *Grand Chamber decision as to the Admissibility of Demopoulos and Others v. Turkey* (Application no. 46113/99), 1 March 2010, see in particular para. 87 - 129.
[914] *V. Supra*, to note 895.
[915] *V. Supra*, to note 893, p. 158.
[916] *V. Supra*, to note 893, p. 158.
[917] *V. Supra*, to note 866, pp. 66-67.

substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information"[918]. This is very important for the areas of our concern because concurrent applications are often brought to different dispute settlement mechanism. Nevertheless, the ECtHR can accept these applications only if the other fora have failed to provide effective remedy, otherwise the Court has to declare as inadmissible any application already submitted to *(lis pendens)* or decided by *(res judicata)* by other judicial bodies: this is a very important provision that requires a structural coordination among the international fora with overlapping jurisdiction in order to ovoid the fragmentation of international law or the divergent interpretation of similar articles, to endure legal certainty and to facilitate the fact-finding processes[919].

The presentation of concurrent applications to different fora interests the *de facto* regions of the post-Soviet area because all the mother and patron states in question are not only part of a large majority of the so-called UN treaty-based bodies, but have also accepted the Articles or the Optional Protocols of the different Conventions that authorise the individual complaints procedures: Article 22 of the CAT has been accepted by Russian Federation (1 October 1991), Azerbaijan (4 February 2002), Georgia (30 June 2005), Republic of Moldova (2 September 2011) and Ukraine (12 September 2013); the Optional Protocol of ICCPR has been accepted by all the six states in question (Russian Federation - 1 October 1991, Azerbaijan – 27 November 2001, Armenia – 23 June 1993, Georgia – 3 May 1994, Republic of Moldova – 23 January 2008 and Ukraine – 25 July 1991); the same has happened for the Optional Protocol of the CEDAW that has received the acceptance of all the six states (Russian Federation – 28 July 2004, Azerbaijan – 1 July 2001, Armenia – 14 September 2006, Georgia – 1 August 2002, Republic of Moldova – 28 February 2006 and Ukraine – 26 September 2003); Article 14 of the ICERD has been accepted by all states, with the exception of Armenia, as for the CAT (Russian Federation – 1 October 1991, Azerbaijan – 27 September 2001, Georgia – 30 June 2005, Republic of Moldova – 8 may 2013 and Ukraine 28 July 1992); the provisions of the three remaining Conventions that allow individual procedures have been accepted instead only by one state (the Optional Protocol of ICERS has been accepted only by Armenia) or by two states (Article 31 of ICPED has been accepted by Armenia and Ukraine, while the Optional Protocol of the CRPD has been accepted by Azerbaijan and Ukraine)[920].

[918] *V. Supra,* to note 899, Art. 35.2(b).
[919] *V. Supra,* to note 866, pp. 28-30.
[920] See the ratification status by country at:
https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=8&Lang=EN

Moreover, all these States are entitled to appear before the International Court of Justice because they are all part of the United Nations[921] and, as provided at Article 93.1 of the United Nations: *"All Members of the United Nations are ipso facto parties to the Statute of the International Court of Justice"*[922] and as underlined by Article 35.1 of the Statute *"The Court shall be open to the states parties to the present Statute"*[923]. Nevertheless, in front of the ICJ can be brought only inter-state cases and it has to be noted that the admissibility criterion in question cannot be applied to inter-state proceedings because it refers only to individual applications[924]. For example, in the case *Georgia v. Russia (II)*[925] concerning systematic human rights violations committed by Russian forces during the 2008 conflict, the Court has dismissed for this reason Russian Preliminary Objection that argued that the application concerned the same dispute as the one pending before the ICJ in the case *Georgia v. Russian Federation*[926]. Different case has been the one concerning the applications arisen from Crimea and Eastern Ukraine: Ukraine has seized ICJ alleging several violations of the International Convention for the Suppression of Financing Terrorism (ICSFT) in Eastern Ukraine and of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) committed by Russia[927]. It is clear that the inter-state applications brought before the ECtHR by Ukraine cannot be taken in consideration because the admissibility criterion is not valid for them, but it is important to consider also the huge amount of individual applications brought by single Ukrainians in front of the Court that cannot be declared inadmissible on the basis of Article 32.5 (b) because they all deal with different matter in respect with the cases brought in front of the ICJ: the latter concern a request for the full reparation after the Russian shelling of civilians in various cities in the separatist Eastern Ukraine, while the individual applications brought in front of the ECtHR concern violations of their right to life, property and the prohibition of torture[928]. Moreover, following Article 35.2(b) of the Convention, an application can be declared inadmissible not only if it concerns the same facts and complaints, but also if it has been introduced by the same person and, in this case of Ukraine, it is evident that the individual applicants of the ECtHR cases are not the same parties of the ICJ's procedure[929].

[921] See more at: *https://www.icj-cij.org/en/states-entitled-to-appear*
[922] United Nations, *Charter of the United Nations*, 24 October 1945, Art. 93.1.
[923] United Nations, *Statute of the International Court of Justice*, 18 April 1946, Art. 35.1.
[924] *V. Supra*, to note 866, pp. 31-32.
[925] ECtHR, *Georgia v. Russia (II)* (Application no. 38263/08), Pending Case, 2011, see para. 77-79.
[926] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), 2008. See more at: *https://www.icj-cij.org/en/case/140*
[927] ICJ, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*), 2017. See more at: *https://www.icj-cij.org/en/case/166*
[928] *V. Supra*, to note 866, pp. 36-37.
[929] *V. Supra*, to note 866, p. 37.

As it has already emerged in the first chapter, individual applicants usually do not submit cases to the UN treaty based-bodies because they can only issue recommendations (not-binding) for the respondent state and, as a consequence, they prefer bringing claims to the ECtHR because it has a stronger mechanism of protection that foresees binding decisions for States. Nevertheless, the coordination between all the international fora remains an important element for the effectiveness of the Court, especially for these case "submitted from areas outside the territorial state's effective control"[930] in which there are more elements to take into consideration especially in the fact-finding phase.

2.2.3 Compatibility with the provisions of the Convention

Article 35.3(a) of the Convention affirms that an application can be declared inadmissible if it is incompatible with the provisions and the Protocols of the Convention. As explained in the first chapter, this provision has four main ground of applications: *ratione loci* (incompatibility due to the limits of the state's jurisdiction), *ratione materiae* (incompatibility with the rights covered by the Convention), *ratione temporis* (incompatibility due to the limits in time of the State's obligations under the Convention*), ratione personae* (incompatibility with who and against whom the application has been brought)[931]. As it can be imagined, the ground that affects more directly the applications originated in the *de facto* entities is the one of *ratione loci,* that concerns the territorial jurisdiction of the High Contracting Parties of the Convention and that will be analysed in detailed in the next paragraph. Nevertheless, there have been two interesting cases concerning the ground of *ratione temporis* for the application of the Convention originated from the Nagorno-Karabakh conflict. As already seen, both in the case of *Chiragov v. Armenia*[932] and *Sargsyan v. Azerbaijan*[933] the applicants complained of having lost their homes and properties after the conflict of 1992. This seemed to be outside the competence *ratione temporis* of the Court because both Armenia and Azerbaijan have ratified the Convention only in 2002 – respectively on 26 April and on 15 April; however, the subsequent lack of access to the applicants' properties and homes has created a perpetrated violation of human rights that the Court has been able to examine in 2002, after the ratification of the Convention of the two States[934].

[930] *V. Supra,* to note 866, p. 43.
[931] *V. Supra,* to note 893, pp. 174-175. See more in Chapter 1.
[932] ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015.
[933] ECtHR, *Sargsyan v. Azerbaijan* (Application no. 40167/06), Grand Chamber, 16 June 2015.
[934] *V. Supra,* to note 893, p. 177.

3. The fundamental issue of jurisdiction

From the previous paragraph, it has emerged that the Court can decide on the merits of a case only if the application in question has resulted admissible under the provisions of Article 35 of the Convention. For the purpose of this study, the most important criteria of admissibility to take into consideration is the compatibility *ratione loci* with the Convention: an application can be declared admissible only if the alleged violation has occurred within the jurisdiction of the respondent State[935]. The issue of jurisdiction has primary importance in the ECHR, as it can be stressed from the fact that it is the first concept introduced by the first Article of the Convention: *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention".* States undertake the obligation to guarantee to everyone within their jurisdiction the enjoyment of rights and freedoms set out in the Convention from Article 2 to Article 18[936].

The issue of jurisdiction seems to be a mere territorial question, but with reference to the *de facto* entities it is more controversial to understand who is responsible for a determined violation in a determined portion of land, having to evaluate the different responsibilities of the de patron state, the parent state and even of the local authorities. As it will be shown, in these cases the Court has permitted "other bases of the jurisdictional competence of a state"[937] in order to guarantee the protection of the rights of those people living in these areas, which would otherwise result unprotected[938]. Before proceeding it is therefore useful to dedicate a brief parenthesis to the concept of "jurisdiction".

First of all, it does not have to be confused with the concept of "sovereignty": if it has become clear from the first chapter that sovereignty is a proper characteristic of the state and of its independence, jurisdiction is the expression of the sovereignty of a state[939]. "Jurisdiction is the term that describes the limits of the legal competence of a State or other regulatory authority to make, apply, and enforce rules of conduct upon persons"[940]. As a matter of fact, within the concept of jurisdiction are included three different functions of the state: the legislative one, consisting in the ability to promulgate laws *(jurisdiction to prescribe)*, the ability of the State to enforce them *(jurisdiction to enforce)* and the right of courts to receive, try and determine cases referred to them

[935] *V. Supra*, to note 893, p. 175.
[936] *V. Supra*, to note 893, p. 212.
[937] *V. Supra*, to note 893, p. 175.
[938] *V. Supra*, to note 859, pp. 783, 804.
[939] *V. Supra*, to note 859, p. 786.
[940] C. STAKER, *Jurisdiction*, in M. D. EVANS, *International Law*, Oxford University Press, 2018 (Fifth Edition), p. 289.

(jurisdiction to adjudicate)[941]. The concepts of "sovereignty" and "jurisdiction" must be maintained distinguished for the purpose of this analysis because in the *de facto* territories sovereignty and effective control do not always coincide[942]. Moreover, the concepts of jurisdiction here explained with reference to the scope of powers of states, does not have to be confused neither with the term "jurisdiction" used in international law to describe the *ius dicere* of international courts[943], meaning the right of an international tribunal "to adjudicate upon cases and to make orders in respect of the parties to them"[944]. This last meaning will not be used in this chapter.

Within the meaning of Article 1 of the ECHR "the exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention"[945]. It is interesting to note that initially, the text drawn up by the Committee on Legal and Administrative Affairs of the Consultative Assembly of the Council of Europe was different from the present one and stated that States "shall secure to everyone residing in their territories right and freedoms …"[946]; this text was then substituted by the one that we all know today after the examination of the Committee of Intergovernmental Experts that justified its choice in the following manner:

> *"… It seemed to the Committee that the term 'residing' might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term 'residing' by the words 'within their jurisdiction'…"*[947].

Nowadays, following Article 1 of the Convention, the States undertake the obligation to secure rights and freedoms of the Convention "regardless of an individual's nationality, residence or any other characteristic. The sole condition is jurisdiction"[948].

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[941] *V. Supra*, to note 940, p. 292.
[942] *V. Supra*, to note 859, p. 784.
[943] *V. Supra*, to note 859, p. 782.
[944] *V. Supra*, to note 940, p. 290.
[945] ECHR, *Guide on Article 1 of the European Convention on Human Rights, Obligation to Respect Human Rights – Concept of "Jurisdiction" and Imputability*, Strasbourg, updated 31 December 2019, p. 5, para. 1. Available at: *https://www.echr.coe.int/documents/guide_art_1_eng.pdf*
[946] *V. Supra*, to note 945, p. 5, para. 2.
[947] *Collected Edition of the Travaux Préparatoires of the European Convention on Human Rights*, Vol. III, 2 February – 10 March 1950, published by M. Nijhoff, 1 August 1976, quoted in ECHR, *Guide on Article 1 of the European Convention on Human Rights, Obligation to Respect Human Rights – Concept of "Jurisdiction" and Imputability*, Strasbourg, updated 31 December 2019, p. 5, para. 2.
[948] *V. Supra*, to note 893, p. 212.

The jurisdiction of the states under Article 1 of the Convention is *primarily territorial*[949]. The territorial principle of jurisdiction is "a corollary of the sovereignty of a State over its territory"[950] because it is a natural right of the state to exercise power on its own territory[951]. Nevertheless, the boundaries of the jurisdiction of a state are not always very clear and one of the first and most important cases from which have started the main considerations about the limits of the extent of the territorial jurisdiction of a state has been the *Lotus Case*[952]. This case concerned the collision on the high seas[953] between the *Lotus* French steamer and the *Boz-Kourt* Turkish steamer which resulted in eight losses[954]. In this context, the analysis of the steps of the judgement and of the single events will not be taken into consideration, but it is important to highlight that from this case have emerged two important, even if often contested, principles. The first one concern the fact that a state cannot exercise its jurisdiction outside its territory unless an international or customary law permits it; the Court has indeed affirmed that *"jurisdiction is certainly territorial, it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention"*[955]. The second principle clarifies that within its territory a State may exercise in any case its jurisdiction, even if there is no specific rule of international law permitting it; the Court affirmed indeed that *"it does not follow that international law prohibits a State from exercising jurisdiction in its own territory in respect of any case which relates to acts which have been taken place abroad, and in which it cannot rely on some permissive rule of international law"*[956]. This case has therefore proved to be of fundamental importance for the issue of jurisdiction, nevertheless in a century of evolution of international law several critics have been moved to the conclusions reached by the Court[957] . Above all, in several cases it has been observed the importance of the extra-territorial jurisdiction of a State: as it will be shown in a while, the issue of extra-territorial jurisdiction acquires particular relevance with reference to contested territories in which sovereignty (and therefore jurisdiction) are contended between two states.

3.1 Extra-territorial jurisdiction and effective control over an area

[949] *V. Supra*, to note 945, p. 7, para. 11.
[950] *V. Supra*, to note 940, p. 296. The territory of a state is not composed only by land territory, but also by its territorial sea (extended up to 12 miles from its coast) and the airspace above its land and sea territory.
[951] *V. Supra*, to note 859, p. 788.
[952] PCIJ, *S.S. Lotus (France v. Turkey)*, Ser. A, No. 10, 7 September 1927. Available at: *http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm*
[953] High seas are a part of the seas that is beyond the territorial jurisdiction of every state.
[954] *V. Supra*, to note 940, p. 294.
[955] *V. Supra*, to note 952, para. 45.
[956] *V. Supra*, to note 952, para. 46.
[957] *V. Supra*, to note 940, p. 295.

The starting point in order to speak about jurisdiction is therefore the fact that a state exercises jurisdiction over its own territory, but this point is opposed by the fact that there are states that exercise effective territorial control outside their territories[958]. The leading judgement in which it has been clarified the question of the extra-territorial jurisdiction of a state has been the one of *Al-Skeini and others v. United Kingdom*[959]. This case was related to the British Army's occupation of Iraq in 2003 and it was taken in front of the Court by six Iraqi nationals who alleged that when their relatives where killed they were under the jurisdiction of United Kingdom and that there had not been effective investigations into their deaths[960]. In this case the Court assessed that:

> *"The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention"*[961] and that even if "*A State's jurisdictional competence under Article 1 is primarily territorial … To date, the Court in its case-law has recognised a number of exceptional circumstances capable of giving rise to the exercise of jurisdiction by a Contracting State outside its own territorial boundaries. In each case, the question whether exceptional circumstances exist which require and justify a finding by the Court that the State was exercising jurisdiction extraterritorially must be determined with reference to the particular facts"*[962].

The Grand Chamber in this case affirmed therefore that there were two ways in order to establish the jurisdiction of state outside its borders[963]:

> a. "on the basis of the power (or control) actually exercised over the person of the applicant *(ratione personae);*
>
> b. on the basis of control actually exercised over the foreign territory in question *(ratione loci")*[964].

If the first category is not very interesting for the purpose of this study, the second one - concerning the effective control of an area outside the national territory of a member state - is at the basis of this analysis. As a matter of fact, it has become clear that when violations occur in the territories of the *de facto* entities, the responsible must be found in an already existing and

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[958] *V. Supra*, to note 859, p. 804. See an in-depth analysis about jurisdiction and extra-territorial jurisdiction in M. MILANOVIC, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, 2011.
[959] ECtHR, *Al-Skeini and others v. United Kingdom* (Application no. 55721/07), Judgement, 7 July 2011.
[960] *V. Supra*, to note 959, para. 3.
[961] *V. Supra*, to note 959, para. 130.
[962] *V. Supra*, to note 959, para. 131-132.
[963] *V. Supra*, to note 959, para 133-140.
[964] *V. Supra*, to note 945, p. 12, para. 30.

recognized state - the patron or the parent one - which is, in that case, exercising effective control outside its (recognized) territory[965]. The determination of this "effective control" is a question of fact that needs to be evaluated in every single case[966] and that, as it will emerge, underwent a considerable evolution: at the beginning the Court focused exclusively on the military force that a State exercised outside its borders, then it put more emphasis also on less tangible factors such as military, political and economic support that it could provide to another entity[967].

Once established the degree of the effective control exercised on the territory following these two criteria, the Court has to determine also the grade of responsibility of the respondent State that usually is the "active state" (in our case the patron one, which is exercising its authority outside its own territory through the provision of support or assistance to the installation of a separatist regime); however, as it will be shown, also the passive contracting party (in our case the parent State, which is undergoing the above actions) could be in part responsible for the violations occurring on the territory that its *de jure* within its official borders [968]. As a matter of fact, once the Court establishes that the facts of the case are under the respondent's state jurisdiction, the obligations to fulfil are both positive (the ones that guarantee the respect for the rights and freedoms of the Conventions) and negative (the obligations to refrain from actions incompatible with the Convention) and could therefore involve both the active and passive party[969].

Before proceeding with the analysis of the single cases, it is opportune to remind that the exercise of effective control outside the territorial borders of a state must be taken separately from the declarations that a state could make at the time of ratification under Article 56 of the Convention with which it could decide to extend the application of the Convention to *"all or any of the territories for whose international relations it is responsible"*[970].

3.2 Exercise of extra-territorial jurisdiction in the *de facto* entities: analysis of the ECtHR jurisprudence

In the following and final paragraph, I will try to show through the main leading cases concerning the *de facto* entities, which degree of responsibility falls upon the "territorial" or the "outside"

[965] See more in S. ZARĘBA, *Responsibility for the Acts of Unrecognized States and Regimes*, in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, pp. 159- 193.
[966] *V. Supra,* to note 893, p. 213.
[967] *V. Supra,* to note 965, p. 188.
[968] *V. Supra,* to note 945, p. 16, para. 45.
[969] *V. Supra,* to note 945, p. 17, para. 51.
[970] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Art. 56.1.

state. It is on this jurisprudence of the ECtHR that lays the entire work, but it has been necessary, before arriving here, to discover the complex process that an individual applicant hailing from these areas must accomplish before the issue of a proper judgement. It is evident that less importance has been given (and will be given) to the events behind the single applications which have already been described at the beginning of this chapter, preferring a focus on the peculiarities of these cases that entail particular human rights violations and, especially, a complex exercise of jurisdiction.

3.2.1 Cases concerning TRNC

The first case to take into consideration is the one of *Loizidou v. Turkey*[971] which was brought in front of the Court by a Cypriot national, Mrs Titina Loizidou who claimed that she was continuingly prevented by the Turkish forces that had invaded Cyprus to return to her home and property in Norther Cyprus[972]. Turkey objected that it had no jurisdiction in Northern Cyprus, a sovereign and independent State recognized by Turkey that however was not party to the ECHR and could not therefore be part to the proceeding[973]. Nevertheless, it was in this case that the Court declared legally invalid the proclamation of independence of the TRNC and called upon all States to the deny its recognition and stressed the fact that the sole legitimate authority in Norther Cyprus was the Republic of Cyprus, refusing therefore the objections related to statehood brought by Turkey[974]. Moreover, the Court stressed that:

> *"the concept of "jurisdiction" under Article 1 of the Convention is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory … the responsibility of a Contracting Party could also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory"*[975].

In this first important case, the exercise of "effective overall control" was obvious from the presence of a large number of Turkish troops (more than 30,000 soldiers) in Northern Cyprus and this entailed Turkey's responsibility for policies and actions of the TRNC[976]. The same position

[971] ECtHR, *Loizidou v. Turkey* (Application no. 15318/89), Grand Chamber, 18 December 1996.
[972] *V. Supra*, to note 971, para. 1, 11,12.
[973] *V. Supra*, to note 971, para. 51.
[974] *V. Supra*, to note 971, para. 42-45.
[975] *V. Supra*, to note 971, para. 52.
[976] *V. Supra*, to note 971, para. 56-57.

was reiterated in the inter-state case *Cyprus v. Turkey,* brought by the government of the Republic of Norther Cyrus against the Government of Turkey for the continuous violations of the Conventions regarding *"Greek-Cypriot missing persons and their relatives; the home and property of displaced persons; the right of displaced Greek Cypriots to hold free elections; the living conditions of Greek Cypriots in northern Cyprus; and the situation of Turkish Cypriots and the Gypsy community living in northern Cyprus*"[977]. In this case the Court found again that Turkey had effective overall control of TRNC and, at the same time, that the Turkish effective overall control over Northern Cyprus had resulted in the inability of the territorial state to exercise its Convention obligations[978].

3.2.2 Individual cases concerning Transnistria

A slightly different position with reference to the exercise of the effective overall control outside the national borders of a State, was taken by the Court in the case of ECHR, *Ilaşcu And Others v. Moldova and Russia* brought in front of the Court by four Moldovan nationals who had been imprisoned and subjected to ill-treatment and who had decided to bring their claim both against the patron and parent states[979]. In this case the effective overall control could not be assessed only with reference to the Russian troops present in the territory that were far less of the ones present in TRNC (in 2002 there were 1500 Russian troops in the TRN)[980], but the Court decided to take into consideration all the less tangible factors such as the military, political and economic support that Russian Federation had provided to Transnistria and that had permitted to Transnistria to survive despite the efforts of Moldova to regain this territory: this has rendered Russian Federation responsible for the acts alleged by the applicants[981]. This case is very interesting also because the Court established the doctrine of "multifold responsibility" that entails obligations for the State supporting the *de facto* entity, but also for the one whose sovereignty has been violated[982]. As a matter of fact, the Court stated that:

> *"where a Contracting State is prevented from exercising its authority over the whole of its territory by a constraining de facto situation … it does not thereby cease to have jurisdiction within the meaning of Article 1 of the Convention over that part of its territory*

[977] ECtHR, *Cyprus v. Turkey* (Application no. 25781/94), Grand Chamber, 10 May 2001, para. 3.
[978] *V. Supra*, to note 977, para. 77-78.
[979] ECtHR, *Ilaşcu And Others v. Moldova and Russia* (Application no. 48787/99), Grand Chamber, 8 July 2004, para 1, 3.
[980] *V. Supra*, to note 979, para 131.
[981] *V. Supra*, to note 979, para. 379-394.
[982] D. RICHTER, *Illegal States?,* in W. CZAPLIŃSKI – A. KLECZKOWSKA, *Unrecognized subjects in international law,* Scholar Publishing House Ltd., Warsaw, 2019, p. 41.

temporarily subject to a local authority sustained by rebel forces or by another State. Nevertheless, such a factual situation reduces the scope of that jurisdiction in that the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's positive obligations towards persons within its territory. The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention"[983].

The court then exposed the main positive obligations a state has to fulfil even if it has lost control over a territory:

"Moldova's positive obligations relate both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure their release. The obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separatist regime of the "MRT", and secondly to act by taking all the political, judicial and other measures at its disposal to re-establish its control over that territory"[984].

Moldova was therefore not exempt from the exercise of its positive obligations towards the applicants, even if the Court admitted that *"when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation … there was little Moldova could do to re-establish its authority over Transdniestrian territory"*[985]. In this case the Court found Moldova to be responsible for its failure to discharge its positive obligations with regard to the applicants, especially with reference to the lack of effort to reach an agreement with the Transnistrian regime in order to put an end to the continuing infringements of the Convention and because they had failed to raise the question of Ilaşcu in the context of bilateral negotiants with the separatist authorities[986]. It is interesting to note that in two subsequent cases, namely *Ivanţoc and Others v. Moldova and Russia*[987] and *Mozer v. The Republic of Moldova and Russia*[988], the Court has found that Moldova, on the basis of the recommendations of the Ilaşcu case, had been able to discharge its positive obligations in order to seek to secure the applicants' Convention rights. Another leading case concerning Transnistria is the one of *Catan and Others*

[983] *V. Supra*, to note 979, para. 333.
[984] *V. Supra*, to note 979, para. 339-340.
[985] *V. Supra*, to note 979, para. 341.
[986] *V. Supra*, to note 979, para. 348-352.
[987] ECtHR, *Ivanţoc and Others v. Moldova and Russia* (Application no. 23687/05), Former Fourth section, 15 November 2011 (Final 04/06/2012), see para. 111.

[988] ECtHR, *Mozer v. The Republic of Moldova and Russia* (Application no. 11138/10), Grand Chamber, 23 February 2016, see in particular para. 151-155

v. Moldova and Russia[989], brought to the Court by Moldovan nationals who lived in Transnistria and were pupils at three Moldovan-language schools and their parents, invoking in particular Article 2 of Protocol No. 1 of the Convention related to the right of education, complained about the closure of their schools and their harassment by the separatist authorities[990]. With regard to Moldova, the Court recognized its considerable effort in order to relocate the schools in question in order to continue to provide necessary education to children and had therefore fulfilled its positive obligations[991]; while with reference to Russian Federation it found that there was no evidence of direct Russian troops involvement in the actions taken against the schools, but that based on the findings of Ilaşcu, Russia exercised effective control over Transnistria in the period in question in view of its military, economic and political support and was therefore responsible for the violations[992].

3.2.3 Individual cases concerning Nagorno-Karabakh

Similar conclusions to the ones regarding Transnistria were reached in the two leading cases concerning Nagorno-Karabakh, namely *Chiragov and Others v. Armenia*[993] and *Sargsyan v. Azerbaijan*[994] whose main background has been already presented above. In the case of Chiragov, the Court in order to assess the existence of Armenian jurisdiction over Nagorno-Karabakh started from the evaluation of all the elements that could constitute the exercise of effective control over the territory. It underlined the close military cooperation between Armenia and the separatist entity originated in the defence alliance of 1994 and the military support furnished by the Armenian forces to the unrecognized region, without which they could not have defended themselves against the Azerbaijani forces in 1990s[995]. Besides the military aid, the Court stressed also the economic help that Armenia had given to Nagorno-Karabakh - such as inter-state loans that covered 60% of the budget of the de facto entity[996] – or the fact that lot of the residents of the unrecognized entity were provided by an Armenian passport to travel abroad[997] and the high number of politicians that took important positions in Armenian after having hold similar position in Nagorno-Karabakh[998]. All these elements led the Court to affirm that Armenia exercised

[989] ECtHR, *Catan and Others v. Moldova and Russia (*Applications nos. 43370/04, 8252/05 and 18454/06), Grand Chamber, 19 October 2012.
[990] *V. Supra*, to note 989, para. 1,3.
[991] *V. Supra*, to note 989, para. 49, 56, 61, 61, 145-148.
[992] *V. Supra*, to note 989, para. 149-150.
[993] ECtHR, *Chiragov and Others v. Armenia* (Application no. 13216/05), Grand Chamber, 16 June 2015.
[994] ECtHR, *Sargsyan v. Azerbaijan* (Application no. 40167/06), Grand Chamber, 16 June 2015.
[995] *V. Supra*, to note 993, para. 174-178.
[996] *V. Supra*, to note 993, para. 80-81.
[997] *V. Supra*, to note 993, para. 83.
[998] *V. Supra*, to note 993, para. 181.

effective control over Nagorno-Karabakh, that it *"had a significant and decisive influence over the "NKR", that the two entities are highly integrated in virtually all-important matters ... In other words, the "NKR" and its administration survive by virtue of the military, political, financial and other support given to it by Armenia"*[999].

Similarly, in the case Sargsyan the Court was called to decide upon the exercise of the Azerbaijani jurisdiction over the violations of the case, in this case the jurisdiction was the one of the territorial state. Azerbaijan tried to affirm the difficulty to exercise the effective power over an occupied territory, but the Court rejected this position because it had not been established that the Gulistan, the region that the applicant had been forced to leave, was under occupation[1000]. At the end, the Court established that the facts were under the jurisdiction of Azerbaijan *"even though it may encounter difficulties at a practical level in exercising their authority in the area of Gulistan. In the Court's view such difficulties will have to be taken into account when it comes to assessing the proportionality of the acts or omissions complained of by the applicant"*[1001].

Obviously, the jurisprudence of the ECtHR related to the evaluation of the extra territorial application is not limited to these cases[1002], but the ones just illustrated are the more significant with respect to the *de facto* regions and concern mainly Northern Cyprus, Transnistria and Nagorno-Karabakh[1003].

3.2.4 Inter-state cases: Georgia and Ukraine vs. Russian Federation

With reference to the situations of South Ossetia and Abkhazia, the most relevant cases are the inter-state ones that have been brought by Georgia against Russian Federation in relation to the conflict of 2008. In this sense, the Court has very recently decided on the case *Georgia v. Russian Federation (II)*[1004], a judgement that will for sure become a milestone in the jurisprudence of the Court due to its relevance, also from a political point of view, being an inter-state case and containing the different responsibilities owned by the states during the conflict mentioned. As a matter of fact, the Court has decided that the Russian Federation had not jurisdiction during the

[999] *V. Supra*, to note 993, para. 186.
[1000] *V. Supra*, to note 994, para. 140-148.
[1001] *V. Supra*, to note 994, para. 150-151.
[1002] See more in ECHR, *Extra-territorial jurisdiction of States Parties to the European Convention on Human Rights*, Factsheet, July 2018, available at: *https://www.echr.coe.int/documents/fs_extra-territorial_jurisdiction_eng.pdf*
[1003] See more in ECHR, *Guide on Article 1 of the European Convention on Human Rights, Obligation to Respect Human Rights – Concept of "Jurisdiction" and Imputability*, Strasbourg, updated 31 December 2019, para. 59 – 75.
[1004] ECtHR, *Georgia v. Russian Federation (II)* (Application no. 38263/08), Grand Chamber, Judgement, 21 January 2021.

active phase of the hostilities during the five-day war from 8 to 12 August 2008[1005]. Nevertheless, the Court noted that after the cessation of the hostilities the respondent state had a "substantial military presence" mainly in South Ossetia, but also in the "buffer zone"[1006] and that it had provided the separatist area with huge economic, military and political support even after the end of the conflict[1007]. The Court has therefore concluded that:

> *"the Russian Federation exercised "effective control", within the meaning of the Court's case-law, over South Ossetia, Abkhazia and the "buffer zone" from 12 August to 10 October 2008, the date of the official withdrawal of the Russian troops. Even after that period, the strong Russian presence and the South Ossetian and Abkhazian authorities' dependency on the Russian Federation, on whom their survival depends, as is shown particularly by the cooperation and assistance agreements signed with the latter, indicate that there was continued "effective control" over South Ossetia and Abkhazia"*[1008].

The Court also concluded that the events occurred after the cessation of the hostilities fell within the jurisdiction of the Russian Federation[1009].

With reference to the Russian or Ukrainian jurisdiction exercised over Crimea the debate is still open. Moreover, as underlined above, it must always be kept in mind that the situation of Crimea is slightly different from the other already analysed because it has been incorporated into Russian Federation. As already shown above, in addition to the 6,500 pending applications brought by individuals before the Court regarding this conflict, five complaints have been presented by Ukraine against Russian Federation after the incorporation of Crimea in 2014 (originally, they were six, but one has been struck off the list)[1010]. Two of these cases have been presented in front of the Grand Chamber regarding respectively violations occurred in Crimea[1011] and Eastern Ukraine[1012], other three have been presented in front of a Chamber of seven Judges regarding the

[1005] *V. Supra*, to note 1004, para. 125 – 144.
[1006] *V. Supra*, to note 1004, para. 165.
[1007] *V. Supra*, to note 1004, para. 166 – 173.
[1008] *V. Supra*, to note 1004, para. 174.
[1009] *V. Supra*, to note 1004, para. 175.
[1010] ECtHR, *Ukraine v. Russian Federation* (re Crimea, no. 20958/14), (re Eastern Ukraine, no. 8019/16), (III, no. 49537/14), (II, no. 43800/14), (VII, 38334/18), (VIII, no. 55855/18). Note that the III (no. 49537/14) has been struck off the list and that no. 20958/14 and no. 8019/16 were originally a unique application that has been separated by the Court following geographical criteria. See more in S. DE VIDO, *Di Autorità, Poteri Sovrani e Iurisdictio: l'incerta Situazione della Crimea nei Procedimenti Innanzi a Corti Internazionali, Regionali e a Tribunali Arbitrali*, Ordine Internazionale e Diritti Umani, 2020, p. 803.
[1011] ECtHR, *Ukraine v. Russian Federation* (re Crimea, no. 20958/14), 13 March 2014.
[1012] ECtHR, *Ukraine v. Russian Federation* (re Eastern Ukraine, no. 8019/16), 13 March 2014.

kidnapping of children in Eastern Ukraine between June and August 2014[1013], the detention of Ukrainian citizens[1014] and the naval incident in the Kerch Strait in November 2018[1015]

The case on which I have decided to concentrate is the one of *Ukraine v. Russian Federation* (re Crimea) presented on 13 March 2014. The choice of this case is due to the fact that its jurisprudence is developing faster than the others and, as a consequence, there is more available material. As a matter of fact, the hearing about the case *Ukraine v. Russian Federation* (re Crimea) has been held on 11 September 2019[1016] and it has also been declared partially admissible on 14 January 2021, taken jointly with the applications *Ukraine v. Russian Federation (VII)*[1017].

The Ukrainian Government complained that Russia was responsible for human rights violations from 27 February 2014, the date from when they allege that Russia exercised extraterritorial jurisdiction over Crimea, until 26 August 2015, the date of introduction of their second application[1018]. Ukraine complained in particular about the violation of Article 2 (right to life), Article 3 (prohibition of inhuman treatment and torture), Article 5 (right to liberty and security), Article 6 (right to a fair trial), Article 8 (right to respect for private life), Article 9 (freedom of religion), Article 10 (freedom of expression) and Article 11 (freedom of assembly). They also complain under Article 14 (prohibition of discrimination), Article 1 of Protocol No. 1 (protection of property), Article 2 of Protocol No. 1 (right to education) and Article 2 of Protocol No. 4 (freedom of movement)[1019]. Very interesting in this case is the application of interim-measures, under rules 39 of the Rules of Court, urgently requested by Ukraine: these measures can be applied by the Court where there is a risk of irreparable harm in order to prevent violations while a case is pending[1020]. In particular, in this case the Court sought to protect Ukrainians under Article 2 and 3 of the convention calling on both parties to refrain from taking any measure or military action that could lead to further violations of the Convention[1021]. Nevertheless, an evaluation has

[1013] ECtHR, *Ukraine v. Russian Federation* (II, no. 43800/14),
[1014] ECtHR, *Ukraine v. Russian Federation* (VII, 38334/18),
[1015] ECtHR, *Ukraine v. Russian Federation* (VIII, no. 55855/18),
[1016] Webcast of the hearing of *Ukraine v. Russia* (re Crimea, Application no. 20958/14) of 11 September 2019 available at:
https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=2095814_11092019&language=en&c=&py=2019
[1017] Admissibility decision of Applications no. 20958/14 and no. 38334/18 available at:
https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-207622%22%5D%7D
[1018] ECtHR, *Complaints brought by Ukraine against Russia concerning a pattern of human rights violations in Crimea declared partly admissible*, Press Release, 14 January 2014. Available at:
https://hudoc.echr.coe.int/eng-press#{%22itemid%22:[%22003-6904972-9271650%22]}
[1019] *V. Supra*, to note 1018.
[1020] J. KOCH, *The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia*, Boston College International and Comparative Law Review, Vol.39, 2016, p. 173. See more about interim-measures in the Factsheet on Interim-Measures, available at:
https://www.echr.coe.int/Documents/FS_Interim_measures_ENG.pdf
[1021] *V. Supra*, to note 1020, p. 173.

shown that both Russia, with human rights violations and effective control of Crimea, and Ukraine, putting aside a counter-argument for self-defence, have failed to respect the interim measures imposed by the Court[1022].

In the admissibility decision the Court has underlined since the beginning that the scope of the case was to find out if the alleged violations were admissible or not and that it was not called upon to decide about the lawfulness of Crimea's annexation[1023]

The main thing to understand is whether Russian Federation had jurisdiction over Crimea before 18 March 2014, and especially between February and March when the more violent events that have determined a real change in the territory have taken place[1024]. As shown also in the geopolitical analysis regarding Crimea, Russia has declared that it had no jurisdiction over Crimea before the date in question, while Ukraine has called upon the Court to recognize Crimea as part of the Ukrainian territory, as asserted by the large majority of the international community[1025]. Very interesting in this sense is the position of M. Milanovic[1026] who, starting from the judgement of Loizidou, has underlined the fact that the Court could affirm that Russia has jurisdiction over Crimea regardless of the way – lawful or unlawful – in which it has taken control[1027] and has asserted that:

> *"In sum, the Court can in my view quite reasonably say – and should say – that per Loizidou Russia has control, and thus jurisdiction, over Crimea, regardless of whether it obtained such control lawfully or unlawfully. That Russia does not dispute that it has jurisdiction is simply an added bonus. The Court could then add for even more clarity that its finding of jurisdiction is not an implicit determination of the sovereignty dispute between the parties"*[1028].

In the admissibility decision the Court has found that there was sufficient evidence to conclude that Russia had exercised effective control over Crimea not only after 18 March, but also between 27 February and 18 March 2014 and that it has therefore the competence to examine the

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[1022] *V. Supra*, to note 1020, p. 183.
[1023] *V. Supra*, to note 1018.
[1024] *V. Supra*, to note 859, p. 808.
[1025] *V. Supra*, to note 859, p. 808.
[1026] M. MILANOVIC, *Does the European Court of Human Rights Have to decide on Sovereignty over Crimea? Part I: Jurisdiction in Article 1 ECHR*, EJIL:Talk!, 23 September 2019. Available at: *https://www.ejiltalk.org/does-the-european-court-of-human-rights-have-to-decide-on-sovereignty-over-crimea-part-i-jurisdiction-in-article-1-echr/#:~:text=The%20Court%20has%20jurisdiction%20only,other%20rule%20of%20international%20law.&text=However%20the%20Court%20certainly%20has,look%20into%20sovereignty%20over%20Crimea.*
[1027] ECtHR, *Loizidou v. Turkey* (Application no. 15318/89), Grand Chamber, 18 December 1996, para 52.
[1028] *V. Supra*, to note 1026.

application because the alleged violations complained fell within the jurisdiction of Russia and has declared the case admissible[1029].

The next step will be the one on the merits of the case and there are still open questions on which the Court could be asked to adjudicate on, such as "the mass automatic naturalization of Ukrainian citizens that Russia implemented in Crimea, and an individual's right to enter their own country"[1030]. However, what it is certain is that even if a regional court cannot decide on issue of sovereignty, the main mission of the ECtHR is the protection of the rights of all the individual present in the European space[1031], even in areas - such as the post-Soviet *de facto* entities - in which the residents would otherwise remain unprotected.

[1029] *V. Supra*, to note 1018.
[1030] *V. Supra*, to note 1026.
[1031] *V. Supra*, to note 859, p. 808.

CONCLUSION

The present dissertation has analysed the difficult path toward justice that must be accomplished by the inhabitants of the *de facto* regions of the post-Soviet area in order to obtain justice for the human rights violations they suffer on a daily basis. In particular, the work has focused on the efficiency in this respect of the European Court of Human Rights, that is the Court in front of which the large majority of cases concerning these areas has been brought.

First of all, it has emerged that the capacity to bring a claim in front of a Court for an individual is a quite recent conquest in the panorama of international law. The system established by the European Council is the most efficient in this sense because it enshrines in its provisions, in particular in Article 34, the *jus standi in judicio* for individuals: people can therefore have direct access to the Court. Moreover, even when compared with the other systems of protection of human rights established at international level, the strength of the judgements of the ECtHR is evident.

For this reason, the Court in question results the most attractive even for the inhabitants of the *de facto* regions of the post-Soviet area. Nevertheless, a problem that must be overcome is the exhaustion of domestic remedies that is one of the main criteria of admissibility included in Article 35 of the Convention. It has been demonstrated that in these regions, in the majority of the cases, the domestic remedies are considered ineffective because the local authorities are often corrupted or because the systems of protection are inefficient. Even the national authorities often deny having jurisdiction on these cases and, as a consequence, the unique possibility to obtain justice for the victims is the ECtHR that can operate as court of first instance. Usually, the applications are brought against the *parent* and the *patron* state: as a matter of fact, it has been shown that all of them - Armenia, Azerbaijan, Republic of Moldova, Georgia, Ukraine and Russian Federation – are all member states of the Council of Europe and they all have ratified the ECHR, assuming the responsibility to protect rights and duties of people under their jurisdiction.

It has been precisely on the issue of jurisdiction that the last part of the work has focused, and it has been shown the importance of the jurisprudence of the Court that, in different cases, has demonstrated the exercise of effective control of the *parent* or *patron* state over the separatist area. This is very important because it permits not to leave a vacuum in the protection of human rights, even in those zones of international law that are more controversial. The judgements of the Court and the possibility for victims to bring individual claims in front of it, are two sides of the same question and highlight the importance of the presence of the States in the Council. As

underlined, the difficult relation between Russian Federation and the Council could therefore represent a problem for the protection, not only of the Russian citizens, but also for the inhabitant of the territories in question that have Russia as *patron* state, which can exercise jurisdiction over them.

Moreover, there is a quite important number of inter-state cases regarding these areas that has been presented in front of the Court, following the provisions of article 33 of the ECHR. Even if more difficult to decide upon, they are a clear example of the seriousness of the conflicts that have taken place (and that are still taking place) in these areas. As a matter of fact, another conclusion reached is the fact that the non-recognition of an entity does not automatically mean that things are not occurring on its territory. On the contrary, it has been demonstrated that the conflicts originated after the collapse of the Soviet Union are "not frozen" and, consequently, there are still clashes occurring in these areas that are producing hundreds of deaths and internally displaced people. The violations of properties, the prohibition to return to one's own property and the ethnic struggles are very common in these areas and maybe they have been reawakened by the 2014 conflict in Crimea. One certain thing is the fact that the non-recognition of these entities, even if justified from the point of view of international law, is maybe exacerbating the human rights situations of these areas.

It has been demonstrated, also through the historical examples proposed, that the action of recognition is a highly politicized one and has contributed in different cases to show the position of the international community toward a self-proclaimed entity. All the self-proclaimed authorities brought as case studies have in common the fact of claiming their independence from a territorial state, without obtaining the recognition of the international community. The *contested territories* of the post-Soviet area, in particular, are enduring situations that have their origins in the policies of the Soviet Union, but that have developed throughout thirty years during which came in succession clashes and (often failed) attempts of reconciliation.

After the analysis developed, it can be concluded that the situation in these areas is in continuous evolution as it has been demonstrated by the conflict of last year in Nagorno-Karabakh and by the fact that there are a lot of still pending cases in front of the ECtHR that could change the flow of the events in the region. Nevertheless, the *jus standi* enshrined in the ECHR remains a fundamental pillar that secure the "right to justice" that can be exerted by the contested territories of the post-Soviet area – and by their inhabitants - because the *parent* and *patron* states are members of the Council of Europe and have ratified the ECHR.

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