

Vol. 1, No. 2 (2009)

Special Issue

Russia and International Law – From the North Pole to the Caucasus

Articles

Setting the Flag in Arctic Waters: Russia's Claim to the North Pole
Nele Matz-Lück

Russia and Human Rights: Incompatible Opposites?
Bill Bowring

International Law in Russian Textbooks: What's in the Doctrinal Pluralism?
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Questions
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The War between Russia and Georgia – Consequences and
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Vol. 1, No. 2 (2009)**Editorial**

Article 15 (4) of the Constitution of the Russian Federation indicates that “[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be an essential part of its legal system. If an international treaty or agreement of the Russian Federation fixes other rules than those envisaged by law, the rules of the international agreement shall be applied”.¹

Since 1993, when Russia enacted its Constitution, international scholars heralded Article 15 (4) of the Constitution as a clear break from the Soviet Union’s cautious approach to the incorporation of international law into domestic law.²

Russia has changed enormously since 1993. Today Russians remember the spirit of the early post-soviet years with horror rather than with nostalgia. Did this have the effect of relativizing the strong constitutional commitment to international law? During the past months, certain activities of the Russian Federation that are of concern to international law might indicate such a development: The Russian-Georgian Conflict escalated a year ago and is still not resolved. The territorial dispute over the North Pole goes on: Russia’s claims have been opposed by the other states bordering the Arctic Ocean.

On the other hand, since 1996, when Russia signed the European Convention on Human Rights (ECHR) of the Council of Europe, it committed itself to comply with international standards of Human Rights

¹ Constitution of the Russian Federation of 12 December 1993, *Rossijskaja Gazeta*, 25 December 1993, no. 237 (Конституция Российской Федерации, 12 декабря 1993 г., Российская газета, 25 декабря 1993, N 237).

² G. M. Danilenko, ‘Implementation of International Law in Russia and Other CIS States: Theory and Practice’, 10 *European Journal of International Law* (1998) 1, 51-69; T. Långström, *Transformation in Russia and International Law* (2003); B. Tuzmukhamedov, ‘The Implementation of International Humanitarian Law in the Russian Federation’, 85 *International Review of the Red Cross* (2003), 385-396.

and to allow its citizens to bring individual claims to the Strasbourg Court. Of 104,100 claims currently, (as of 1 April 2009) pending before the court 29,000 of those claims, 27,9 % of the total, have been brought against the Russian Federation. However, Russia still insists on having certain reservations to the ECHR (as do other States). Furthermore, it has neither ratified Protocol 6 on the prohibition of the death penalty in peacetime nor Protocol 14 containing the necessary modifications to the control system of the Convention that are critical for the Court's ability to cope with its increased workload.

Thus, the question remains: How should we evaluate named incidents in and outside of Russia? Is the Russian Constitution's spirit of openness toward international law still convertible currency today?

This edition of the GoJIL examines a wide range of issues regarding Russia and its approach to international law. The title of this special issue sets the track. We would like to invite you on an expedition through "Russia and International Law – From the North Pole to the Caucasus".

We commence our journey up North with the article by Nele Matz-Lück, "Planting the Flag in Arctic Waters: Russia's Claim to the North Pole". She examines the claim of Russia and the other Arctic rim states to the North Pole and the related disputes about the jurisdictional claims to parts of the ocean and the seabed between Russia, Canada, the United States, Denmark and Norway.

In the second contribution, "Russia and Human Rights: Incompatible Opposites?", Bill Bowring raises the question of whether Russia's obligations under the European Convention on Human Rights are at a breaking-point. Based on a description of the history of law in Russia, he proves that human rights discourse has a long tradition in Russia.

The review essay, "International Law in Russian Textbooks: What's in the Doctrinal Pluralism?", written by Lauri Mälksoo, examines the four leading Russian textbooks of Public International Law. Mälksoo seeks to demonstrate that the authors' understandings of human rights are an expression of their attitude focused on the Soviet legacy and Russia's role in International Law.

In "Protection against Indirect Expropriation Under National and International Legal Systems", Max Gutbrod, Steffen Hindelang and Yun-I Kim elaborate on direct expropriation through states and its challenges to foreign investment by presenting six scenarios based on Russian legal regulations.

"Geopolitics at Work: the Georgian-Russian Conflict", by Peter W. Schulze, analyses the Russian-Georgian War from a political science point

of view. He highlights the role of the United States and the European Union in the conflict and its settlement. Furthermore, he incorporates these procedures in their broader geopolitical context.

Our intellectual “expedition” ends in the Caucasus with the article, “The War between Russia and Georgia – Consequences and Unresolved Questions”, by Angelika Nußberger. She examines the divergent views and legal assessments of Georgia and Russia with regard to the breakaway regions South-Ossetia and Abkhazia. By approaching the conflict from a historical perspective, Nußberger analyses whether these regions’ right to secession could be based on the right to self-determination.

This special issue of the *GoJIL* is intended to contribute to a broader understanding of the role of international law in Russia’s politics and Russia’s role in international relations. A nation as versatile as Russia and its complex positions on many issues merit such a broad view. Having regained considerable political and economic strength, Russia’s position will be of weight in any appraisal of the present international order. However, we forgo jumping to premature conclusions here. Rather, we hope that the contributions in this issue might give to our esteemed readers enough food for thought and discussion on such “big” questions.

The Editors

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Planting the Flag in Arctic Waters: Russia's Claim to the North Pole

Nele Matz-Lück*

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Abstract

With its demonstrative planting of a Russian Flag in the seabed in the Arctic Ocean outside of the 200 nautical mile limitation of the continental shelf in 2007, the Russian Federation has fuelled discussions on claims concerning the outer continental shelf by Arctic rim-States. Although the planting of the flag in the ocean floor is irrelevant under international law, it reveals a political attitude that may make agreement and co-operation concerning the different demands more difficult. The disputes on the boundaries of the outer continental shelf cannot be settled finally by the Commission on the Limits of the Continental Shelf or by dispute settlement under the UN Convention on the Law of the Sea but only by agreement amongst the parties themselves.

A. Introduction

The Russian Federation is one of the Arctic rim-States and possesses a long coastline and islands north of the Arctic Circle. The recognized maritime zones, in which Russia enjoys sovereignty or at least certain sovereign rights, reach far into the Arctic Ocean. Russia, however, claims rights to more of the world's most Northern – and mainly frozen – sea: the extension of the continental shelf and the relevant sovereign rights up to the North Pole. The Russian Federation has been particularly active in claiming sovereign rights over vast parts of the Arctic Ocean floor. The two most significant events are the formal submission to the Commission on the Limits of the Continental Shelf (CLCS)¹ to extend the continental shelf and the symbolic planting of a Russian flag in the ocean floor during the course of a scientific exploration expedition in 2007. While the former is relevant for the legal proceedings in the determination of Russian claims, the latter has only political relevance. How strong a political symbol the planting of the Russian flag was, can be measured by the reaction of other Arctic States. The other Arctic States have begun to start scientific missions themselves to collect evidence for potential claims to extended continental shelves, and to

¹ This Commission was established by Art. 76, para. 8 and Annex II of the UN Convention on the Law of the Sea (UNCLOS), 21 ILM (1982), 261-262.

enhance the number of modern ice-breakers stationed in Arctic harbors and to reinforce military capacity in the region.²

In 2001 Russia made a submission to the CLCS for the extension of its continental shelf beyond 200 nautical miles (nm) in the Arctic Ocean region. The Russian Federation, however, is not the only State claiming functional jurisdiction, i.e. jurisdiction as far as the exploration and exploitation of natural resources is concerned, over an extended part of the Arctic continental shelves. In 2006 Norway made a submission to the CLCS which inter alia concerns the central Arctic Ocean. Denmark, allegedly, is considering a submission.

The continental shelf, like the Exclusive Economic Zone (EEZ) in the water column above the continental shelf up to 200 nm from the baselines,³ is not subject to full national sovereignty or jurisdiction.⁴ Yet, the law of the sea grants certain exclusive rights concerning economic activities, namely, for the continental shelf, the exploitation of mineral and certain natural resources.⁵ Allegations of vast oil or gas fields in the subsoil of the seabed around the North Pole, as well as diamond and non-ferrous metal accumulations, added to the rising potential to access these resources due to advanced technologies and the melting of the ice, has raised the interest of riparian States. While figures on the amount of mineral resources hidden in the subsoil of the Arctic Ocean are mainly estimations due to a lack of research caused by the hostile conditions of the deep sea under permanent ice cover, in times of growing energy demand States clearly desire to safeguard access and exclusive exploitation rights. It shall be noted, however, that if resources are exploited on the continental shelf beyond 200 nm, Art. 82 of the UN Convention on the Law of the Sea (UNCLOS) requests States to make payments and contributions. In this respect the regime concerning the ex-

² Canada has announced to reinforce military capacity of Canadian Rangers in Resolute Bay from 900 to 5.000, see A. Proelss & T. Müller, 'The Legal Regime of the Arctic Ocean', 68 *Heidelberg Journal of International Law* (2008), 651, 652.

³ An extension of the continental shelf beyond 200 nm does not confer rights in the water column above (Art 78 UNCLOS), i.e. an extended shelf does not mean an extended EEZ.

⁴ On the regime for the EEZ see Arts 55-75 UNCLOS.

⁵ Art. 77 para. 1 UNCLOS allows the coastal State sovereign rights for the purpose of the exploration and exploitation of the natural resources of the continental shelf. Natural resources are defined to consist of mineral resources and living sedentary species (Art. 77 para. 4 UNCLOS). According to Art. 77 para. 2 UNLCOS the rights are exclusive in the sense that non-exploration and non-exploitation do not legitimize other States to undertake these activities.

tended continental shelf differs from the exploitation rights for the shelf up to 200 nm from the coastal baselines. In any case the planting of a Russian flag by a submersible in the ocean floor well outside the limit of 200 nm from the Russian baselines, from which the extension of the different zones of the sea and the seabed are measured,⁶ has fuelled discussions over “who owns the North Pole” and has even led to notions of a “battle over the North Pole” in the press.⁷

B. Factual and Legal Background

I. The Arctic: Features and Problems

The term “Arctic”, in common parlance refers to the region surrounding the North Pole, delineated by the Arctic Circle. The States commonly referred to as the “Arctic nations”, i.e. those States which have coastal waters within the Arctic Circle, are Canada, Denmark (via Greenland), Norway, the Russian Federation and the United States of America (via Alaska). Other interested and affected States in the Arctic region include Iceland, Finland and Sweden.⁸ Yet, the latter are not part to any potential disputes concerning rights over the continental shelf below the Arctic Ocean around the Pole. The Arctic Ocean extends over 14.056 million sq km and for most part of the year still consists of the polar icecap.⁹ The permanent presence of ice has played an important role concerning the question of which legal regime is applicable to the Arctic: land or water?

The Arctic is faced with many problems of various kinds: environmental, social and legal. Environmental aspects such as the melting of sea-ice due to global warming, the extinction of endemic species and pollution may alter the biosystem irreversibly. While the melting of the ice opens new

⁶ Art. 3-16 UNCLOS address the limits of the territorial sea and the relevant establishment of baselines along the coast as the basis for measurement. The articles on the breadth of the other zones of the seas and the seabed refer back to these provisions, e.g. Art. 57 UNCLOS concerning the EEZ and Art. 76 para. 1 concerning the Continental Shelf.

⁷ See the report in the German weekly magazine *Der Spiegel*, ‘Der Kampf um den Nordpol’, *Der Spiegel*, 38/2008, 15 September 2008, 160-168.

⁸ Consequently some authors refer to eight Arctic States, e.g. D. R. Rothwell, *The Polar Regions and the Development of International Law* (1996), 155.

⁹ On further geographical data concerning the Arctic Ocean see Central Intelligence Agency, *Arctic Ocean, The World Factbook* (2008), available at <https://www.cia.gov/library/publications/the-world-factbook/geos/xq.html> (last visited 19 January 2009).

economic prospects with regard to the exploitation of mineral resources and transportation, local communities may lose their livelihoods and culture. Human rights concerns relate to the more than thirty indigenous peoples whose traditional lifestyle and cultural heritage depends upon the preservation of the Arctic environment. Last but not least disputes about jurisdictional claims to parts of the ocean and the seabed between the littoral States complicate the creation of a comprehensive governance regime in the Northern Polar region.

During the Cold War the Arctic gained particular strategic relevance because it comprised the shortest route between the Soviet Union and the United States of America. At the Bering Strait both States are only 57 miles apart.¹⁰ At that time the Arctic was suddenly perceived as a key geostrategic deployment area in any major conflict between the superpowers.¹¹ While strategic proximity between Russia and the US may have lost its immediate relevance, new conflicts could arise not only in the Arctic but over the Arctic. The focus of the current discussion relates to the question of the exploitation of mineral resources, e.g. oil and gas fields, to the transportation of cargo¹² and to related environmental concerns. Yet, the issue of sovereign rights over mineral resources bears particular potential for conflict and may even prove to be a risk for international security. Furthermore the melting of the ice opens the way not only for carrier ships but also for warships. In this context the designation of certain passages as "international straits"¹³ is under dispute and may gain particular relevance. As a result of these developments Arctic rim-States have lately confirmed to keep and potentially strengthen their Arctic fleets. At the same time they have declared in the Ilulissat Declaration their commitment to an orderly settlement of disputes and the rules and regulations of the law of the sea.¹⁴ Russian rhetoric, how-

¹⁰ S. Chaturvedi, *The Polar Regions – A Political Geography* (1996), 88.

¹¹ *Id.*

¹² Russia has always relied strongly upon the northern sea route. The melting of the ice will further enhance interests in shipping in Arctic waters. On the relevance of the Russian Arctic waters for transport see N. I. Khvochtchinski & Y. M. Batskikh, 'The Northern Sea Route as an Element of the ICZM System in the Arctic: Problems and Perspectives', 41 *Ocean & Coastal Management* (1998), 161-173.

¹³ UNCLOS has established a special regime for straits used for international navigation that recognizes certain rights of third States, e.g. transit passage and innocent passage; see Arts 34-45. UNCLOS.

¹⁴ The Declaration can be accessed at <http://www.ambmoskva.um.dk/NR/ronlyres/08609E4F-8D34-4174-A419-A65547B317F0/0/ArcticOceanConference.pdf> (last visited 25 February 2009).

ever, seems to indicate that it is committed to the law of the sea as long as Russian claims in the Arctic are formally acknowledged. Internally there is a strong emphasis on Russian rights over the Arctic. The value of political declarations like the Ilulissat Declaration will be put to the test, if Russian claims to extended sovereign rights in the Arctic Ocean are assessed negatively.

II. Formal Co-operation and Governance in the Arctic

When comparing legal regulation for the two Poles it becomes apparent that the land of, and waters around, Antarctica are governed by a specific legal regime consisting of different legal instruments and institutions and that there is no equivalent for the Arctic.¹⁵ While Antarctica and the Arctic differ considerably – the former being a continent surrounded by a belt of ocean, the latter a partially frozen ocean surrounded by a belt of continents¹⁶ – they resemble each other in their need for a specific governance regime founded upon the co-operation of States.¹⁷

Although agreement on the necessity of cooperation in the Arctic has led to the creation of the Arctic Council by the Ottawa Declaration in 1996,¹⁸ the organization has not created a legal and governance regime for the region that is comparable to the one for Antarctica. Member States to the Arctic Council are Canada, Denmark (including Greenland and the Faroe Islands), Finland, Iceland, Norway, the Russian Federation, Sweden and the United States of America. In addition to the member States, organizations of indigenous peoples qualify as permanent participants and give the Arctic Council a unique structure. Although the mandate of the Arctic Council is broader, its focus of attention is concerned with environmental matters.¹⁹

¹⁵ See inter alia Proelss & Müller, *supra* note 2, 654; Rothwell, *supra* note 8, 155, however is of the opinion that a distinctive “Arctic international law” has begun to emerge and that the different bilateral and multilateral efforts constitute an “Arctic legal regime”, even if the institutional frame may not be comparable to Antarctica.

¹⁶ D. Pharand, ‘Freedom of the Seas in the Arctic Ocean’, 19 *University of Toronto Law Journal* (1969), 210, 214.

¹⁷ For suggestions on establishing a regime for the Arctic comparable to Antarctica see S. Holmes, ‘Breaking the Ice: Emerging Legal Issues in Arctic Sovereignty’, 9 *Chicago Journal of International Law* (2008), 323, 346-347.

¹⁸ 35 ILM (1996), 1387-1390.

¹⁹ On the different approaches to protect the Arctic Environment before the founding of the Arctic Council see D. R. Rothwell, ‘The Arctic Environmental Protection Strategy and International Environmental Cooperation in the Far North’, 6 *Yearbook of International Environmental Law* (1995), 65-105; on more recent developments see

One explanation for the late and not particularly substantive cooperation in the Arctic region was seen in the Cold War period. Decades of tension between the superpowers and the strategic relevance of the Arctic resulted in the perception of the Arctic nations that they had little interests in common and hence they felt only marginally motivated to cooperate in non-military matters.²⁰

III. The Legal Regime for the Arctic: Ice-is-Land?

As there is no landmass at the North Pole and the law of the sea does not generally distinguish between fluid and frozen waters,²¹ it is now commonly accepted that the Arctic Ocean and the relevant jurisdictional claims by riparian States are governed by UNCLOS and customary international law of the sea.²² In the past the permanent presence of ice had led some commentators to suggest that the Arctic Ocean should not be subject to the general legal regime of the seas. One approach to extend sovereignty claims by the littoral States in the Arctic was the so-called "ice-is-land" theory. According to such considerations ice off the coasts of States could *inter alia* be used to define the baselines from which the breadth of the sea-zones is measured. A potential differentiation between different types of ice, e.g. pack ice or shelf ice, further complicated this approach.²³ While "land-is-ice" theories had originally been popular by Soviet commentators²⁴ before the adoption of UNCLOS, afterwards Soviet and Russian writings generally acknowledged that the Arctic Ocean, whether frozen or not, is governed by

D. VanderZwaag *et al.*, 'The Arctic Environmental Protection Strategy, Arctic Council and Multilateral Environmental Initiatives', 30 *Denver Journal of International Law and Policy* (2001-2002) 131-171.

²⁰ Chaturvedi, *supra* note 10, 97.

²¹ Art. 234 UNCLOS is titled "ice-covered areas". However, this article does not establish a general regime on such areas but only concerns competences of the coastal State to adopt specific regulations to prevent, reduce and control pollution in ice-covered areas in its exclusive economic zones.

²² Specific treaties for the Arctic concern the protection of species, e.g. Polar Bears, but do not establish a territorial regime. The Agreement on the Conservation of Polar Bears, 13 ILM (1974), 13-18, which was concluded between Canada, Denmark, Norway, the Soviet Union and the United States is a remarkable exception to the lack of co-operation in non-military issues during the Cold War; see also Chaturvedi, *supra* note 10, 98-99.

²³ For the Canadian and Russian Perspective see E. Franckx, *Maritime Claims in the Arctic – Canadian and Russian Perspectives* (1993), 81 and 153.

²⁴ W. Lakhtine, 'Rights over the Arctic', 24 *American Journal of International Law* (1930), 703, 712.

the law of the sea and that coastal States could not make fully-fledged claims to sovereignty over ice-covered areas off their coasts.²⁵ Today Russian claims to sovereign rights in Arctic waters are based upon UNCLOS and mainly concern the extension of the Russian continental shelf according to Art. 76 para. 8 UNCLOS.

Another theory supporting extended sovereignty claims which are, as such, not in conformity with the current international law of the sea, suggested dividing the Polar region up into national sectors amongst the Arctic States.²⁶ The Soviet Union had kept its policies open in regard to the sector theory.²⁷ While claims to full sovereignty over a sector of ice and water up to the Pole seemed to have been discarded by the Soviet Government at an early stage, the exercise of certain rights over a sector or the use of the sector theory to delimit sea zones was not as clearly rejected but became a “cornerstone” in the writings of Soviet and Russian commentators.²⁸ The insistence of Soviet academic writings upon a sector theory for the Poles has sometimes led to its designation as a “Soviet theory”. This, however, fails to recognize the acceptance of the sector theory for Antarctica and early views by the other Arctic rim-States.²⁹ In today’s boundary questions in the Arctic, the sector theory could resurface as part of the argument to determine sea-zones according to coastline proportionality.³⁰ Indeed maps of the Russian claims for functional jurisdiction over an extended continental shelf roughly resemble a pie-shaped sector.³¹

²⁵ See the evaluation of Soviet and later Russian writings Franckx (23), 170.

²⁶ On this discussion see D. Pharand, ‘Sovereignty in the Arctic: the international legal context’, in E. J. Dosman (ed.), *Sovereignty and Security in the Arctic* (1989), 145, 151 and, with further references to early writers, Pharand, *supra* note 16, 213.

²⁷ On Soviet and Russian reliance upon the sector theory see Rothwell, *supra* note 8, 168-169.

²⁸ See the evaluation by Franckx, *supra* note 23, 153 and 168-169. As early as 1926 the Soviet Union formulated the sector theory in a decree; see Lakhtine, *supra* note 24, 709.

²⁹ For the Canadian example see Franckx, *supra* note 23, 79-83.

³⁰ Holmes, *supra* note 17, 343. Proportionality, however, is only one element of the delimitation of the continental shelf and closely connected to the equidistance principle, see ICJ, Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), para. 57.

³¹ A map in which the Russian claims to the outer continental shelf in the Arctic are marked was part of the 2001 submission and is available at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/RUS_CLCS_01_2001_LOS_2.jpg (last visited 20 January 2009).

C. The Extended Continental Shelf Under the Law of the Sea

I. The Planting of the Russian Flag

While the designation of ocean zones is a national unilateral act, its effect and acceptance by other States depends upon public international law. The determination of the outer limits of the continental shelf is such an act. In principle, States may declare the boundaries unilaterally. In cases where an extended continental shelf is claimed other States will only accept the boundaries if the procedure established by the UNCLOS is adhered to. With the exception of the United States all Arctic Nations are parties to the UNCLOS.³²

The planting of the Russian flag in the floor of the Arctic Ocean has led commentators to insist that there is no more terra nullius and that international law no longer knows titles to land which rely upon such unilateral acts.³³ Russia, like other States, has a history of claiming sovereignty over Arctic islands by discovery through Russian explorers, relative proximity to the Russian mainland, and effective occupation.³⁴ Although the perspectives on a lack of title due to occupation are correct and the planting of the flag no longer has any legal relevance under international law, Russia, from its point of view, has not intended to claim and occupy territory in the sense of terra nullius. Rather the flag in the ocean floor is a demonstrative political symbol of Russian legal claims to an extended continental shelf under the UN Convention on the Law of the Sea. So far Russia has clearly expressed its will to abide by the rules and regulations of the law of the sea.³⁵ In the

³² With a view to Arctic issues US National Security Presidential Directive 66, issued 9 January 2009 under President George W. Bush, urges the Senate to accede to UNCLOS in order to benefit from the procedure for the establishment of an extended continental shelf and to participate in the development and interpretation of the Convention. See <http://www.fas.org/irp/offdocs/nspd/nspd-66.htm> (last visited 25 February 2009).

³³ See Holmes, *supra* note 17, 323 with further references; Proelss & Müller, *supra* note 2, 655.

³⁴ Rothwell, *supra* note 8, 168.

³⁵ The German weekly magazine *Der Spiegel* announced an openly aggressive national Russian directive according to which full sovereignty was claimed and the termination of membership in UNCLOS proclaimed as ultima ratio if the Russian claims were not accepted. See Reich der Kälte, *Der Spiegel*, 5/2009, 26 January 2009. For an English version see <http://www.spiegel.de/international/world/0,1518,604338,00.html> (last vi-

submission to the CLCS Russia has designated the boundaries of the claims in the Arctic. The flag was planted within this area. Whether Russia is legally entitled to such extensive claims is a distinct matter and depends inter alia upon geological evidence and other States' claims to an extension of their continental shelves.

II. Continental Shelf and Outer Continental Shelf

Under UNCLOS all coastal States parties are entitled to a continental shelf, i.e. the seabed and the subsoil of the submarine areas extending to a distance of 200 nm from the baselines (Art. 76 para. 1 UNCLOS).³⁶ This provision guarantees a 200 nm zone for those coastal States where the continental margin does not extend up to that distance. Coastal States in areas where the continental margin lies further out than 200 nm from the baselines can claim the area up to the margin by making a submission to the CLCS.³⁷

As already mentioned, in principle, the designation of the continental shelf, like the delineation³⁸ of other zones under the law of the sea, is a unilateral act. However, in the case of the extended continental shelf UNCLOS has established an institution and procedure to determine the boundaries. Clearly, the act of determination of the limit is still performed by the relevant State. However, only the limits of the extended continental shelf, which are established on the basis of the recommendations of the CLCS become "final and binding" (Art. 76, para. 8 UNCLOS). While the legal consequences of a violation of the procedure or disregard of the recommendations of the Commission are not explicitly stated in UNCLOS, it must be assumed that such unilateral claims are under international law not binding and will not be accepted by other States. In the end, the process of participation with the CLCS and their recommendations do not change the nature of the determination of the relevant seaward boundary of the outer continental shelf as being unilateral. Yet, the process is decisive for acceptance by other States and unilateral determination in contradiction to a recommendation at

sited 25 February 2009). However, it seems that so far, relying upon sources in English language including English press information by the Russian Government and Parliament, a Russian directive with such content has not been adopted.

³⁶ On the predecessor convention and the cumbersome drafting history of the UNCLOS provisions see M. Nordquist *et al.* (eds), *United Nations Convention on the Law of the Sea 1982 – A Commentary*, Vol. II (1993), 827-836.

³⁷ See S. V. Suarez, *The Outer Limits of the Continental Shelf* (2008) for a substantive discussion on the issue.

³⁸ On the difference between delineation (unilateral) and delimitation (contractual) see Proelss & Müller, *supra* note 2, 675-676 and footnote 93.

least violates the procedure established by Art. 76 para. 8 UNCLOS.³⁹ Coastal States with adjacent or opposite coasts shall determine the boundaries of their continental shelves by agreement.⁴⁰

The Commission is only competent to deal with claims for functional jurisdiction over a continental shelf extending further than 200 nm. The designation of a continental shelf up to 200 nm is undertaken by the coastal State unilaterally or by agreement with their neighboring or opposite coastal States.⁴¹ The definition of the outer limit as such is "open-ended"⁴². States may define the outer limits by choosing either 350 nm from the baselines as the outer limit or draw a line 100 nm from the 2,500 metre isobath.⁴³ The second method could result in the establishment of a margin which extends further than 350 nm from the baselines.⁴⁴ This also applies to the Arctic Ocean as States are free to choose the more favorable method to delineate the outer continental shelf.⁴⁵

While Art. 76 para. 6 UNCLOS limits the extension to the 350 nm boundary in the case of submarine ridges, it distinguishes between such ridges and submarine elevations that are natural components of the continental margin. For elevations that are natural components of the continental margin, States can choose the determination according to a line drawn 100 nm from the 2,500 metre isobath. For submarine ridges an extension reaching up to 350 nm from the baselines is the absolute limit of an outer continental shelf.⁴⁶

The provisions referring to the delineation of the outer limits of the continental shelf belong to the most complicated provisions of the law, the sea convention. Terms such as "shelf", "slope", "rise", "oceanic ridge", "submarine ridge", and "submarine elevation" are decisive for the correct determination of the outer limits of the continental shelf. UNCLOS provides

³⁹ *Id.*, 675-677.

⁴⁰ Art. 83 UNCLOS.

⁴¹ In the absence of agreement many cases of continental shelf delimitation have ultimately been decided by arbitration or other dispute settlement.

⁴² A. Oude Elferink, 'Continental Shelf, Commission on the Limits of', in R. Wolfrum (ed.), *Max-Planck Encyclopedia of Public International Law* (2008), available at www.mpepil.com (last visited 20 January 2009), para. 2.

⁴³ Art. 76 para. 5 UNCLOS.

⁴⁴ Nordquist *et al.*, *supra* note 36, 879.

⁴⁵ Proelss & Müller, *supra* note 2, 665.

⁴⁶ On the distinction between the different elevations and their relevance for Art. 76 UNCLOS see R. Lagoni, 'Festlandsockel', in W. Graf Vitzthum (ed.), *Handbuch des Seerechts* (2006), 193-194.

a formula for the calculation of the limits of the outer continental shelf, but does not offer definitions for terms crucial to apply the formula and thus leaves the application of the provisions to each case to the Commission and the States parties. Although the CLCS has attempted to clarify matters in Chapter 7 of its Scientific and Technical Guidelines, many questions are left open. The issue of different types of ridges, for example, which is most relevant to the Russian claims in the Arctic Ocean, is left to examination on a case-by-case basis. Yet, not only is the application of the method of calculation and the evaluation of supporting scientific data complicated, the legal consequences are likewise subject to interpretation. For example, the interpretation of crucial legal terms such as “final and binding” in Art. 76 para. 8 UNCLOS or “without prejudice” in Art. 6 para. 10 UNCLOS have been identified as problematic.⁴⁷

The CLCS may not itself decide upon a legally binding boundary but can only recommend the determination of an extended continental shelf. If the coastal State establishes the boundaries of its extended continental shelf in accordance with the recommendation by unilateral declaration, the limits become final and legally binding on the other States parties in accordance with Art. 76 para. 8 UNCLOS. However, the interpretation of the terms “final and binding” has raised considerable consternations among academic writers.⁴⁸

In such a complicated matter such as the determination of the outer shelf it is likely that the precise implementation of a CLCS recommendation may be questioned and, as a consequence, legal validity be doubted by other States parties. With a view to the Arctic Ocean the CLCS has not yet made any accepted recommendations on the extension of any State’s continental shelf.⁴⁹ Hence, as of today no littoral State may exercise any sovereign

⁴⁷ The International Law Association has identified 22 “Legal Issues of the Outer Continental Shelf” which warrant further consideration; ILA Resolution No.2/2006, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/33> (last visited 20 January 2009).

⁴⁸ See B. Baker, ‘States Parties and the Commission on the Limits of the Continental Shelf’, in T. Malick Ndiaye & R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes – Liber Amicorum Judge T. A. Mensah* (2007), 669, 673. For a discussion of the interpretation of the term see Proelss & Müller, *supra* note 2, 673-677.

⁴⁹ Russia has responded to recommendations by another round of fieldwork; see *infra* at C). Norway is the second Arctic State to have submitted claims for an extension. Denmark has undertaken scientific missions in the Arctic to collect geological sam-

rights concerning the exploitation of the resources of the continental shelf under the Arctic Ocean beyond 200 nm from the baselines.⁵⁰

III. "Disputed Areas"

The legal capacity of the CLCS, however, is even more limited than it might seem,⁵¹ when it comes to maritime areas under dispute.⁵² Art. 76 para. 10 UNCLOS provides that "[t]he provisions of this article are without prejudice to the question of delimitation of the continental shelf between States with opposite or adjacent coasts." In contrast to the unilateral determination of the limits following a recommendation of the CLCS, States with opposite or adjacent coasts shall delimit their continental shelves by agreement (Art. 83 para. 1 UNCLOS) or, if an agreement cannot be reached within a reasonable time, by dispute settlement (Art. 83 para. 2 UNCLOS). An equivalent provision has been adopted for the EEZ in Art. 74 UNCLOS.

Since parties to UNCLOS may opt out of binding dispute settlement for questions concerning Art. 83 UNCLOS under Art. 298 para. 1 lit. a) i) UNCLOS, the law of the sea does not offer any compulsory method of delimitation of the continental shelf, if States have adjacent or opposite coasts. In principle, States are forced to reach an agreement with their neighbours. Norway is the only Arctic UNCLOS member that has not opted out of mandatory and binding dispute settlement with a view to Art. 83 UNCLOS.⁵³

ples with a view to support claims to an extended continental shelf off the Greenland coast but has not made any submission yet.

⁵⁰ The exploitation of mineral resources outside the continental shelf is governed by the special regime for the deep-seabed, i.e. Part XI of UNCLOS and the Agreement Relating to the Implementation of Part XI of the UNCLOS, and administered by the International Seabed Authority (ISA).

⁵¹ On general criticism concerning the Commission's capacity see also Baker, *supra* note 48, 669 with further references in footnote 2 and 680-686 in regard to a lack of legal expertise and competence.

⁵² On "disputed areas" see A. Oude Elferink & C. Johnson, 'Outer Limits of the Continental Shelf and "Disputed Areas": State Practice Concerning Article 76(10) of the LOS Convention', 21 *International Journal of Marine and Coastal Law* (2006), 461-487.

⁵³ Canada's declaration under Art. 298 para. 1 UNCLOS to opt out compulsory dispute settlement for inter alia the delimitation of the continental shelf according to Art. 83 UNCLOS was made upon ratification on 7 November 2003. The declaration is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Canada (last visited 20 January 2009); Denmark declared upon ratification on 16 November 2004 that binding dispute settlement was not accepted for delimitation of adjacent or opposite continental shelves; available at: [http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%](http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Denmark%20Upon%20)

D. The Russian Claims

I. Procedure

The Russian Federation was the first State to make use of the procedure under Art. 76 para. 8 UNLCOS when delivering a submission to the CLCS in 2001.⁵⁴ Art. 4 of Annex II to UNCLOS sets a deadline for submissions. According to this provision claims must be made within 10 years after the convention for that State has entered into force. This provision was adapted by the 11th Meeting of the Parties. Due to the fact that members for the CLCS were only elected in 1997, i.e. three years after UNCLOS entered into force, and the Scientific and Technical Guidelines for submissions to the CLCS were established as late as 1999, States decided to extend the 10-year period for States for which the convention entered into force before 1999. For these States the day of commencement of the 10-year time period for making submission is 13 May 1999, i.e. the day the Scientific and Technical Guidelines of the CLCS were adopted. For the Russian Federation UNCLOS came into force on 11 April 1997. Hence the deadline for Russian submissions to an extended continental shelf is 13 May 2009. Norway is in the same position as Russia, while the 10-year period for Canada and Denmark ends 2013 and 2014 respectively. For the United States it would commence upon entry into force, if the US acceded to UNCLOS.⁵⁵ It has been suggested that the Russian submission years before the ending of the deadline resulted in large part from circumstances within the Government.⁵⁶

20ratification (last visited 20 January 2009). The Soviet Union made the relevant declaration to opt out binding procedures on 10 December 1982 when signing the treaty and the Russian Federation made another declaration with the same objective upon ratification on 12 March 1998. The latter is available at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#Russian%20Federation%20Upon%20signature (last visited 20 January 2009).

⁵⁴ See UN Press Release SEA/1729, 21 December 2001, available at <http://www.un.org/News/Press/docs/2001/sea1729.doc.htm> (last visited 20 January 2009).

⁵⁵ On 15 May 2007 then President George W. Bush urged the US Senate to decide favorably on accession to UNCLOS, speech available at <http://www.whitehouse.gov/news/releases/2007/05/20070515-2.html> (last visited 20 January 2009), but despite a Senate Panel voting in favor of accession in October 2007, the full Senate has not yet decided. A law of accession would need a 2/3 majority. As mentioned above National Security Presidential Directive 66 repeats the advantages of accession and urges the Senate to decide favorably.

⁵⁶ R. Macnab & L. Parson, 'Continental Shelf Submissions: The Record to Date', 21 *International Journal of Marine and Coastal Law* (2006), 309, 310 with further reference in footnote 2.

The Russian submission concerns an extended continental shelf in the Arctic and the Pacific Ocean. Canada, Denmark, Japan,⁵⁷ Norway and the United States have each reacted with communications to the Russian submission laying out their positions.⁵⁸ Canada and Denmark were concerned that a lack of reaction could implicitly express agreement or acquiescence in regard to the Russian claims. While both States wanted to prevent such conclusions, they refrained from expressing an opinion on the substance of the claims. Norway drew the attention of the Commission to the fact that the Barents Sea was an area under dispute regarding the boundaries between Norway and the Russian Federation and should be treated accordingly. By this submission Norway maintained that any recommendation by the Commission for the area under dispute is without prejudice to matters relating to the delimitation between parties.⁵⁹ The US took the opportunity to express their views on the substance of the claims, e.g. in regard to oceanic ridges. In essence the United States questions the Russian submission in the light of contradicting scientific opinions and asks the Commission not to give any recommendation if there is a lack of certainty with regard to scientific evidence. The claims concerning the Arctic Ocean have been fully considered by the CLCS. In 2002 the Commission gave a recommendation on the outer limit of the Russian continental shelf⁶⁰ and expects Russia to revise the submission for the extension of the continental shelf in the Central Arctic Ocean.⁶¹

II. The Lomonosov and Alpha-Mendeleev Ridge

The Lomonosov and Alpha-Mendeleev Ridges traverse the Arctic Ocean from the margin of Siberia to that of Greenland and North America. While their location indicates that they are natural prolongations of the mar-

⁵⁷ The Japanese communication concerns the Russian claims in the Pacific and do not refer to questions of Arctic Ocean delimitation.

⁵⁸ The relevant letters are available at http://www.un.org/Depts/los/clcs_new/submissions_files/submission_rus.htm (last visited 20 January 2009).

⁵⁹ See Rule 4 lit. b) of Annex I to the Rules of Procedure of the CLCS, UN Doc. CLCS/40/Rev.1, 17 April 2008. While the Rules of Procedure were amended in 2008; Annex I was adopted in 1998 and has remained unchanged.

⁶⁰ The recommendation as such was not published. A summary of the proceedings and the recommendation is contained in the Report of the Secretary General to the General Assembly, UN Doc. A/57/57/Add.1, 8 October 2002, para. 27-41.

⁶¹ UN Doc. A/57/57/Add.1, 8 October 2002, para. 41.

gins, there are morphological breaks off the Russian coast that could be regarded as separations from the continental margin.⁶² Due to many uncertainties there is no broad consensus in the Arctic geoscientific community whether or not elevations such as the Lomonosov Ridge are natural prolongations of the landmasses of the adjacent coasts of the Amerasia Basin.⁶³ In addition to organizing an international conference on the issue in St. Petersburg in 2003,⁶⁴ Russia in 2005 and 2007 proved active in collecting more scientific evidence to support the claims of an extended shelf based upon sea ridges as an underwater prolongation of the continental margin.⁶⁵ The submarine field mission in 2007 during the course of which the submersible planted the Russian flag, *inter alia* had the task to collect samples of sediment and rock to support the theory of the Lomonosov ridge as an extension of the Russian landmass.⁶⁶ Art. 76 UNCLOS defines the continental shelf as the “natural prolongation of [...] land territory”. Hence, claims for an extension of the shelf must provide some evidence that the ocean floor beyond 200 nm still meets this requirement.

In the 1940s Russian scientists discovered the Lomonosov mountain ridge extends from the New Siberian Islands to the Canadian Ellesmere Island.⁶⁷ Denmark claims that the ridge had previously been connected to Greenland.⁶⁸ So far, however, no other Arctic State except Russia has submitted any claims to an extended shelf based upon the Lomonosov Ridge. In a letter in response to the Russian submission in 2001, the US stated that in her view the Lomonosov Ridge was “a freestanding feature in the deep, Oceanic Part of the Arctic Ocean Basin, and not a natural component of the continental margins of either Russia or any other State.”⁶⁹

Russia emphasizes the qualification of the Lomonosov and Alpha-Mendeleev Ridge as “submarine elevations” and not as “submarine ridges”. As already explained above, three categories have to be distinguished to

⁶² See figures and explanations at R. Macnab, *Submarine Elevations and Ridges: Wild Cards in the Poker Game of UNCLOS Article 76*, 223, 226.

⁶³ Macnab & Parson, *supra* note 56, 311.

⁶⁴ On the contents see Macnab & Parson, *supra* note 56, 311-312.

⁶⁵ On the 2005 mission and plans for subsequent field work Macnab & Parson, *supra* note 56, 312.

⁶⁶ Holmes, *supra* note 17, 336.

⁶⁷ Pharand, *supra* note 16, 214-216.

⁶⁸ Holmes, *supra* note 17, 336.

⁶⁹ The US communication is available at http://www.un.org/Depts/los/clcs_new/submissions_files/rus01/CLCS_01_2001_LOS__USAtext.pdf (last visited 20 January 2009).

explain Russian anxiety: oceanic ridges, submarine ridges and submarine elevations. Claims for an extended shelf cannot be based upon oceanic ridges, i.e. such ridges cannot be used to determine the outer limit of the shelf by e.g. relying upon the 100 nm distance from the 2,500 m isobath. Submarine ridges that are a natural prolongation of the mainland can be employed for determination of an extended shelf but the maximum seaward limit of 350 nm from the baselines applies. This maximum limit, however, does not apply for submarine elevations, provided, again, that they can be regarded as natural prolongations of the continental landmass. Russian insistence on the ridges qualifying as natural prolongations of the continental shelf in the form of underwater elevations, therefore, has the aim of achieving the largest possible extension of the continental shelf under the law of the sea and, in fact, to claim most of the seabed in the Arctic Ocean.⁷⁰ As mentioned above it is disputed amongst scientists whether the Lomonosov and Alpha-Mendeleev Ridge indeed meet the criteria. There is a tendency in international writings, however, to qualify the ridges as "submarine ridges" and to limit Russian claims to an outer continental shelf at 350 nm of the coast.⁷¹

Whether Russia will accept a recommendation of the CLCS which is not in conformity with Russian expectations on extending sovereign rights is difficult to assess. So far Russia has relied upon the procedure by delivering further evidence instead of seeking direct confrontation by simply proclaiming an extended continental shelf.⁷² However, so far Russia still has hope that the evidence will convincingly prove its claims. In the end Russia may have to decide whether it reverses the internal policies that proclaim Russian rights over the largest parts of the Arctic Ocean or whether it risks non-compliance with the procedure under the UNCLOS, the related stigmatization and, potentially, dispute-settlement.

⁷⁰ On different modes of delineation for the Russian claims in the Arctic Ocean see the charts and discussion in Proelss & Müller, *supra* note 2, 665-672.

⁷¹ See inter alia R. Macnab, 'The Outer Limits of the Continental Shelf in the Arctic Ocean', in M. Nordquist *et al.* (eds), *Legal and Scientific Aspects of Continental Shelf Limits* (2004), 301, 305.

⁷² As a consequence Proelss & Müller, *supra* note 2, 682 see grounds for careful optimism.

III. Overlapping Norwegian Claims

In 2006 Norway submitted its claims to an extended continental shelf in Arctic waters: the Barents Sea Loop Hole and the Western Nansen Bay.⁷³ Both areas have also been claimed by Russia. Norway, in the executive summary of the submission, notes bilateral delimitation consultations for the Barents Sea and the Western Nansen Basin.⁷⁴ In a communication concerning the Norwegian submission, Russia acknowledges that the continental shelf between both States has not yet been settled and that the Barents Sea delimitation issue is considered a “maritime dispute”. Accordingly, any recommendation by the Commission shall not prejudice matters relating to the delimitation of the shelf between them.⁷⁵ In March 2009 the CLCS issued a recommendation on the Norwegian claims.⁷⁶ In regard to the Barents Sea Loop Hole the Commission finds that the Norwegian continental shelf extends beyond 200 nm and that it will depend upon agreement between Norway and Russia to determine the exact delimitation.⁷⁷ Notwithstanding the claims and the relevant recommendation by the CLCS Norway has explicitly stated that a Norwegian outer continental shelf would not reach as far as the North Pole. As a consequence, the Russian Federation is currently the only State formally claiming sovereign rights over mineral resources under the Pole.

⁷³ Continental Shelf Submission by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea – Executive Summary, available at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_exec_sum.pdf (last visited 20 January 2009).

⁷⁴ *Id.*, 12.

⁷⁵ The note is available at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/rus_07_00325.pdf (last visited 20 January 2009).

⁷⁶ A document entitled Summary of the Recommendations of the Commission on the Limits of the Continental Shelf in Regard to the Submission made by Norway in Respect of Areas in the Arctic Ocean, the Barents Sea and the Norwegian Sea on November 2006 (hereinafter Summary of the Recommendations) can be accessed at http://www.un.org/Depts/los/clcs_new/submissions_files/nor06/nor_rec_summ.pdf (last visited 24 April 2009).

⁷⁷ Summary of the Recommendations, *id.*, paras 22-24. For the Western Nansen Bay and the Banana Hole, both areas, which are not under dispute, the CLCS recognizes Norwegian entitlement to an extended continental shelf, see Summary of the Recommendations, paras 26 and 44.

IV. Other Issues

Although the United States are not a party to UNCLOS, the CLCS has asked Russia to transmit to the Commission the charts and coordinates of the delimitation line after entry into force of the maritime boundary delimitation agreement with the US concerning the Bering Sea.⁷⁸ The US is interested in operation of the agreement and has stated that it is awaiting Russia's ratification and will urge the Russian Federation to do so.⁷⁹

Other issues concerning Russian Arctic waters, while not related to claims to the Pole, concern the question of straight baselines⁸⁰ and straits. Russia claims that most of its Arctic straits are internal waters which are enclosed by strait baselines and not subject to any passage rights.⁸¹ The question of passage rights will gain further relevance when the Arctic becomes navigable in larger parts and for more time during the summer and maybe even permanently. In this case "internationality" may be established by more frequent use. Canada, likewise, focuses upon exclusive rights over its Arctic straits,⁸² while the US maintains that the Russian North East Passage and the Canadian North West Passage are international straits regulated by UNCLOS.⁸³ Russia and Canada will attempt to prevent transit use by insisting upon sovereignty over the waters as either internal or historic waters.⁸⁴

⁷⁸ UN Doc. UN Doc. A/57/57/Add.1, 8 October 2002, para. 39.

⁷⁹ US National Security Presidential Directive 66 (32).

⁸⁰ On the issue of the Russian straight baselines in the Arctic see R. D. Brubaker, 'The Legal Status of the Russian Baselines in the Arctic', 30 *Ocean Development & International Law* (1999), 191-233.

⁸¹ See R. D. Brubaker, 'Straits in the Russian Arctic', 32 *Ocean Development & International Law* (2001), 263, 265 and 271.

⁸² See M. Byers, 'Internationales Recht und internationale Politik in der Nordwestpassage: Konsequenzen des Klimawandels', 67 *Heidelberg Journal of International Law* (2007), 145-157.

⁸³ Brubaker, *supra* note 81, 277. US National Security Presidential Directive 66 (32) once again confirms the US views concerning the North West Passage as a strait for international navigation but does not mention the North East Passage.

⁸⁴ On the status of and passage through the North West Passage see Proelss & Müller, *supra* note 2, 655-661.

E. Future Prospects: Agreement or Dispute Settlement?

In the case of the overlapping Arctic claims between Norway and Russia both States must reach an agreement on delimitation. Since Russia does not accept compulsory dispute settlement for the continental shelf concerning adjacent or opposite coasts, UNCLOS does not offer any legally binding proceedings to decide the matter. For the central Arctic Ocean and claims reaching to the Pole Russia must wait for a recommendation from the CLCS and potentially reach an agreement with other States claiming overlapping parts, e.g. in the case of a possible future submission by Denmark.

In the hypothetical case of Russia or any other Arctic nation starting to explore or exploit gas or oil resources on the Arctic Ocean's seabed beyond 200 nm, this could be challenged in a dispute settlement procedure e.g. before the ICJ or the International Tribunal for the Law of the Sea (ITLOS) or an arbitral tribunal. Parties to UNCLOS shall attempt to peacefully settle conflicts concerning the interpretation or application of the convention firstly by informal means (Arts. 279-285 UNCLOS) before they turn to formal procedure and refer the dispute to the ITLOS, the ICJ or an arbitral tribunal (Arts. 286-296 UNCLOS).

In general, States Parties to UNCLOS may choose a forum for the binding settlement of disputes upon ratification of the convention (Art. 287 UNCLOS). The Arctic States Parties to UNCLOS have elected different fora. In this case UNCLOS indicates that the parties to a dispute shall agree upon arbitration. Two situations have to be distinguished in this context: the extension of the shelf in an area of maritime dispute, i.e. with overlapping claims from the adjacent or opposite neighbour, and the extension into the Area without overlapping claims for an outer continental shelf. For the first scenario UNCLOS offers an exception to compulsory dispute settlement. As mentioned above Art. 298 UNCLOS allows parties optional exceptions to formal dispute settlement for specific categories of disputes. The determination of the limits of the continental shelf between States with opposite or adjacent coasts (Art. 83 UNCLOS) is such a matter. Not only Russia, but also Canada and Denmark have made use of these exceptions and have declared not to accept any of the procedures under Arts 286 et seq. The United States, as a non-party, to UNCLOS cannot bring a case concerning the limits of the outer continental shelf to the ITLOS but could request arbitration or apply to the ICJ given that the relevant preconditions for the specific case are met.

In the case of no overlapping claims by adjacent or opposite coastal States and Russia extending the continental shelf beyond 200 nm miles in

contradiction to a recommendation by the CLCS other States' standing before an international court or tribunal may be problematic.⁸⁵ The designation of the seabed outside the coastal States' continental shelves as the common heritage of mankind in Art. 136 UNCLOS alone may not be sufficient to give standing as an effect erga omnes of the concept is not generally accepted. Yet, the provisions on benefit-sharing resulting from the exploitation of mineral resources of the Area give States Parties to the UNCLOS a subjective interest in governance of these resources by the International Seabed Authority (ISA) and not by individual States. In sum, however, recourse to formal dispute settlement is unlikely.

It seems more likely that the Arctic nations will co-operate and solve the issue of jurisdictional claims by agreement. In the end it will be the States who decide upon the delimitation of the continental shelf and neither the CLCS nor a dispute settlement body. It must be doubted, however, whether States will agree upon a comprehensive governance regime for all Arctic issues. States have expressed the view that a new legal governance regime for the Arctic is not necessary. They have done so both jointly, in the Ilulissat Declaration, and individually, e.g. the US in National Security Presidential Directive 66. A piecemeal approach for the continental shelves seems the more likely option. By the planting of the flag and the claims to large parts of the Arctic, Russia has clearly given the political signal that negotiations will not be easy. It is left to be seen whether a "working mutual trust"⁸⁶ amongst the Arctic States can be established that allows for an operational system of communication and procedure leading to a consensual solving of the boundary questions.

⁸⁵ See the discussion by Proelss & Müller, *supra* note 2, 678.

⁸⁶ Baker, *supra* note 8, 686.

Russia and Human Rights: Incompatible Opposites?

Bill Bowring*

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A. Introduction

Since the end of the Cold War and the collapse of the USSR in late 1991, Russia appeared from time to time to have made giant strides in the direction of full implementation of the rule of law, multi-party democracy, and protection of individual human rights. That is, there has been a serious engagement in the course of the last 20 years with the “three pillars” of the Council of Europe, which Russia joined in 1996, followed by ratification of the European Convention on Human Rights in 1998. The Russian Constitution of 1993, despite the controversial circumstances in which it was adopted, has stood the test of time; its democratic aspirations are beyond question.

But the same period has been scarred by a series of largely self-inflicted humanitarian disasters. The Case of the Communist Party, which took up so much of the time of the new Constitutional Court in 1992, its first full year, ended in a meaningless compromise.¹ In 1993 President Yeltsin stormed the Parliament (the Supreme Soviet) as it sat in the White House, tore up the existing constitution, and suspended the Constitutional Court, which dared to declare his actions unconstitutional. From 1994 to 1997, Russia was wracked by the First Chechen War, which ended in the Russian Federation’s defeat by one of its smaller subjects, and Chechnya’s de facto independence for two years. In 1999 the newly appointed Prime Minister, Vladimir Putin, decided to take revenge, and the Second Chechen War, which started in late 1999, led to extraordinary bloodshed and destruction, and to a continuing series of severe judgments against Russia in the European Court of Human Rights.² In 2003 then President Putin oversaw the arrest of Mikhail Khodorkovsky, his trial and imprisonment, and the break-up and state seizure of the most successful business in Russia, the YUKOS oil company.

A pessimistic view is well-founded. There has now been a flood of judgments against Russia concerning Chechnya.³ And as I explore later in

¹ J. Henderson, ‘Making a Drama out of a Crisis: The Russian Constitutional Court and the Case of the Communist Party of the Soviet Union’, 19 *King’s College Law Journal* (2008) 3, 489-506.

² P. Leach, ‘The Chechen Conflict: Analysing the Oversight of the European Court of Human Rights’, *European Human Rights Law Review* (2008) 6, 732-761.

³ The author has assisted the applicants in many of these cases, through the European Human Rights Advocacy Centre (EHRAC), which, in partnership with the Russian

this article, relations between Russia and the Council of Europe are practically at breaking-point.

Does this mean that the human rights experiment in Russia has failed, indeed that it was bound to fail?

On the contrary: the thesis of this article is that Russia has, like all its European neighbours, a long and complex relationship with human rights – and with the rule of law and judicial independence, which are its essential underpinning.

I give two examples at this point. First, serfdom, *krepostnoye pravo*, was abolished in Russia in 1861. Slavery was finally abolished in the USA in 1866 – the American Anti-Slavery Society was founded in 1833.⁴ Jury trial has since 2002 been available in all of Russia's 83 regions, except Chechnya. This is not an innovation forced on Russia after defeat in the Cold War. It is the restoration of an effective system of jury trial for all serious criminal cases, presided over by independent judges, which existed in Russia from 1864 to 1917. Jury trial was introduced in a number of Western European countries at about the same time as in Russia, though it had been strongly advocated by leading law reformers from the late eighteenth century.

In order to answer my questions, I start with the extraordinarily complex nature of the Russia Federation. Second, I explore the little-known history of law reform in Russia. Third, I turn to the Gorbachev period and the attempts to institutionalise the rule of law, human rights and constitutional adjudication. Fourth, I engage with the dramatic developments of the Yeltsin period, including accession to the Council of Europe. Fifth, I analyse the fact that simultaneously with his brutal prosecution of the war in Chechnya, Putin, for the first three years of his first term as President, pushed through a number of dramatic legal reforms.

B. The Complexity of the Russian Federation

The Russian Federation is the largest and most complex in the world. When I wrote about this topic previously, in 2000⁵ it was composed of no

human rights NGO, *Memorial*, he founded in 2003; see www.londonmet.ac.uk/ehrac (last visited 23 March 2009).

⁴ See the African American Mosaic on the struggle of abolition and slavery, <http://lcweb.loc.gov/exhibits/african/afam007.html> (last visited 23 March 2009).

⁵ B. Bowring, 'Ancient Peoples and New Nations in the Russian Federation: Questions of Theory and Practice', in S. Tierney (ed.), *Accommodating National Identity: New Approaches in International and Domestic Law* (2000), 211-232.

less than 89 “subjects of the Federation”. As of 1 March 2008, it has 83 subjects. The reason for this surprising “shrinking” are to be found in the Putin policy of centralisation, itself a potential cause for conflict.⁶

The subjects are as follows. First, and most significant from the point of view of human rights, Russia has 21 ethnic republics, the successors of the “autonomous republics” of the USSR, named after their “titular” people, with their own presidents, constitutions, and, in many cases, constitutional courts. There has been no reduction in the number of ethnic republics, not least because of the potential strength of their resistance. Next, there are 9 enormous *krais*, a word often translated as “region”, with their own appointed governors. In 2000 there were 6, with elected governors. The most numerous subjects of the Federation are the 46 *oblasts*, territorial formations inhabited primarily by ethnic Russians, also with governors. There were 49 *oblasts* in 2000. The 4 “autonomous *okrugs*” are also ethnic formations, and reflect a relative concentration of the indigenous peoples which give them their name. There were 10 of these in 2000, and the six which have disappeared have been “united” with larger neighbours, often in very controversial circumstances. For all their formal constitutional equality under the 1993 Constitution, they were for the most part located within other formations (*krais* and *oblasts*), with consequences which will be explored later in this chapter. There is a Jewish autonomous oblast, located in the Russian Far East. Finally, two “cities of federal significance”, Moscow and St Petersburg, are also subjects of the federation.

It is important to remember that of at least 150 nationalities in the Russian Federation, only 32 had their own territorial units⁷, including the Chechens. This number has now shrunk.

C. Russia’s Rich History of Law Reform

The question is: what was there before? Was there a “legal culture” which was simply anathema to human rights? Was Russia simply the home of backwardness and despotism? Is it really the case that the Russians are condemned to catching up with the enlightened West from a position of le-

⁶ B. Bowring, ‘The Russian Constitutional System: Complexity and Asymmetry’, in M. Weller (ed.), *Asymmetrical Autonomy Settlements: Asymmetrical Constitutional Designs as a Means of Accommodating Ethnic Diversity* (2009), forthcoming.

⁷ D. R. Kempton, ‘The Republic of Sakha (Yakutia): The Evolution of Centre-Periphery Relations in the Russian Federation’, 48 *Europe-Asia Studies* (1996) 4, 587-613, 609.

gal barbarism? To answer these questions, a historical perspective is essential. What is frequently neglected is any recognition of Russia's own pre-revolutionary traditions, especially the reforms of Tsar Alexander (*Aleksandr*) II (1855-1881).

These had deeper roots still. The history of Russian law reform began at a climactic time for the UK and for Western Europe, the 18th century with its bourgeois revolutions. This history also contains a surprise for most Western scholars. A current textbook, based on a course of lectures at Moscow State University,⁸ points out that the first Russian professor of law, S. E. Desnitsky (1740-1789), was a product not so much of the French enlightenment, that is of Diderot, Voltaire and Rousseau, but of the *Scottish* enlightenment.

Desnitsky studied in Scotland, under Adam Smith and others, from 1761 to 1767, when he received a Doctorate of Civil and Church Law from the University of Glasgow. He awoke to the ideas of the Scottish Enlightenment, and especially the philosophy of David Hume, and as well as the Scottish emphasis on Roman Law traditions and principles - the focus of Alan Watson's pathbreaking work on legal transplants.⁹ In 1768, on the basis of his lengthy researches in Scotland, Desnitsky sent the Empress Catherine II his "Remarks on the institutions of legislative, judicial and penitentiary powers in the Russian Empire" - however, his suggestions were entirely unacceptable, and the work was sent to the archives. Amongst other radical proposals, Desnitsky urged the abolition of serfdom. He survived Catherine's rejection of these ideas, and became a full professor of law in 1777, shortly after the Pugachev uprising. He published books introducing Russians to the ideas of Adam Smith and John Millar. At Catherine's own instruction, he translated into Russian volume 1 of Blackstone's *Commentaries*, and this was published in Moscow in 1780-3. His courses included the history of Russian law, Justinian's *Pandects*, and comparisons of Roman and Russian law.¹⁰ He died in the year of the French Revolution, and the *Declaration of the Rights of Man and of the Citizen*.

It should be noted that Desnitsky did not undertake a simple transmission of some already existing Western liberalism to Russia. The period of

⁸ N. M. Azarkin, *Istoriya yuridicheskoi mysli Rossii: kurs lektsii (History of Legal Thought in Russia: Course of Lectures)* (1999).

⁹ A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993).

¹⁰ W. Butler, *Russian Law*, (1999), 24-25, and 52-53; see also A. Brown, 'The Father of Russian Jurisprudence: The Legal Thought of S. E. Desnitskii', in W. Butler (ed.), *Russian Law: Historical and Political Perspectives* (1977), 117-141.

his work was as much the period of the revolt of reason against autocracy in England as in Russia. Desnitsky was born only a few years after Thomas Paine.¹¹

Thus, that there is a distinctively Russian tradition of thought and argument about human rights.¹² Russia's defeat by England and France in the Crimean War was the necessary stimulus to reform. Starting with the revolutionary Law on Emancipation of the Serfs in 1861, Alexander's reforms culminated in the Laws of 20 November 1864.¹³ The new Laws introduced a truly adversarial criminal justice procedure, and made trial by jury obligatory in criminal proceedings. Judges were given the opportunity to establish real independence, in part by freeing them of the duty to gather evidence, and enabling them to act as a free umpire between the parties. The Procuracy lost its powers of "general review of legality", and became a state prosecutor on the Western model. The institution of Justices of the Peace was introduced. It is ironical that the Bolsheviks reinstated the pre-reform model of the procuracy.

Indeed, as Samuel Kucherov wrote in 1953: "Between 1864 and 1906, Russia offered the example of a state unique in political history, where the judicial power was based on democratic principles, whereas the legislature and executive powers remained completely autocratic."¹⁴ A collection on jury trial in Russia contains an extensive memoir by one of the most distinguished judges of the period, A. F. Koni.¹⁵ Moreover, it also reproduces the advocates' speeches and judicial summings-up in some of the most famous trials, for example the trial in 1878 of Vera Zasulich, charged with the attempted murder of the governor of St Petersburg, Trepov, whom she had

¹¹ Paine left England for the American colonies in 1774, and began writing his extraordinarily influential *Common Sense* in 1775. Its publication in 1776 was a sensation, selling at least 100,000 copies in that year alone. Its content was entirely unacceptable to the English ruling elite. His *Rights of Man* appeared in 1791, and he was forced to leave England, remaining in France for 10 years - he was imprisoned in 1793 after war broke out between England and France.

¹² B. Bowring, 'Rejected Organs? The Efficacy of Legal Transplantation, and the Ends of Human Rights in the Russian Federation', in E. Orucu (ed.), *Judicial Comparativism in Human Rights Cases* (2003), 159-182.

¹³ O. I Chistyakov & T. E Novitskaya (eds), *Reformi Aleksandr II (Reforms of Aleksandr II)* (1998).

¹⁴ S. Kucherov, 'Courts, Lawyers and Trials under the Last Three Tsars (1953)', 304-305, in Z. Zile, *Ideas and Forces in Soviet Legal History: a Reader on the Soviet State and Law* (1992) 31.

¹⁵ S. Kazantsev, *Sud Prisyazhnikh v Rossii: Gromkiye Ugolovniye Protsessi (Trial by Jury in Russia: Great Criminal Trials)* (1991).

shot in broad daylight and before witnesses. Koni, who was presiding judge, refused to be pressured by the authorities, and Zasluch was acquitted, a verdict which was respected by the authorities.

Despite the reactionary policies pursued by Alexander III and Nikolai II, the essence of these reforms continued until the Bolshevik Revolution.

D. The Reforms of the Perestroika Period

It would be inaccurate to say that the USSR had no place for human rights.¹⁶ Stalin's Constitution, approved on 5 December 1936, shortly after the USSR joined the League of Nations in September 1934, contained paper guarantees of a number of fundamental rights. However, as Vyshinsky, the prosecutor of the notorious Moscow trials pointed out:

Proletarian declarations of rights frankly manifest their class essence, reflecting nothing of the desire of bourgeois declarations to shade off and mask the class character of the rights they proclaim.¹⁷

Nikolai Bukharin, the best-known member of the drafting Commission, who later boasted that he had written the text from the first word to the last, believed that the Constitution would be implemented. But he was himself a victim of the Great Purge, and was executed in 1938 after a show trial.

The Brezhnev USSR Constitution of 1977 (which provided the model for the 1978 Constitutions of the Russian Federation (RSFSR) and the Union Republics) contained Chapter 7, entitled "Basic Rights, Freedoms and Obligations of the Citizens of the USSR". It should not be surprising that social and economic rights were given priority, and were, indeed, delivered by the Communist state. These were the right to work (Art. 40), the right to leisure (Art. 41), the right to health care (Art. 42), the right to social security (Art. 43), the right to housing (Art. 44), the right to education (Art. 45), and the right to use the achievements of culture (Art. 46). It is generally recognised that the USSR provided first rate free education and health care; and every Soviet town had its art gallery, theatre and concert hall. The constitutional guarantee and genuine implementation of these rights was perhaps the main source of legitimacy of the Soviet state, and the reason it was not over-

¹⁶ B. Bowring, 'Human Rights in Russia: Discourse of Emancipation or only a Mirage?', in *Istvan Pogany* (ed.), *Human Rights in Eastern Europe* (1995), 87-109, at 96-97.

¹⁷ A. Vyshinsky, *The Law of the Soviet State* (1948), 554.

thrown, but collapsed, after its ideals had rotted away. Political and personal rights, which followed, were hedged about with phrases such as “in accordance with the interests of the people and in order to strengthen and develop the socialist system” (Art. 50, freedom of speech, of the press, and of assembly and meetings), so as to be meaningless in practice.

At an early stage, transition to a “law-governed state” was seen, by Gorbachev¹⁸ (1988) and others, to be inextricably connected to the creation of a mechanism for constitutional adjudication.¹⁹ In the words of Sergei Pashin, who drafted the Law of 6 May 1991 “On the Constitutional Court of the RSFSR”: “A Constitutional Court is an organ which is unknown to the state structure of Russia during the whole course of its existence.”²⁰

The first step therefore was the creation of the Committee for Constitutional Supervision, the CCS.²¹ Although such a body was first proposed by academics in 1977, there was no legislation until December 1988, when the CCS was founded “with the goal of guaranteeing the strictest correspondence of laws and Government decrees with the Constitution of the USSR”.²² It started work in April 1990, and was dissolved, together with the other supreme organs of the Union, and the USSR itself, in December 1991.

The CCS worked within a context of much greater respect for international human rights norms than previously. On 10 February 1989 the Presidium of the Supreme Soviet passed a Decree recognising the compulsory jurisdiction of the UN’s International Court of Justice with respect to six

¹⁸ M. Gorbachev, *Perestroika i Novoye Mishleniye dlya Nashei Strany i dlya vsevo Mira (Perestroika and New Thinking for our Country and for the Whole World)* (1987).

¹⁹ A. Yakovlev, ‘The Political Philosophy of Perestroika’, in A. Aganbegyan, *Perestroika Annual* (1988); V. Kudryavtsev, ‘Towards a Socialist Rule of Law State’, in A. Aganbegyan, *Perestroika Annual* (1988); A. Vaksberg, ‘Legal Reforms and Basic Principles’, in A. Brumberg, *Chronicle of a Revolution: A Western-Soviet Inquiry into Perestroika* (1990); B. Kazaimirchuk, ‘On Constitutional Supervision in the USSR’, in W. Butler (ed.), *Perestroika and the Rule of Law: Anglo-Soviet and Soviet Perspectives* (1991).

²⁰ S. Pashin, *Kak obratitsya v konstitutsionni sud Rossii (How to apply to the Russian Constitutional Court)* (1992).

²¹ A full account of the CCS and of the early days of the Russian Constitutional Court may be found in H. Hausmaniger, ‘The Committee of Constitutional Supervision of the USSR’, 23 *Cornell International Law Journal* (1990), 287-322; and H. Hausmaniger, ‘From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court’ 25 *Cornell International Law Journal* (1992) 305-337.

²² Materials of the XIX All-Union Conference of the CPSU, Moscow 1988, 146.

UN human rights convention.²³ Schweisfurth commented that “this move marked a positive shift in the previously negative attitude of the Soviet Union towards the principle judicial organ of the United Nations”.²⁴

He saw, rightly I think, these developments as exemplifying a farewell to the traditional strict positivistic approach to human rights.²⁵ The USSR had always ratified UN human rights treaties, but with no intention that they should apply within the Soviet Union, much less that there should be the possibility of interference in internal affairs.

During its short existence the CCS heard 29 cases. Some of these were of considerable significance, demonstrating the seriousness with which the CCS took human rights. Here are a few examples.

First, in the *Unpublished Laws Case* of 29 November 1990 the CCS ruled that all unpublished USSR regulations (there were many such ‘secret’ laws) violated international human rights standards and would lose their force unless published within three months.²⁶ Second, in the *Right to Defence Counsel Case*, the CCS (petitioned by the Union of Advocates), decided that the USSR law of 10 April 1990 on reforms to the criminal law, which restricted the right to defence counsel, violated both the Constitution and international standards. Third, in the *Ratification of the Optional Protocol Case*, (4 April 1991), in a move which put the USSR ahead of the UK and the US, the CCS requested the Supreme Soviet to secure ratification by the USSR of the First Optional Protocol to the UN *International Covenant on Civil and Political Rights* (ICCPR).²⁷ The USSR had ratified the ICCPR – in 1973 – but not the Protocol, which enables individual complaint to the UN’s Human Rights Committee by a person complaining of a violation. There was a commendably prompt and positive response. On 5 July 1991

²³ Reported in 4 *Interights Bulletin* (1989) 3: the treaties were the 1948 Genocide Convention; the 1984 Convention Against Torture; the 1949 Convention for the Suppression of Traffic of Persons; the 1952 Convention on the Political Rights of Women; the 1965 Convention on the Elimination of Racial Discrimination; and the 1979 Convention on the Elimination of Discrimination Against Women.

²⁴ T. Schweisfurth, ‘The Acceptance by the Soviet Union of the Compulsory Jurisdiction of the ICJ for Six Human Rights Conventions’, *European Journal of International Law* (1990) 2, 110, 111.

²⁵ B. Bowring, ‘Positivism versus Self-determination: The Contradictions of Soviet International Law’, in S. Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies* (2008), 133-168.

²⁶ *Vedomosti Syezda Narodnikh Deputatov SSSR i Verkhovnoy Sovyeta SSSR*, 1990 No.50, 1080.

²⁷ *VSN D SSSR* *ibid*, 1991 No.17, 502; see also *Sovetskaya Iustitsiya* 1 23 December 1991, 17.

the Supreme Soviet adopted two Resolutions acceding to the Optional protocol and recognising the jurisdiction of the HRC.²⁸ Fourth, in the *Dismissal on Attainment of Pensionable Age Case*, the CCS considered the USSR Presidium Decree amending labour law by adding as a ground for termination by the employer “attainment by the worker of pensionable age with entitlement to old age pension”. The CCS declared:

“The rights and freedoms granted to citizens in carrying out any form of activity in the field of work and occupation not forbidden by law form a most important part of human rights, and indicate the level of social protection attained in a society. In a law-governed state every human must be guaranteed equality of opportunity in the possession and use of these rights [...] The principle of equality before the law is enshrined in the Constitution, in statutes, and in international legal acts on human rights and freedoms [...] and its main guarantee is the prohibition of discrimination.”²⁹

Finally, there was the *Residence Permit Case* of 11 October 1991, where the CCS decided that *propiska*, the Soviet system of registration, plainly contradicted that rights freely to move around and to choose one’s place of residence, which is to be found in several international human rights treaties, but was not then part of the Soviet Constitution. This is an issue which has continued to exercise the Constitutional Court of the Russian Federation.

Savitskii believed that the role of the CCS “was a secondary one and amounted to the publication of a number of purely symbolic ‘conclusions’ that were binding on no-one”.³⁰ I disagree. Indeed, in the view of Van Den Berg, the work of the CCS “in the field of human rights on the whole was positive”; it was not an illogical institution; he considered that “[i]n fact it had much more power than most constitutional courts in the world [...]”.³¹

²⁸ *Vedomosti SSSR*, 1991 No.29, 842, 843.

²⁹ *Vedomosti SSSR*, 1991 No.17, 501.

³⁰ V. Savitskii, ‘Will there be a judicial power in the new Russia?’, 19 *Review of Central and East European Law* (1993) 6, 639-660, 651.

³¹ G. Van Den Berg, ‘Human Rights in the Legislation and the Draft Constitution of the Russian Federation’, 18 *Review of Central and East European Law* (1992), 197-251, 206, 207.

And on 5 September 1991 the USSR adopted a *Declaration of the Rights and Freedoms of Man*, followed by the *Declaration of Rights and Freedoms of the Person and Citizen* adopted by the Russian Federation on 5 September 1991. This was then incorporated into the 1978 Constitution of the Russian Federation.

E. Human Rights under Yeltsin

There can be no question of the importance for the Russian Federation of its accession to the Council of Europe on 28 February 1996, or its ratification of the European Convention of Human Rights on 5 May 1998³². To many observers, the Council of Europe's invitation to Russia, and the political decisions to accede and to ratify, were a great surprise.³³ The USSR had considered that the principles of state sovereignty and non-interference in internal affairs were the two cornerstones of international law, and it was a great surprise that even the Communists and nationalists in the Russian parliament voted in favour. Yet Russia was now accepting an unprecedented degree of external supervision and intervention, with the prospect of compulsory judgments and the payment of large sums of compensation. It was perhaps even more surprising that the Council of Europe was prepared to accept Russia, given that the First Chechen War was in full swing.

The road to ratification was opened by the publication of the *Conception of Judicial Reform* published on 24 October 1991, after several years work, by Sergei Pashin³⁴, Sergei Vitsin³⁵ and others, and the enactment on 22 November 1991 of the *Declaration of the Rights and Freedoms of the Person and Citizen* by the Supreme Soviet of the RSFSR. The Constitutional Court³⁶, created as the USSR reached its death-throes, started work in January 1992, followed on 26 June 1992 by enactment of the Law "On the Status of Judges of the Russian Federation", on 27 April 1993 by enactment of the Law "On Complaining to Court About Activities and Decisions

³² The date of deposition of the Instrument of Ratification at Strasbourg.

³³ See B. Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Compliance or Cross-Purposes?', 6 *European Human Rights Law Review* (1997), 629; B. Bowring, 'Russia's Accession to the Council of Europe and Human Rights: Four Years On', 4 *European Human Law Review* (2000), 362.

³⁴ His career is described below.

³⁵ Now professor, indeed a general, in the University of the Ministry of the Interior, in Moscow.

³⁶ A. Trochev, *Judging Russia: Constitutional Court in Russian Politics, 1990-2006* (2008).

which Violate the Rights and Freedoms of Citizens”. On 16 July 1993 a great experiment, led by Sergei Pashin, began with enactment of the new Part X to the Criminal Procedural Code (UPK), which introduced jury trial, as an experiment, in nine Russian regions.³⁷

The dissolution, by force, of the Supreme Soviet and suspension of the Constitutional Court in October 1993 appeared to throw the whole process of reform into doubt. But the new Constitution of the Russian Federation, adopted by (dubious) referendum on 12 December 1993, contained many human rights provisions taken straight from the ECHR and UN instruments. The Constitutional Court was revived on 24 June 1994, with a new Law which the judges themselves had drafted, and an increased complement of 19 judges. It was a positive omen that continuity was retained, with all the pre-1993 judges keeping their positions, including the controversial former Chairman – and now once again Chairman - Valerii Zorkin.

An initial test of the renewed Constitutional Court was presented by the First Chechen War. On 31 July 1995 the Constitutional Court of the Russian Federation delivered its decision on the constitutionality of President Yeltsin’s decrees sending Federal forces into Chechnya.³⁸ The Court was obliged in particular to consider the consequences of Russia’s participation in AP II.³⁹ As Gaeta pointed out⁴⁰:

The Court determined that at the international level the provisions of Protocol II were binding on both parties to the armed conflict and that the actions of the Russian armed forces in the conduct of the Chechen conflict violated Russia’s international obligations under Additional Protocol II to the 1949 Geneva Conventions. Nonetheless, the Court sought to excuse this

³⁷ For analysis of these developments see F. J. M. Feldbrugge, *Russian Law: The End of the Soviet System and the Role of Law* (1993); G. Smith, *Reforming the Russian Legal System* (1996); P. Solomon (ed.), *Reforming Justice in Russia, 1864-1996. Power, Culture, and the Limits of Legal Order* (1997); P. Solomon, ‘Courts and Their Reform in Russian History’, in P. Solomon (ed.), *Reforming Justice in Russia, 1864-1996. Power, Culture, and the Limits of Legal Order* (1997), 3-20.

³⁸ An unofficial English translation of this judgement was published by the European Commission for Democracy through Law (Venice Commission) of the Council of Europe, CDL-INF (96) 1.

³⁹ The RF is a party to the 1949 Geneva Conventions. The Soviet Union ratified both the 1977 Additional Protocols on 29 September 1989 to become effective on 29 March 1990. The Russian Federation deposited a notification of continuation on 13 January 1992.

⁴⁰ P. Gaeta, ‘The Armed Conflict in Chechnya before the Russian Constitutional Court’, *7 European Journal of International Law* (1996), 563.

non-compliance because Protocol II had not been incorporated into the Russian legal system.

Despite an order of the Court, incorporation has still not taken place. And Chechnya was de facto independent for two years, although it was not recognised by any state.

On 25 January 1996, despite the First Chechen War, and after fierce debate, the Parliamentary Assembly of the CoE (PACE) voted by a two thirds majority to admit Russia, and on 21 February 1996 the Russian State Duma approved, by 204 votes to 18.⁴¹ Vladimir Lukin, then Chair of the Duma's International Affairs Committee, assured deputies that the benefits of Council membership would more than justify the Euro 12 m a year dues⁴². The upper house, the Federation Council, unanimously agreed.

When on 28 February 1996, the Russian Foreign Minister signed the European Convention on Human Rights (ECHR) and other CoE treaties, he did so pursuant to the long list of obligations accepted by Russia, set out in PACE Opinion 193(1996) of 25 January 1996.⁴³ In February 1998 the Duma once again voted overwhelmingly to ratify the ECHR, and it entered into force for Russia on 1 November 1998. In this way, Russia fulfilled one of the most important commitments which it made on accession to the CoE. Russia has satisfied most of its obligations, including the transfer of the penitentiary system from the Ministry of the Interior to the Ministry of Justice, in 1998, and enactment of new judicial procedural laws.

However, a very important obligation was:

“[...] to sign within one year and ratify within three years from the time of accession, Protocol No.6 to the European Convention on Human Rights on the abolition of the death penalty in time of peace, and to put into place a moratorium on executions with effect from the day of accession;”

Accordingly, on 16 May 1996 President Yeltsin issued a Decree ordering the government to present to the Duma within one month a law on ratification of Protocol 6, and on 2 August he announced an unofficial moratorium on executions. However, the Duma refused to ratify Protocol 6, and

⁴¹ Federal Law No.19 - F3. The text is set out in S. A. Glotov, *Pravo Soveta Evropi I Rossii [The Law of the Council of Europe and Russia]* (1996), 118.

⁴² S. Parish, *OMRI Daily Digest*, 22 February 1996. Lukin is now the Human Rights Ombudsman.

⁴³ See S. A. Glotov, *supra* note 41, 82-89.

also refused to enact a law on moratorium. In August 1999 the Russian Government once more submitted Protocol 6 to the Duma for ratification. This met a similar fate. The matter was resolved indirectly when, in February 1999, the Federal Constitutional Court held⁴⁴ that in order for the death penalty to be applied in Russia, the accused must in every part of Russia have the right to a trial by jury. At that time trial by jury existed in only 9 of 89 regions of Russia.

F. Human Rights in Putin's Russia

From 2000 to 2003 President Putin expressly referred to himself as following in the footsteps of the great reforming Tsar, Alexander II, and his law reforms of 1864. Putin too presided over creation of a system of justices of the peace; installation of jury trial throughout Russia with the exception of Chechnya; enhanced judicial status; a much reduced role for the prosecutor in criminal and civil trials. I have analysed Putin's speeches and the events of this period.⁴⁵ The reforms of 2001-2003 were driven through the Russian Parliament by Dmitrii Kozak of the President's Administration.⁴⁶ These included the three new procedural codes enacted from 2001 to 2003, Criminal,⁴⁷ Arbitrazh (Commercial),⁴⁸ and Civil,⁴⁹ as well as the radical improvements to Yeltsin's Criminal Code of 1996, 257 amendments in all, which were enacted on 8 December 2003.⁵⁰

Further reforming legislation were accompanied by the more controversial amendments of 17 December 2002 to the Laws "On the Constitutional Court", "On the Judicial System of the Russian Federation", and "On the Status of Judges in the Russian Federation", and the new Law "On the

⁴⁴ Decision of 2 February 1999, No. 3-P, *Rossiskaya Gazeta*, 10 February 1999, English summary in Venice Commission, *Bulletin on Constitutional Case-Law*, Edition 1999-1, 96-98.

⁴⁵ B. Bowring, 'Russia in a Common European Legal Space. Developing effective remedies for the violations of rights by public bodies: compliance with the European Convention on Human Rights', in K. Hober (ed.), *The Uppsala Yearbook of East European Law 2004* (2005), 89-116.

⁴⁶ The author worked as an expert for the Council of Europe with Mr Kozak on the draft of the new Criminal Procedural Code; Kozak is the most effective public servant in Russia.

⁴⁷ Into force on 1 July 2002.

⁴⁸ Into force in September 2002.

⁴⁹ Into force in January 2003.

⁵⁰ Federal Law No.162-FZ "On Amendments and Modifications of the Criminal Code of the Russian Federation".

Advokatura and Advocates' Activities" of 3 June 2002.⁵¹ The Council of Europe had substantial expert input into all of this new legislation. However, the initial phase of legal reform from 2000, which included enactment of the new procedural codes referred to in the next paragraph, came to a definitive end in late 2003, simultaneously with the arrest of Mr Khodorkovsky and the destruction of YUKOS.

However, simultaneously with the speeches reported above, Putin was prosecuting with unprecedented ruthlessness a new conflict in Chechnya. It should be no surprise that in the course of the year 2000 the Russian government demonstrated the reality of its attitude to the ECHR. Experts who examined the correspondence between the Secretary General of the Council of Europe and the Foreign Minister of the Russian Federation concluded that the explanations provided by the Russian Federation "were not adequate and that the Russian Federation has failed in its legal obligations as a Contracting State under Article 52 of the Convention."⁵²

The conclusion was:

Our conclusion in regard to point B is that the replies given by the Russian authorities are characterised by a total absence of any reference to the case-law of the Court and, most often, to the text of the Convention itself. They are characterised either by a total lack of information (in regard to Articles 3, 5 and 6 of the Convention and Article 2 of Protocol No. 4 and other provisions guaranteeing rights and freedoms) or by their general and evasive nature (in respect of Article 2 of the Convention).

The death penalty has continued to pose problems under Putin. Russia has not executed a convicted person since 1999. But the Criminal Procedural Code of 2001 extended jury trial to the whole of Russia except Chechnya, where it should be introduced not later than 1 January 2007. This would then, of course, trigger the restoration of the death penalty. However, on 15 November the State Duma adopted at first reading a draft law which

⁵¹ For analysis of these more recent developments, see P. Solomon & T. Foglesong, *Courts and Transition in Russia. The Challenge of Judicial Reform* (2000); P. B. Stephan, 'Review of Peter H. Solomon, Jr. and T. S. Foglesong *Courts and Transition in Russia: The Challenge of Judicial Reform*', 117 *Political Science Quarterly* (2002) 1,165-167; P. H. Solomon, 'Judicial Power in Russia: Through the Prism of Administrative Justice', 38 *Law & Society Review* (2004) 3, 549-582.

⁵² T. Bán *et al.*, Consolidated Report Containing an Analysis of the Correspondence between the Secretary General of the Council of Europe and the Russian Federation under Article 52 of the European Convention on Human Rights, 26 June 2000, SG/Inf(2000)24, at http://www.coe.int/t/e/human_rights/cddh/2._activities/Art52CM_en.asp (last visited 27 April 2009).

changes the date for introduction of jury trials in Chechnya from 1 January 2007 to 1 January 2010.⁵³ The (good) reason they gave was that lists of potential jurors must be compiled by municipalities, which do not yet exist in Chechnya. On 27 December 2006, the draft law was signed by the President; and it was published in the Russian Gazette and came into force on 31 December 2006, in the nick of time.⁵⁴ So Russia has another three years before the death penalty will automatically become available once more.

Nonetheless, one of the more encouraging trends in the Putin era is that the Constitutional Court has consistently begun to refer to and apply the jurisprudence of the European Court of Human Rights.⁵⁵ The breakthrough was made in the case of *Maslov*, decided on 27 June 2000.⁵⁶ The case concerned the constitutionality of Articles 47 and 51 of the Criminal Procedural Code, and the issue at stake was the right to defence counsel following detention. According to the Code, a person in detention as a “suspected person” or an “accused”, was entitled as of right to the presence of a defender. But this was not the case for a person brought to a police station to be interrogated as a “witness”, even though attendance was compulsory, and might well lead to transformation into a suspect or accused. The Court not only referred to Article 14 of the ICCPR and Articles 5 and 6 of the ECHR, but for the first time cited the jurisprudence of the European Court of Human Rights. The Court held that the Code must not be read literally, since this would violate the spirit of the Constitution and of the Convention as interpreted by the Court.

Anton Burkov⁵⁷ has reviewed the 54 judgments by August 2004 citing the ECHR out of 215 altogether since the founding of the RCC in 1991, 166 since Russia’s accession to the Council, and 116 since ratification.⁵⁸ Like Trochev, however, he is critical of the failure of the RCC to evaluate the case-law to which it refers, or even to reference it properly.

The Justices of the RCC also played a leading role in another legal breakthrough. In the Soviet period, the USSR was perhaps the most assiduous ratifier of UN instruments, but never allowed these to have any serious

⁵³ <http://prima-news.ru/eng/news/2006/11/17/37095.html> (last visited 20 April 2009).

⁵⁴ http://www.demokratia.ru/archive-ru/2007/obzor_zakonov_109.zip (last visited 20 April 2009).

⁵⁵ W. B. Simons, ‘Russia’s Constitutional Court and a Decade of Hard Cases: A Postscript’, 28 *Review of Central and East European Law* (2003) 3-4, 655-678.

⁵⁶ Case 11-P of 27 June 2000 – Trochev, *supra* note 36, 175, note 238.

⁵⁷ A. Burkov, *The Impact of the European Convention on Human and Application on Russian Law: Legislation and Application in 1996-2006* (2007).

⁵⁸ *Id.*, 36.

internal effect. Thus, content must be given to Article 15 of the 1993 Constitution⁵⁹, which provides not only that the Constitution itself has “the highest legal force and direct effect”, but, by Article 15.4

Generally recognised principles and norms of international law and international treaties of the Russian Federation shall be an integral part of its legal system. If other rules have been established by an international treaty of the Russian federation than provided for by law, the rules of the international treaty shall apply.

The apotheosis of this new relationship seemed to have truly arrived with the Resolution of the Plenum of the Supreme Court of the Russian Federation of 10 October 2003. The Resolution is entitled *On application by courts of general jurisdiction of the commonly recognized principles and norms of the international law and the international treaties of the Russian Federation*.⁶⁰ The Supreme Court consulted widely in composing this Resolution: participants in discussion included justices of the RCC, Justice Kovler, and other experts.⁶¹

However, Russia began to lose a number of high-profile cases in the Strasbourg Court. In May 2004, in *Gusinskiy v Russia*⁶² the Court held that Russia had acted in bad faith in using the criminal justice system to force a commercial deal, by arresting the TV magnate. In July 2004, in *Ilaşcu and Others v Moldova and Russia*⁶³ the majority of the Grand Chamber of the Court found that Russia rendered support to Transdniestria, which broke away from Moldova, amounting to “effective control”. The first six Chechen applicants against Russia won their applications to Strasbourg in February 2005.⁶⁴ In April 2005 in *Shamayev and 12 others v Russia and Geor-*

⁵⁹ The 1993 Constitution can be found in English at <http://www.kremlin.ru/eng/articles/ConstMain.shtml> (last visited 02 April 2009).

⁶⁰ Resolution No. 5 adopted by the Plenum of the Supreme Court of the Russian Federation, 10 October 2003, English translation to be found on the web-site of the Supreme Court, at <http://www.supcourt.ru/EN/resolution.htm> (last visited 02 April 2009).

⁶¹ Although former justice, now consultant, at the Constitutional Court, Tamara Morshchakova, takes the view that the resolution itself violates the Constitution – conversations with the author.

⁶² *Gusinskiy v. Russia*, ECHR, Application no. 70276/01, decision of 19 May 2004.

⁶³ *Ilaşcu and Others v Moldova and Russia*, ECHR, Application no. 48787/99, decision of 8 July 2004.

⁶⁴ These applicants were represented, from 2000, by the author and his colleagues from the European Human Rights Advocacy Centre, which he founded, in partnership with the Russian human rights NGO “Memorial”, with EU funding, in 2002.

*gia*⁶⁵, the Court condemned Russia for deliberately refusing to cooperate with the Court despite diplomatic assurances; and in October 2002 the Court had given “interim measures” indicating to Georgia that Chechens who had fled to Georgia should not be extradited to Russia pending the Court’s consideration.

In 2006, the European Court of Human Rights delivered 102 judgments against the Russian Federation. The Court received 10 569 new applications (the highest from any one of the Council of Europe’s 47 member states). At the beginning of 2007, there were 19 300 cases against Russia pending before the Court. This represented no less than 21,5 per cent of the total of cases from all of the 47 states which are now members of the Council of Europe⁶⁶.

Furthermore, a September 2006 report of the Committee on Legal Affairs and Human Rights (CLAHHR) of PACE observed that “after the prompt reactions to the first European Court’s judgments, the execution process has slowed down in the adoption of further legislative and other reforms to solve important structural problems [...]” This is diplomatic language describing what is essentially a freezing of Russia’s relations with the Court. Such a frosty relation between Russia and the Court is simply not sustainable, since what is at stake is the very authority, and the integrity, of the Strasbourg enforcement mechanism.

These expressions of regret by CoE institutions, and the defeats in the cases noted above, received a stunning riposte from the Russian authorities when, on Wednesday 20 December 2006, the Russian State Duma (lower house of parliament) voted to refuse ratification of Protocol 14 to the ECHR. This Protocol, which must be ratified by every one of the CoE’s 46 member states in order to come into force, is designed to streamline the procedure of the Strasbourg Court, so as to reduce the backlog of cases (now about 80,000 cases), and shorten the time needed to deliver a decision (now 5-6 years for a “fast-track” case, up to 12 years for other cases). The Vice-Speaker of the Duma, the nationalist Sergey Baburin, complained “[...] our voluminous membership fees (Euro 12m, the same as the UK) are being

⁶⁵ *Shamayev and 12 others v Russia and Georgia*, ECHR, Application no. 36378/02, decision of 12 April 2005.

⁶⁶ Survey of Activities, 2006, Registry of the European Court of Human Rights, Strasbourg, 2007, available at <http://www.echr.coe.int/NR/rdonlyres/69564084-9825-430B-9150-A9137DD22737/0/SurveyofActivities2006.pdf> (last visited 02 April 2009).

used for attacks on our country” by the CoE.⁶⁷ The Duma’s decision was described in the *Kommersant* newspaper as “The Duma ‘Gives It’ to the European Court.”⁶⁸ Alexei Mitrofanov, deputy chairman of the Duma’s legislation committee, said that the Duma decision was “a direct order from the Kremlin [...] it is also a mystery what we can achieve by all this. We should simply have explained our grievances to the West”.⁶⁹

The Secretary General of the CoE, Terry Davis, immediately issued a Declaration expressing his disappointment that “essential and long-overdue changes [...] must be put on hold.”⁷⁰ This is a rare response, and in diplomatic terms very strongly worded.

Any impression that the Duma had somehow thwarted Putin’s genuine intent was dispelled when, on 11 January 2007 he met members of the “Civil Society Institutions and Human Rights Council”. Former Constitutional Court judge and leading human rights supporter Tamara Morshchakova asked him specifically about the refusal to ratify Protocol 14. Putin replied:

“Unfortunately, our country is coming into collision with a politicisation of judicial decisions. We all know about the case of *Ilascu*, where the Russian Federation was accused of matters with which it has no connection whatsoever. This is a purely political decision, an undermining of trust in the judicial international system. And the deputies of the State Duma turned their attention also to that [...]”⁷¹

The Council went on in February 2007 to analyse in depth the failure of Russia (and other states, especially Turkey) to cooperate with the Court.⁷²

⁶⁷ <http://humanrightshouse.org/Articles/7680>. (last visited 02 April 2009).

⁶⁸ http://www.kommersant.com/p732043/r_500/State_Duma_European_Court/ (last visited 02 April 2009).

⁶⁹ <http://en.rian.ru/analysis/20061225/57808422.html> (last visited 02 April 2009).

⁷⁰ <https://wcd.coe.int/ViewDoc.jsp?id=1078355&BackColorInternet=F5CA75&BackColorIntranet=F5Ca75&BackColorLogged=A9BACE> (last visited 02 April 2009).

⁷¹ The official transcript of this exchange has since the election of President Medvedev been removed from the President’s website; but it is accurately reported at <http://www.demos-center.ru/reviews/15999.html> (last visited 16 April 2009). See also <http://www.novayagazeta.ru/data/2007/02/01.html> (last visited 16 April 2009).

⁷² See the Report of the CLAHR, PACE, Member states’ duty to co-operate with the European Court of Human Rights, Doc.11183, 9 February 2007; I gave evidence to PACE in the course of preparation of this Report.

In an unusual move, PACE passed a further follow-up Resolution on 2 October 2007. This stated, in part:

“6. Illicit pressure has also been brought to bear on lawyers who defend applicants before the Court and who assist victims of human rights violations in exhausting domestic remedies before applying to the Court. Such pressure has included trumped-up criminal charges, discriminatory tax inspections and threats of prosecution for “abuse of office”. Similar pressure has been brought to bear on NGOs who assist applicants in preparing their cases.

7. Such acts of intimidation have prevented alleged victims of violations from bringing their applications to the Court, or led them to withdraw their applications. They concern mostly, but not exclusively, applicants from the North Caucasus region of the Russian Federation [...]”⁷³

Such public condemnation of a Council of Europe member state is without precedent.

On 15 April 2008 PACE published an introductory memorandum by Dick Marty, its Rapporteur on the situation in the North Caucasus. He highlighted ongoing human rights violations by security forces, including enforced disappearances, torture, and extrajudicial executions, and noted impunity for these violations of international law. The memorandum, entitled “Legal remedies for human rights violations in the North Caucasus,” characterised the human rights situation in the region as “by far the most alarming” in all 47 Council of Europe member states.⁷⁴

G. Conclusion

Other scholars in this special issue are tackling the August 2008 war between Georgia and Russia. Georgia claims against Russia at the Interna-

⁷³ PACE Resolution 1571 (2007), at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta07/ERES1571.htm#1> (last visited 02 April 2009).

⁷⁴ Human Rights Watch “Council of Europe Failing on Russia. Urgent Need for Vigorous Monitoring in the North Caucasus”, available at <http://www.hrw.org/english/docs/2008/04/15/russia18548.htm> (last visited 02 April 2009) and see also http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/CommitteeDocs/2008/20080411_ajdoc21_2008.pdf (last visited 02 April 2009).

tional Court of Justice are now under way, and Georgia is seeking to interest the Prosecutor at the International Criminal Court in investigating alleged war crimes by Russians.

In my view, the most significant proceedings are now taking place before the Strasbourg Court. It will be recalled that a very large number of Chechen cases, including violations of Article 3 of the ECHR, the prohibition of torture and inhuman and degrading treatment, have been brought against Russia arising out of the conflict since 1999. The applicants have won more than 30, many with the assistance of EHRAC.

Applications relating to the August War have been made from both the Russian and Georgian sides. In October 2008 the president of the Strasbourg Court, Jean-Paul Costa, announced that “[w]e have received very close to 2,000 applications [...] from people living in South Ossetia, against Georgia. There will be a massive increase in the workload of the court. We cannot just throw away these cases.”⁷⁵ It is plain that these applications are supported by Russia.

On 6 February 2009 Georgia lodged an interstate application against Russia, alleging serious and mass violations. Its initial application was lodged on 11 August 2008, and on 12 August the Court’s President applied interim measures. And on 12 February 2009 EHRAC and its partner in Georgia the Georgian Young Lawyers Association announced⁷⁶ that they had jointly lodged 32 groups of cases on behalf of 132 Georgian citizens who allege killing or injuring of civilians, destruction of property, and illegal detention by Russian soldiers. Some complaints rely on Article 3 of the ECHR. However, it is highly unlikely that any judgments will be delivered for at least three years.

I therefore return to my starting thesis. Will Russia leave, or be forced to leave, the Council of Europe? I think this is very unlikely. First, the reforms which have sought to bring Russia into line with Council of Europe standards and expectations are not alien implants, but to a large extent the restoration of the great reforms of the 1860s. Second, the Convention itself is now very much part of Russian law, and an intrinsic part of the education of the new generations of Russian lawyers and judges. Third, Russian human rights defenders, despite increasingly onerous NGO legislation, continue to promote human rights in every possible forum, not least at Strasbourg.

⁷⁵ <http://www.alertnet.org/thenews/newsdesk/L6112324.htm> (last visited 02 April 2009).

⁷⁶ http://www.londonmet.ac.uk/londonmet/library/k13142_3.pdf (last visited 02 April 2009).

Finally, Russia, like its legal predecessor the USSR, takes international law very seriously indeed. Its commitment in terms of diplomatic and financial resources to the United Nations and the European regional organisations is substantial. Russia always wishes to demonstrate that it complies meticulously with its obligations. Indeed, in 2007 the European Court of Human Rights heard 192 complaints against Russia. Russia won just 6, and in 11 there was a friendly settlement. Russia paid in full the orders for compensation in every case it lost, millions of Euros.⁷⁷ It should be recalled that the EU, despite considerable pressure from Strasbourg, and despite its prominent commitment to human rights, has not yet ratified the European Convention on Human Rights.

⁷⁷ See *Anastasiya Kornya* "In the European Court they understand the words 'SIZO' and 'Kresty' without translation" *Vedomosti* 22 February 2008, at <http://www.vedomosti.ru/newspaper/article.shtml?2008/02/22/142259> (last visited 02 April 2009).

International Law in Russian Textbooks: What's in the Doctrinal Pluralism?

Lauri Mälksoo^{*}

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Abstract

This review essay examines four leading Russian textbooks of public international law. It is noteworthy that doctrinal pluralism has been established in the international law doctrine as represented by the Russian scholars. One particular doctrinal question of heavy symbolic significance – whether individuals have become subjects of international law beside states – is examined. It turns out that different answers given to that question in the scholarship are linked with a general attitude towards the Soviet legacy.

K.A. Bekyashev (ed.) *Mezhdunarodnoe publichnoe pravo*, 2nd edition, Moscow: Prospekt (2003) (the textbook of Moscow State Juridical Academy).

Y.M. Kolosov & E.S. Krivchikova (eds) *Mezhdunarodnoe pravo*, 2nd edition, Moscow: Mezhdunarodnye otnoshenia (2005) (the textbook of Moscow's MGIMO University).

A.A. Kovalev & S.V. Chernichenko (eds) *Mezhdunarodnoe pravo*, 3rd edition, Moscow: Prospekt (2008) (the textbook of Moscow's Diplomatic Academy).

V.I. Kuznetsov & B.R. Tuzmukhamedov (eds), *Mezhdunarodnoe pravo*, 2nd edition, Moscow: Norma (2007) (the textbook written under the auspices of the Russian Association of International Law).

A. Introduction

One way to get an idea about how international law is understood in a certain country is to take a closer look at its international law textbooks. Of course, the scholarly doctrine that is reflected in the international law textbooks is not the same as the international legal views of the state itself as expressed in its international communication and interpretation by domestic institutions such as courts. Nevertheless, besides giving evidence of prevailing trends of thinking, the study of leading textbooks can be a useful shortcut to learn about the practice and views of the respective state. Moreover, it

is a professional characteristic of the “invisible college of international lawyers” that their more outstanding representatives usually have some sort of a role in, or proximity to, the formulation of their country’s international legal positions. Who, in the country that made famous Fyodor Fyodorovich Martens (1845-1909), should mind that international law professors would also advise the Prince?¹

The important news from the Russian Federation is that there is no longer a monolithic, “one and only state-approved” theory of international law. A doctrinal pluralism has emerged in the contemporary international law scholarship of the Russian Federation. Even in the Soviet period, the Russian international law doctrine was not always as monolithic or dictated by the Kremlin as it usually must have seemed abroad (although, in comparison to the relative pluralism of the Western doctrine, quite monolithic and dictated from the Communist Party it was indeed). Russian students of international law can nowadays choose between different doctrinal viewpoints concerning the discipline. Although not everything that is nowadays written and published in the field of public international law bears the stamp of timeless quality, one finally has a choice. Indeed, my Estonian teacher of international law once in the mid-1990s caught the postmodernist spirit of the time when he told us that things had changed fundamentally for international law scholarship: “Once there was a time when there was only one Anzilotti. Now every university has its own Anzilotti”. This was a paradox, of course, since to say that now every university has its own Anzilotti means nothing else but that there is no more Anzilotti.

As in every other European university, liberals and conservatives among international law professors have emerged in the post-socialist Russia. Perhaps the meaning of liberalism and conservatism remains slightly idiosyncratic in the Russian context, but this point will be elaborated on later. However, the main trend is noteworthy: the relative freedom that has embraced Russia after the collapse of the USSR has started to do its work. The more outstanding scholars, who were formerly all required to be mem-

¹ See further (and back) L. Mälksoo, ‘The History of International Legal Theory in Russia: a Civilizational Dialogue with Europe’, 19 *European Journal of International Law* (2008) 1, 211-232; L. Mälksoo (ed.), 7 *Baltic Yearbook of International Law* (2007), a symposium issue dedicated to the history of international law scholarship in Eastern Europe; L. Mälksoo, ‘The Science of International Law and the Concept of Politics. The Arguments and Lives of the International Law Professors at the University of Dorpat/Iurev/Tartu 1855-1985’, 76 *British Year Book of International Law* (2005), 383-502.

bers of the Communist Party of the USSR, are now thinking differently about phenomena that they were trained to think about in a more or less identical fashion back in the USSR. What is also noteworthy, although it is almost self-evident, is that doctrinal choices are not accidental; they seem to come along with a more conservative or more liberal vision about the world and the Russian Federation's role in it.

This is a review essay based on four leading Russian textbooks of international law: the 2003 textbook edited by Professor Bekyashev at Moscow State Juridical Academy, the 2005 textbook edited by Professors Kolosov and Krivchikova at Moscow's MGIMO University, the 2007 textbook edited by Professor Kuznetsov and Professor Tuzmukhamedov under the auspices of the Russian Association of International Law and the 2008 textbook edited by Professors Kovalev and Chernichenko from the Diplomatic Academy.

In today's Russian Federation, following the Soviet tradition, international law textbooks are usually collective works (the textbook written by the late Igor Ivanovich Lukashuk is a noteworthy exception).² The collectives of authors are usually formed around universities and around other institutional affiliations but also - and connected with the latter - along doctrinal inclinations that seem to have their roots in the realm of the political. As there is now a number of competing Russian international law textbooks on the market, this race of writing textbooks is in itself fascinating. It must partly have material reasons: students in the faculties of law of the Russian Federation make up a huge educational market and one can earn something in addition to one's salary with a well-selling textbook.

Even more, however, there seem to be reasons of prestige explaining this "race of writing textbooks": universities and chairs compete with each other for influence and resources. Whatever the exact mix of reasons, the result is competition and this cannot be harmful when looking at it from the students' perspective. Although everybody knows in theory that *tempora mutantur et nos mutamus in illis*, change is not always easy to master. In the foreword to the textbook of the Diplomatic Academy, the editors express their slight disappointment with the fact that the Diplomatic Academy and the MGIMO University (two prestigious universities in Moscow with close ties to the Ministry of Foreign Affairs) used to have a common textbook until the MGIMO professors took their colleagues by surprise and published their own textbook. Thus, according to the professors of the Diplomatic

² I. I. Lukashuk, *Mezhdunarodnoe pravo*, 2nd ed. (2001).

Academy, they were left no other choice but to take up the “creative challenge presented by the colleagues”.³

Another interesting aspect is that the textbook published under the auspices of the Russian Association of International Law is introduced by the Minister of Foreign Affairs, Mr Sergey Lavrov. This is a warm and mainly non-ideological introduction, dedicated to one of the editors, Professor Kuznetsov, who had deceased.⁴ But since some of the leading authors of this textbook are well-linked with the Ministry of Foreign Affairs – especially Mr Roman Kolodkin, the Legal Advisor at the Ministry of Foreign Affairs and member of the International Law Commission elected from the Russian Federation – one may speak of a certain touch of “official authorization” here. What is even more fascinating is that this is among the two of the more liberal of the four textbooks of international law discussed here. The Russian politicians and institutions around President Medvedev and Prime Minister Putin, such as the Foreign Minister Lavrov, tend to appear hawkish, nationalistic and resolute in their communication with the outside world – and yet, at least in a number of contexts, represent a relatively liberal and reformist civilizational agenda in the Russian domestic setting.

During the 2006 Paris conference of the European Society of International Law, one of the invited speakers, Professor Yuri M. Kolosov from MGIMO, was asked from the audience what in the Russian doctrine of international law had changed since the collapse of the USSR. I am obliged to rely on my memory, but Professor Kolosov's answer went something like this: references to Marxism-Leninism have been abandoned, but otherwise most things have remained the same, especially as far as the predominance of positivism is concerned. But this point raises the question as to what, if anything, besides Marxism-Leninism, could have been different in the Soviet international law doctrine when compared to the Western understanding of international law. For if these things have not since changed then the Russian doctrine still differs from the Western mainstream.

One such key aspect was the low ideological standing of human rights vis-à-vis state sovereignty in the USSR. Human rights law is therefore a topic of symbolic importance in any new scholarly analysis of international law in the Russian Federation. One of the key questions of symbolic importance that has to be solved by the doctrine is the reach of the circle of sub-

³ A. A. Kovalev & S. V. Chernichenko (eds), *Mezhdunarodnoe pravo*, 3rd ed. (2008), 9.

⁴ V. I. Kuznetsov & B. R. Tuzmukhamedov (eds), *Mezhdunarodnoe pravo*, 2nd ed. (2007), 15-16.

jects of international law. More precisely, can individuals be subjects of international law beside states and intergovernmental organizations?

In the following, I will demonstrate that this doctrinal question is an indicator of the wider attitude towards the Soviet legacy and Russia's role in international law. Scholars who in their minds have raised the individual to the status of a subject of international law generally have a more critical opinion about Soviet history while authors who are reluctant to grant the individual such a status both continue to see the Soviet legacy in less critical tones and conceptualize the world in Manichean tones of "we" (encircled Russia) vs. "they" (NATO, the US).

B. Concrete Examples: The Link between the Status of Individuals in International Law and the Attitude towards the Soviet Legacy

The textbook edited by Professor Kamil Abdulovich Bekyashev from Moscow State Juridical Academy clearly recognizes that individuals have become subjects of international law.⁵ Moreover, it suggests that in the 21st century, the reach of this subject status will be further widened.⁶

In addition, let us now look at how the textbook edited by Professor Bekyashev sees the historical role of the USSR. While emphasizing a number of positive contributions of the USSR, the authors maintain:

"One should not over-idealize the influence of the events of 1917 in Russia, the ideas and practices of the Soviet State. [...] The international legal practice of the USSR was not in everything consequently progressive. Let us remember the infamous Soviet-German Pact of Non-Aggression of 23 August 1939 (Molotov-Ribbentrop Pact) and especially its secret protocols. The activities of the USSR on the international plane did not correspond to the progressive development of international law either ("liberation campaigns" of the Red Army in 1939-1940; war with Finland in 1939-1940; the entry of the Soviet forces in Hungary in 1956 and in Czechoslovakia in 1968; the fulfillment by the Soviet forces of "international debt" in Afghanistan in 1979-1989, etc). This triggered a negative reaction in the inter-

⁵ K. A. Bekyashev (ed.), *Mezhdunarodnoe publichnoe pravo*, 2nd ed. (2003), 120.

⁶ *Id.*, 120.

national community. Thus, in 1940 the USSR was excluded from the League of Nations because of the war against Finland and from 1980 to 1988, the General Assembly of the UN adopted resolutions condemning the entry of the Soviet forces in Afghanistan.”⁷

As far as the textbook edited by Professor Valeri Ivanovich Kuznetsov and Professor Bakhtiar Raisovich Tuzmukhamedov is concerned, the authors submit an extensive discussion on the broadening of the circle of subjects of international law. The inclusion of physical and juridical persons into the circle of the subjects of international law corresponds to the contemporary understanding of international law.⁸ The authors of the textbook edited by Kuznetsov and Tuzmukhamedov admit that in Russia, the acceptance of individuals as subjects of international law has met heavy resistance by leading scholars such as Lukashuk or Chernichenko.⁹ Finally, the authors conclude that the inclusion of international non-governmental organizations, transnational corporations, juridical persons and individuals in the circle of the subjects of international law seems “completely real”.¹⁰ Finally, the authors of the textbook edited by Kuznetsov and Tuzmukhamedov give a detailed overview of the exact ways in which individuals can have international legal status.¹¹

When we now turn to the history of the USSR and international law, the account in the textbook of Kuznetsov and Tuzmukhamedov is fairly balanced and critical of the Soviet period. In the introductory chapter, Roman Kolodkin admits that for a considerable time during the Soviet period, the Soviet doctrine did not recognize the existence of universal international law and scholarship itself was not autonomous from political power.¹² Quite similarly to the textbook of Bekyashev, the authors write that the USSR did not necessarily follow its own theoretically progressive ideas in the 1930s – e.g. when it attacked Finland in 1939 and was as a result excluded from the League of Nations. The main difference between the textbooks of Bekyashev and Kuznetsov/Tuzmukhamedov is that according to the latter, the secret protocol of the Hitler-Stalin Pact of 23 August 1939 was not illegal

⁷ *Id.*, 51.

⁸ Kuznetsov & Tuzmukhamedov (eds), *supra* note 5, 70.

⁹ *Id.*, 72-73.

¹⁰ *Id.*, 74.

¹¹ *Id.*, 102-107.

¹² *Id.*, 34.

under international law.¹³ This viewpoint looks like a regrettable “compromise” with the truth – especially in light of the later claim that the Munich agreement of 29 September 1938 (the separation of Sudetenland from Czechoslovakia) was invalid *ab initio*.¹⁴

In the main part, however, the textbook of Kuznetsov/ Tuzmukhamedov makes a clear break with the Soviet legacy. It admits that the ideology that governed the USSR was not always favourable to international law.¹⁵ Roman Kolodkin, the author of the pertinent chapter in the textbook, argues:

“A characteristic feature of the foreign policy of contemporary Russia and its attitude towards international law is pragmatism and non-dogmatism. Our country no longer fights for the victory of some kind of ideology or system of views in the whole world. [...] Contemporary Russian international law scholarship is independent from the State and maintains a positive continuity with the Soviet scholarship, especially as concerns the systematic treatment of international law. At the same time, it differs from the Soviet scholarship because of the pluralism of views.”¹⁶

Thus, the textbooks of Bekyashev on the one hand and Kuznetsov/Tuzmukhamedov on the other hand share certain ‘liberal’ premises – for example that individuals are included in the circle of subjects of international law and that the USSR deserves to be remembered quite critically. The representatives of the more conservative spectrum are the textbooks written and edited by the MGIMO University and the Diplomatic Academy. However, it is noteworthy that both universities are leading in training future diplomats in the Russian Federation.

Both textbooks share the viewpoint that individuals cannot be subjects of international law.¹⁷ Furthermore, how the authors of the textbook edited by Professor Aleksandr Antonovich Kovalev and Professor Stanislav Valentinovich Chernichenko think about human rights law can be well revealed from the following passage:

¹³ *Id.*, 35.

¹⁴ *Id.*, 174.

¹⁵ *Id.*, 36.

¹⁶ *Id.*, 39-40.

¹⁷ Y. M. Kolosov & E. S. Krivchikova (eds), *Mezhdunarodnoe pravo*, 2nd ed. (2005), 20, 107; Kovalev & Chernichenko (eds), *supra* note 4, 170.

“The principle of the respect of human rights does not stand in opposition to other principles of international law but corresponds to them harmoniously. Therefore, no calls to protect human rights can justify attempts to violate such principles as sovereign equality of States, non-intervention of States in each others' matters, or prohibition of the threat of use of force. It follows from the principle of sovereignty that the State's relationship with its own population is a domestic question, regulated at the national level. It is necessary to de-politicize and de-ideologize the use of human rights in inter-State relations.”¹⁸

This comes quite close to saying that concerns for human rights could only be expressed when and to the extent that the concerned state does not perceive its sovereignty to be attacked.

Moreover, in the textbook edited by Kovalev and Chernichenko, the Russian and Western doctrines are occasionally clearly distinguished. For example, the authors maintain that:

“In the Western doctrine and practice of international law, there is a widespread point of view, according to which only intervention in the narrow sense is illegal, i.e., a “dictatorial” intervention, the use of force or threatening with it. In the Russian doctrine and practice another view has always been predominant, according to which any intervention is non-permissible, even including putting a question that relates to the internal authority of a state to discussion within an international organ.”¹⁹

Is that really so? Some former satellites, member republics of the USSR or countries illegally annexed by the USSR can probably tell slightly different or at least more nuanced accounts of how the Russian state practice relates to the principle of non-intervention, especially in its self-proclaimed “near abroad”. Another example where the authors juxtapose the Russian and Western understanding of the practice of international law is when they on eight (*sic!*) pages criticize the International Criminal Tribunal for the

¹⁸ Kovalev & Chernichenko (eds), *supra* note 4, 277.

¹⁹ *Id.*, 52.

former Yugoslavia (ICTY) for being illegally constituted,²⁰ politically biased and fundamentally unjust.²¹

The textbook of Professors Kovalev and Chernichenko also addresses the issue of negative aspects of the Soviet legacy. Consider, for example, the following passage:

“The inward-looking nature of the first Soviet constitutions [of 1924 and 1936] in terms of international relations and norms was a means of the self-preservation of the State. For a long period when law and legality were trampled underfoot in the USSR, this kind of inward-lookingness also ensured that the State apparatus could not be punished because the victims could not turn to remedies provided by international law. At the same time, the Constitution of 1936 during the operation of which the State carried out cruel repressions among its own citizens, guaranteed formally a quite broad and progressive selection of rights and freedoms, such as freedom of conscience (Article 124) and freedom of expression (part “a” in Article 125).”²²

Since self-preservation is not necessarily a bad thing or rather, to the contrary, is a very natural or normal thing from the particular state’s point of view, it is unclear whether this kind of explanation simply explains or partly also justifies the Soviet isolationist attitude towards what had remained from classical international law after 1919. And should it not be stated more outrightly that the Soviet Constitution of 1936 was doubly cynical, dangerous and perverse when under its beautifully formulated rights guarantees the worst repressions against the country’s own citizens could be carried out? Maybe Hitler was morally a step less evil because at least he repeatedly made the point that he did not give a damn about law or legality? Or should one still somehow remember the 1936 Soviet Constitution as a “progressive” legal document, against the letter and spirit of which mass repressions were carried out?

Coming finally to the MGIMO textbook edited by Professor Yuri M. Kolosov and Professor Elena S. Krivchikova, it argues in at least two differ-

²⁰ The liberal Minister of Foreign Affairs Andrei Kozyrev who was in charge in the early 1990s must then be co-responsible for this illegality since Russia did not veto the Security Council decision to establish the ICTY.

²¹ *Id.*, 574-581.

²² *Id.*, 103.

ent sections that the use of force by the US and its allies against Yugoslavia in 1999, Afghanistan in 2001 and Iraq in 2003 was illegal.²³ Thus, this clear and unqualified triad differs from the majority of Western analyses according to which the intervention against Yugoslavia in 1999 was “maybe not legal but nevertheless legitimate” and that the US use of force against the Taliban-led Afghanistan in 2001 was covered by the right to self-defense as it is enshrined in the UN Charter letter and practice (a clear majority of international law experts in the West would agree that the use of force against Iraq in 2003 was illegal). At the same time, the authors of the textbook affirm that pre-emptive use of force is supported both in the US and Russian official military doctrines in cases when the threat of attack is imminent (in reality, the Bush doctrine notoriously went further than responding to imminent threats along the lines of the Caroline doctrine).²⁴ The authors around Professors Krivchikova and Kolosov maintain that “there is no right to intervention as argued by some foreign international law scholars, especially no ‘humanitarian intervention’”.²⁵ To drive the larger point home once again, the authors maintain that NATO is dangerous for Russia and its eastward expansion in 2004 has been bad; the organization’s declared goals do not correspond to its over-militarized and expansive reality.²⁶

Human rights law remains somewhat in the shadow of such statements. But at least the reader learns that the Great October Revolution of Russia in 1917 contributed significantly to the formation of the second generation of human rights in international law.²⁷

C. Conclusion

It is a highly interesting and generally laudable phenomenon that we can nowadays witness a race of international law textbooks in the Russian Federation. These textbooks have many things in common and yet reveal a number of significant small and sometimes big differences. Yet, considering how big a country the Russian Federation is and, correspondingly, how vast its intellectual resources should be, one could expect even more from Russian scholars. The nuances and differences between authors are mostly of a

²³ Kolosov & Krivchikova (eds), *supra* note 18, 70, 428.

²⁴ *Id.*, 69.

²⁵ *Id.*, 177.

²⁶ *Id.*, 427.

²⁷ *Id.*, 534.

political nature and sometimes even relate to pseudo-problems in the scholarly ivory tower.

There are not yet different competing schools of international law in the sense that these schools would have a fully developed – and diverging – understanding of what international law is and what it is not. Notwithstanding the existing differences, the Russian doctrine of international law remains largely positivist and oriented towards textual interpretation; if necessary, willing to bend the contested rule or historical event favorably towards one's own state rather than against it.

Yet, I would not think it right to end this short review here with overly critical tones. The positive efforts towards the rapprochement of the Russian international law doctrine with the Western one, made especially by the authors around Professor Bekyashev and Professors Kuznetsov and Tuzmukhamedov, but occasionally also by the authors of the other two textbooks discussed here, must be acknowledged. Mentally relinquishing the empire has been a long and painful process for Russia; a much longer one than the relatively quick collapse of the USSR in 1991 was. Even though the explanatory work is so far only half-done, the individual international law scholars who, partly with the help of the concept of human rights, try to explain to the Russian students why the collapse of this kind of empire was inevitable and good rather than bad, deserve recognition for their open-mindedness and courage.

Protection against Indirect Expropriation under National and International Legal Systems¹

Max Gutbrod, Steffen Hindelang & Yun-I Kim*

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Introduction

In recent years, direct expropriation² has rarely been seen.³ States which wish to import capital do not like to be associated with posing a permanent, non-calculable threat to foreign-owned property but prefer to present themselves as jurisdictions with very stable, reliable and orderly regulatory environments.⁴ Expropriation, however, has by no means vanished; its execution has just become more subtle.⁵ Ambiguously or generously

² In a nutshell, direct expropriation is the compulsory transfer of legal title or the outright seizure of property by the State. In contrast, indirect expropriation refers to the situation in which the investor formally remains legal owner. See, instead of all, M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed. (2004), 344, with further references. See generally, C. N. Brower & J. D. Brueschke, *The Iran-United States Claims Tribunal* (1998), 379; G. C. Christie, 'What Constitutes a Taking of Property under International Law?', 38 *British Yearbook of International Law* (1962), 309; P. Comeaux & S. Kinsella, *Protecting Foreign Investment under International Law: Legal Aspects of Political Risk* (1997), 8; A. Mouri, *The International Law of Expropriation as Reflected in the Work of the Iran-U.S. Claims Tribunal* (1994), 70-99; C. Schreuer, 'The Concept of Expropriation under the ECT and other Investment Protection Treaties', 2 *Transnational Dispute Management*, (2005) 3, available at www.transnational-dispute-management.com (last visited 9 April 2009); B. H. Weston, 'International Law and the Deprivation of Foreign Wealth: A Framework for Future Inquiry', in R. A. Falk & C. Black (eds), *The Future of the International Legal Order, Vol. 2: Wealth and Resources* (1970), 106; M. M. Whiteman, 8 *Digest of International Law* (1976), 1006-1020.

³ For one of the few cases where direct expropriation occurred in recent years, Cf. *Mr. Franz Sedelmayer v. Russian Federation*, Award, 7 July 1998. See also Bolivia's Supreme Decree No. 28701, Nationalization of Hydrocarbon Sector, 1 May 2006, 45 ILM 1020 (2006).

⁴ M. W. Reisman & R. D. Sloane, 'Indirect Expropriation and its Valuation in the BIT Generation', 74 *British Yearbook of International Law* (2003), 118; L. Reed & D. Bray, 'Fair and Equitable Treatment: Fairly and Equitably Applied in Lieu of Unlawful Indirect Expropriation?', in: A. W. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation*, 2008, 13; A. K. Hoffmann, 'Indirect Expropriation', in: A. Reinisch, (ed.), *Standards of Investment Protection*, 2008, 151; on the subject of indirect expropriation in general refer to U. Kriebaum, 'Partial Expropriation', 8 *Journal of World Investment and Trade* (2007), 69; U. Kriebaum, 'Regulatory Takings: Balancing the Interests of the Investor and the State', *Journal of World Investment and Trade* (2007), 717; A. Reinisch, 'Expropriation', in: P. Muchlinski *et al.* (eds), *The Oxford Handbook of International Investment Law* (2008), 420-451; J. Griebel, *Internationales Investitionsrecht* (2008), 76-79; R. Dolzer & C. Schreuer, *Principles of International Investment Law* (2008), 89-92.

⁵ Reinisch, *supra* note 3, 432.

worded laws are ‘interpreted’ in a way that suits certain groups in the government or are only enforced when it suits a particular interest; administrative discretion is influenced by factors unrelated to the matter at issue, or administrations fail to conduct their processes in a transparent and comprehensible way. All these measures, turned against a foreign investor, can easily drive him out of business. Virtually all bilateral investment treaties (BITs) and multilateral investment agreements (MITs), therefore, reflect this development and also cover acts of State which may expropriate “indirectly through measures tantamount to expropriation or nationalisation”⁶ (indirect expropriation⁷). Moreover, many international investment agreements (IIAs)

⁶ Article III (1) of the Treaty between the United States of America and the Russian Federation concerning the Encouragement and Reciprocal Protection of Investment, signed 17 June 1992, not yet in force; available at: www.unctad.org/sections/dite/iiia/docs/bits/usa_russia.pdf (last visited 9 April 2009). See also Article III of the Abs-Shawcross Draft Convention on Investment Abroad of 1959, United Nations Conference on Trade and Development (UNCTAD), *International Investment Instruments: A Compendium*, Vol. V, 2000, 396; Article 0(3)(a) of the Harvard Draft Convention of 1961, in L. B. Sohn & R. R. Baxter, ‘Responsibility of States for Injuries to the Economic Interests of Aliens’, 55 *American Journal of International Law* (1961), 553; Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1952, available at www.echr.coe.int/NR/ronlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (last visited 11 August 2005); Article 3 of the Draft Convention of the Organisation for Economic Co-operation and Development (OECD) on the Protection of Foreign Property of 1967, in UNCTAD, *International Investment Instruments: A Compendium*, Vol. II, 1996, 114; Article 21 of the American Convention on Human Rights of 1969, available at www.oas.org/juridico/english/Treaties/b-32.htm (last visited 1 September 2005); American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, Vol. 2, 1986, §712(1); OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment Draft Consolidated Text*, OECD Doc. DAFFE/MAI(98)7/REV1, 22 April 1998, available at www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf (last visited 1 September 2005); Article 13(1) of the Energy Charter Treaty (ECT), available at www.encharter.org (last visited 9 April 2009); Article 1110 of the North American Free Trade Agreement (NAFTA) of 1992, available at www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 (last visited 9 April 2009); Article 6 of the 2004 US Model BIT; Article 13 of the 2003 Canadian Model Foreign Investment Protection Agreement; most recently, however, solely referring to ‘expropriation or nationalisation’ without differentiating between direct or indirect expropriation, Article 6 of the 2007 Norway Model BIT.

⁷ From an analytical point of view, one can distinguish between “creeping” and “consequential expropriation”. “‘Creeping’ expropriation is comprised out of a number of elements, none of which can – separately – constitute the international wrong.” Reisman & Sloane, *supra* note 3, 123, 125–127. Intention to harm the investment or the investor or an intention to expropriate is not necessary but helps to prove a creeping

not only provide rules on (indirect) expropriation but also establish so-called treatment standards “which refer to the legal regime that applies to investments once they have been admitted by the host State.”⁸ Administrative malfeasance, misfeasance and nonfeasance may also affect the investment adversely without amounting to “indirect expropriation”, constituting a less intense interference with the property. Indeed, there are arbitral awards which, while not accepting a claim based on “indirect expropriation”, established a compensable violation of “treatment standards”, i.e. in particular the “fair and equitable treatment” embodied in BITs or MITs.⁹

expropriation; Reisman & Sloane, *supra* note 3, 124, 128. Cf. also *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007, at para. 7.5.20 (hereafter referred to as *Compañía de Aguas del Aconquija S.A. and Vivendi Universal*); *Siemens AG v. Argentina*, ICSID Case No. ARB/02/8, Award, 6 February 2007, at para. 270 (hereafter referred to as *Siemens AG*). See also C. Schachter, The Concept of Expropriation under the ECT and other Investment Protection Treaties, in 2 *Transnational Dispute Management* (2005) 3, available at: www.transnational-dispute-management.com (last visited 9 April 2009); A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties – Standards of Treatment* (2009), 343-344; Reinisch, *supra* note 3, 426-431. “Consequential expropriation” refers to the situation in which the host State fails to properly create, maintain and manage “the legal, administrative, and regulatory normative framework contemplated by the relevant BIT, an indispensable feature of the ‘favourable conditions’ for investment.” Reisman & Sloane, *supra* note 3, 129, 130. Here, also, an intention on the part of the host State is not required. Reisman & Sloane, *supra* note 3, 129.

⁸ R. Dolzer & M. Stevens, *Bilateral Investment Treaties* (1995), 58.

⁹ Cf. *CMS Gas Transmission Company v. Argentina*, ICSID Case No. ARB/01/8, Award, 12 May 2005 (hereafter referred to as *CMS*); *Saluka Investments B.V. (The Netherlands) v. Czech Republic*, Partial Award, 17 March 2006; *Azurix v. Argentina*, ICSID Case No. ARB/01/12, Award, 14 July 2006; *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006 (hereafter referred to as *LG&E Energy Corp.*); *PSEG Global, Inc. and Konya Ilgin Elektrik Üretim ve Ticaret Limited Şirketi v. Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007; *Enron Corporation and Ponderosa Assets L.P. v. Argentina*, ICSID Case No. ARB/01/3, Award, 22 May 2007 (hereafter referred to as *Enron Corp.*); *Sempra Energy v. Argentina*, ICSID Case No. ARB/02/16, Award, 28 September 2007 (hereafter referred to as *Sempra Energy*); for cases where State action amounted to both indirect expropriation as well as to a breach of the “fair and equitable treatment” standard, cf. *Siemens AG*, *supra* note 6; *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentina*, *supra* note 6. Many BITs provide in rather repetitive wording not only for “fair and equitable treatment” but also for “full protection and security” and prohibit “unreasonable or discriminatory measures in the course of management, maintenance, use, enjoyment or disposal of investments”; Article 2(2) of the Agreement between The Government of the United Kingdom of Great Britain and Northern Ireland and The Union of Soviet

This article will look at six typically posed challenges to foreign investment posed by administrative acts, focusing on the issues of discrimination, *mala fide* and lack of transparency, and will discuss the response of national and international rules applicable to the situation of indirect expropriation.¹⁰ These scenarios are based on Russian legal regulations¹¹ and are inspired by the events in the Commonwealth of Independent States reality but by no means intend to be a reflection of facts.

We will show that the internal legal order cannot respond to any of these challenges through striking a just balance between legitimate business interests of the foreign investor and the State's sovereign right to regulate. Rather, it is the international (contractual) law on foreign investment which offers the clearly more sophisticated framework for a balanced settlement of a foreign investment dispute. Our prediction is that if economies in transition, like Russia, do not start living up to the standards required by international investment agreements quickly, they might face the risk of the marginalization of their national legal orders in the settlement of foreign investment disputes. Such conflicts, which earlier clearly had an "internal component", would increasingly become international only and would, in this sense, be externalized.

Socialist Republics concerning the promotion and reciprocal protection of investments, signed 6 April 1989, entered into force 3 July 1991. In academic writing, much effort has been spent on the question of whether and how the concepts of "fair and equitable treatment", "full protection and security" and "non-discrimination" are to be delimited from each other.

¹⁰ Occasionally, if it is helpful in making an argument more explicit, we might also make reference to the concept of "fair and equitable treatment", part of the treatment standards attributable to a foreign investment by virtue of IIAs.

¹¹ Russia, like many countries around the world, has become party to a variety of bilateral and multilateral international agreements (at least partly) concerned with or related to the protection of foreign investment, i.e. numerous bilateral investment treaties (BITs) with all major capital exporting countries (Russia had signed 56 BITs as of 1 June 2005, of which 30 had entered into force; for a detailed list, see the UNCTAD Website at www.unctad.org/sections/dite_pcbp/docs/bits_russian_federation_en.pdf (last visited 29 August 2005); the full text can be accessed via www.unctadxi.org/templates/DocSearch___779.aspx (last visited 29 August 2005)); The European Convention for the Protection of Human Rights and Fundamental Freedoms and its First Protocol, available at www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (last visited 11 August 2005); and the Agreement on Partnership and Cooperation, available at europa.eu.int/comm/external_relations/ceeca/pca/pca_russia.pdf (last visited 11 August 2005) with the European Union. Russia is also a signatory to the European Energy Charter Treaty, available at www.encharter.org (last visited 28 August 2005) and is provisionally applying it while the ratification process is pending before the Duma.

This article will start off by providing a brief survey of the present discussion in the literature based on the awards rendered on the subject, on what constitutes a compensable taking in international law (Section A.). It will then turn to certain hypothetical situations (Section B.). These are split into two parts: the first four scenarios deal with State measures which are lawful by national standards (Section B.I.) and the last two scenarios focus on State measures which are unlawful even by national standards (Section B.II.). Finally, it summarizes and evaluates our findings.

A. Identifying a Compensable Taking – A Brief Summary of the Present Discussion

Above, we referred to the ‘subtle’ governmental interference with foreign property. However, what are those ‘subtle’ measures ‘tantamount to expropriation’ which will eventually give rise to compensation?

It has been suggested that the phrase ‘tantamount to expropriation’ does not only refer to intentional or obvious indirect expropriation but that “[i]t also captures the multiplicity of inappropriate regulatory acts, omissions, and other deleterious conduct that undermines the vital normative framework created and maintained by BITs”.¹² Recalling the objectives pursued by entering into BITs and similar agreements – the establishment and maintenance of a “healthy investment climate”¹³ – the concept of ‘indirect

¹² Reisman & Sloane, *supra* note 3, 118–119; differing C. McLachlan *et al.* (eds), *International Investment Arbitration: Substantive Principles* (2007), 291, at para. 8.72–8.74; *cf.* also *Mr. Eudoro Armando Olguín v. Paraguay*, ICSID Case No. ARB/98/5, Award, 26 July 2001, at para. 84; *Sea-Land Services, Inc. v. Iran*, 6 Iran-U.S. C.T.R. (1984), 149 (hereafter referred to as *Sea-Land Services*).

¹³ Article 31 of the Vienna Convention on the Law of Treaties of 1969, available at www.un.org/law/ilc/texts/treaties.htm (last visited 11 August 2005), asks to have due regard to the object and purpose in the construction of a treaty. Most, if not all, BITs, as well as multinational agreements on investment protection such as the European Energy Treaty or the NAFTA, intend, as provided for in their preambles, to establish favourable conditions for investment by nationals and companies of one State in the territory of the other State. For a review of typical preambles, see Dolzer & Stevens, *supra* note 8, 20–21. In short, they envisage a “healthy investment climate” which is *conditio sine qua non* for the attraction of foreign direct investment. Those treaties “contemplate [...] an effective normative framework: impartial courts, an efficient and legally restrained bureaucracy, and the measure of transparency in decision”; Reisman & Sloane, *supra* note 3, 117. If a State signs up to such a treaty, it must be aware that it not only opens its doors to foreign investment but also commits itself to establish and/or maintain an appropriate legal, administrative, and regulatory framework;

expropriation' is extended to "an egregious failure to create or maintain the normative 'favourable conditions' in the host state".¹⁴

However, not every governmental adjustment of the normative framework or change in the application of this framework, or even mistake in application – *errare humanum est* – that adversely affects the economies where a foreign investment is made constitutes an expropriatory act (or a violation of treatment standards):¹⁵

“[S]tate measures, prima facie a lawful exercise of powers of governments, may affect foreign interests considerably without amounting to expropriation. Thus, foreign assets and their use may be subjected to taxation, trade restrictions involving licenses and quotas, or measures of devaluation. While special facts may alter cases, in principle such measures are not unlawful and do not constitute expropriation.”¹⁶

Reisman & Sloane, *supra* note 3, 117; undecided, Dolzer, *supra* note 12, 73–74. See, for such an approach, *Kuwait v. American Independent Oil Co. (Aminoil)*, Final Award, 24 May 1982 (hereafter referred to as *Aminoil*), 21 *ILM* (1982), 976, at para. 147; *Mondev Int'l Ltd v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, 42 *ILM* (2003), 110, para. 127. Some may argue now that an investment treaty is intended to benefit both investor and host State and that, thus, the rights and obligations of both sides need to be recognized; see Dolzer, who stipulates this question at Dolzer, *supra*, 74. As much as this is true, this argument does not speak against the aforementioned. It must be stressed again that BITs and MITs are not intended to prohibit legitimate regulatory measures by the host State. On the contrary, they encourage the host State to exercise its regulatory powers in a transparent, non-discriminating, non-abusive way guided by reason and the rule of law, at least towards the foreign investor. In doing so, the host State is maintaining a “healthy investment climate” which, as already said, is essential for the attraction of foreign capital. The establishment of such an administrative framework will, ultimately, lead to an improvement of the overall governance standards in the host State.

¹⁴ Reisman & Sloane, *supra* note 3, 119.

¹⁵ Reisman & Sloane, *supra* note 3, 117. See also Y. L. Fortier & S. L. Drymer, ‘Indirect Expropriation in the Law of International Investment: I Know it When I See it or Caveat Investor’, 19 *ICSID Review* (2004), 298.

¹⁶ I. Brownlie, *Principles of Public International Law*, 6th ed. (2003), 509; Sornarajah, *supra* note 1, 357; for tax measures in international investment arbitration also *cf. Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, 21 November 2007, available at <http://ita.law.uvic.ca/documents/ADMTateRedactedAward.pdf>, para. 238; *Pan American Energy LLC, and BP Argentina Exploration Company v. Argentina*, ICSID Case No. ARB/03/13, Decision on Preliminary Objections, 27 July 2006, paras 117-139; *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, paras 101-116; *EnCana Corpo-*

In other words, doing business means taking advantage of opportunities while accepting certain risks. Opportunities, or in other words, “favourable business conditions and goodwill, are transient circumstances, subject to inevitable change.”¹⁷ Thus, the materialization of a risk ordinarily related to a business venture does not amount to an expropriation.¹⁸ It is necessary to distinguish between the legitimate interest in adjusting and executing national policies and the abuse of sovereign powers through illegitimate interferences in foreign investment activities which are tantamount to expropriation.¹⁹

International tribunals, arbitration courts, jurists and scholars “have increasingly accepted that expropriation must be analysed in consequential rather than formal terms,”²⁰ and no single, clear-cut test has emerged so far

ration v. Ecuador, LCIA Case No. UN3481, Award, 3 February 2006, paras 141, 145, 177; *Enron Corporation and Ponderosa Assets, L.P. v. Argentina*, Decision on Jurisdiction, 14 January 2004, paras 25-32; *Marvin Roy Feldman Karpa (Cemsa) (USA) v. United Mexican States*, ICSID (Additional Facility) Case No. ARB(AF)/99/1, Award, 16 December 2002, 42 I.L.M. 626 (2003) (hereafter referred to as *Feldman*); *United Parcel Service of America Inc. v. Canada*, UNCITRAL Arbitration, Award on Jurisdiction, 22 November 2002, paras 116-117; *Link-Trading Joint Stock Company v. Moldova*, UNCITRAL Arbitration, Award, 18 April 2002, paras 63-92.

¹⁷ H. Sedigh, ‘What Level of Host State Interference Amounts to a Taking under Contemporary International Law?’, 2 *Journal of World Investment* (2001) 4, 646.

¹⁸ *The Oscar Chinn Case, U.K. v. Belgium*, Award, 12 December 1934 (hereafter referred to as *Oscar Chinn*), *PCIJ Rep. Series A/B*, No. 63, 88: “No enterprise [...] can escape from the chances and hazards resulting from general economic conditions. Some industries may be able to make large profits during a period of general prosperity, or else by taking advantage of a treaty of commerce or of an alteration in customs duties; but they are also exposed to the danger of ruin or extinction if circumstances change. Where this is the case, no vested rights are violated by the State.”; *Starrett Housing Corp. v. Iran*, 4 Iran-U.S. Claims Tribunal Rep. (1983), 156: (hereafter referred to as *Starrett Housing*) “Investors in Iran, like investors in all other countries, have to assume a risk that the country might experience strikes, lock-outs, disturbances, changes of economic and political system and even revolution. That any of these risks materialised does not necessarily mean that property rights affected by such events can be deemed to have been taken.” *Feldman, supra* note 15, para. 112: “Governments, in their exercise of regulatory power, frequently change their laws and regulations in response to changing economic circumstances or changing political, economic or social considerations. Those changes may well make certain activities less profitable or even uneconomic to continue [...]”.

¹⁹ Reisman & Sloane, *supra* note 3, 17.

²⁰ *Revere Copper and Brass, Inc. v. Overseas Private Inv. Corp.*, OPIC Award, 24 August 1978, 58 *ILM* (1980), 271-272; lately, T. Wälde & A. Kolo, ‘Environmental Regulation, Investment Protection and “Regulatory Taking” in International Law’, 50 *International and Comparative Law Quarterly* (2001), 813; Reisman & Sloane,

to determine whether an indirect expropriation has taken place.²¹ Indeed, it seems that the organic and slow “common law method of case-by-case development is pre-eminently the best method, in fact probably the only method, of legal development”²² in this field. The discussion surrounding three important factors which have emerged from this process deserve to be mentioned here.

The severity of the impact on the owner’s legal status, namely the ability to use, enjoy, control and freely dispose of his investment, has been accepted as a central factor in drawing the dividing line between expropriation and legitimate administrative regulation.²³ Importantly, however, it is controversial whether this severity is the sole/predominant factor²⁴ or merely one of several important factors.²⁵ There is case law supporting both

supra note 3, 121. A wide range of State measures may be interpreted as expropriatory if those measures significantly reduce the value of the property rights of an investor or render them useless; see Reisman & Sloane, *supra* note 3, 123.

²¹ Sornarajah, *supra* note 1, 351.

²² Christie, *supra* note 1, 338; *cf.* also Reed & Bray, *supra* note 3, 13; Reinisch, *supra* note 3, 438; Newcombe & Paradell, *supra* note 6, 344, 366-368.

²³ Dolzer, *supra* note 12, 79; Z. A. AlQurashi, ‘Indirect Expropriation in the Field of Petroleum’, 5 *Journal of World Investment and Trade* 6 (2004), 911.

²⁴ One strand of case law supports this doctrine: *Tippetts, Abbett, McCarthy, Stratton v. Tams-Affa Consulting Engineers of Iran* (hereafter referred to as *Tippetts*), 6 Iran-U.S. C.T.R. (1984), 225–226; *Starrett Housing*, *supra* note 17, 154; *Phelps Dodge Corp. v. Iran*, 10 Iran-U.S. C.T.R. (1986), 130; *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000 (hereafter referred to as *Metalclad*), para. 103; *Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and the Government of Ghana* (hereafter referred to as *Biloune*), 95 *ILR* (1989), 183 *et seq.*; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 107; *Compañía del Desarrollo de Santa Elena, S.A. v. Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, para. 76. For a more detailed analysis of the presented case law, refer to AlQurashi, *supra* note 22, 907–909 and Dolzer, *supra* note 12, 86–90.

²⁵ Another strand of case law suggests that there are more factors to be taken into consideration: Oscar Chinn, *supra* note 17, 88. See also T. Weiler, ‘Saving Oscar Chinn: Non-Discrimination in International Investment Law’, in N. Horn, (ed.), *Arbitrating Foreign Investment Disputes* (2004), 159-192; *Barcelona Traction, Light & Power Co., Belgium v. Spain*, (hereafter referred to as *Barcelona Traction*), *ICJ Rep.* (1970), 1, see separate opinions of Judge Fitzmaurice, 106, Judge Gros, 273, and Judge Tanaka, 159; *Sea-Land Services*, *supra* note 11, 149; *S. D. Myers, Inc. v. Canada*, First Partial Award, 13 November 2000 (hereafter referred to as *S. D. Myers*); *Técnicas Medioambientales Tecmed S.A. (Spain) v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, at para. 116 (hereafter referred to as *Tecmed*); see also the *Feldman* case, *supra* note 15. For a more detailed analysis of the

views.²⁶ In this article, we follow the school of thought that determining indirect expropriation only by diminution in property value might reduce national policy space to zero as governments would then be confronted with claims for compensation any time they change policy;²⁷ and this would limit international law on foreign investment to an insurance policy against bad business decisions.²⁸ We will proceed, therefore, from the assumption that the impact of the State measure is a central but not the sole factor.

The degree of interference with property rights which is necessary in order to hold a State liable for indirect expropriation is also controversial.²⁹ Again, two strands of case law have emerged. One line of case law, basically as evidenced by decisions of the European Court of Human Rights (ECHR),³⁰ requires that property rights have been rendered totally valueless, i.e. the investor has been definitely and fully deprived of the ownership of his property,³¹ while more moderate authorities demand a significant or sub-

presented case law, refer to AlQurashi, *supra* note 22, 909–911, Dolzer, *supra* note 12, 81–86.

²⁶ Dolzer points at the weakness of the “sole effect doctrine”, stating that “the proponents of the ‘sole effect doctrine’ would have to explain why international law protecting aliens should require a higher standard of protection than the major domestic legal orders”; Dolzer, *supra* note 12, 91.

²⁷ Wälde & Kolo, *supra* note 19, 839; F. O. Vicuña, ‘Carlos Calvo, Honorary NAFTA Citizen, Keynote Address’, 11 *New York University Environmental Law Journal* (2002), 27; J. Paulsson & Z. Douglas, ‘Indirect Expropriation in Investment Treaty Arbitrations’, in N. Horn, (ed.), *Arbitrating Foreign Investment Disputes* (2004), 145–158, at 146; Feldman, *supra* note 15, para. 112.

²⁸ American Law Institute, *Restatement (Third) of the Foreign Relations Law of the U.S.A.*, Vol. 2, 1987, §712, comment g. Cf. also Reinisch, *supra* note 3, 433.

²⁹ Summarizing Wälde & Kolo, *supra* note 19, 837 *et seq.*

³⁰ See, for example, the following cases: *Handyside v. United Kingdom*, ECHR (1976) Series A, No. 24, 29; *Poiss v. Austria*, ECHR (1987), Series A, No. 117, 108; *Sporrong and Lönnroth v. Sweden*, ECHR (1982) Series A, No. 52, 1 *et seq.* (hereafter referred to as *Sporrong and Lönnroth*); *Matos e Silva, Lda. and Others v. Portugal*, ECHR (1996-IV), No. 14, 1092, para. 79; all cases also available at: <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (last visited 9 April 2009). See, for a more detailed discussion, H. R. Fabri, ‘The Approach Taken by the European Court of Human Rights to the Assessment of Compensation for “Regulatory Expropriations of the Property of Foreign Investors”’, 11 *New York University Environmental Law Journal* (2002), 148–173; See also E. M. Freeman, ‘Regulatory Expropriation under NAFTA Chapter 11: Some Lessons from the European Court of Human Rights’, 42 *Columbia Journal of Transnational Law* (2003), 184–204.

³¹ *Sporrong and Lönnroth*, *supra* note 29, para. 63; *Fredin v. Sweden*, ECHR (1991) Series A No. 192; *Starrett Housing*, *supra* note 17, 154; *Tippetts*, *supra* note 23, 225 *et seq.*; *Kozacioğlu v. Turkey*, judgment of 19 February 2009, para. 70; also refer to *Lauder v. Czech Republic*, UNCITRAL Arbitration, Award, 3 September 2001, para.

stantial interference with the property rights.³² The ECHR leaves the State a rather wide “margin of appreciation” in the implementation of their domestic laws and regulations referring to expropriation.³³ However, this strand of case law should not be over-emphasized; nor should it have “authoritative” impact on the determination of indirect expropriation outside the European Convention for the Protection of Human Rights and Fundamental Freedoms,³⁴ as the Convention and its First Protocol³⁵ aim to set minimum standards for the protection of fundamental rights³⁶ and are not an investment protection agreement and, therefore, do not intend to establish “a healthy investment climate” – in other words, an elevated standard for the protection of property – as BITs and MITs do. In the context of the latter, there is a stronger emphasis on the protection of the legitimate interests of a foreign investor. Therefore, this article proceeds from the assumption that a significant or substantial interference with property rights, i.e. a significant reduction of value, is sufficient for the establishment of an indirect expropriation

198, which stated that a detrimental effect on the economic value of property is not sufficient to constitute an expropriation.

³² *Pope & Talbot Inc. v. Canada*, Interim Award, 26 June 2000, paras 96–98, 102; *S. D. Myers*, *supra* note 24, para. 283; *Feldman*, *supra* note 15, para. 110; *Revere*, *supra* note 19, 258–330; *Metalclad*, *supra* note 23, para. 103; *CME Czech Republic B.V.(The Netherlands) v. Czech Republic*, UNCITRAL Arbitration, Partial Award, 13 September 2001, para. 604 (hereafter referred to as *CME*); *Tecmed*, *supra* note 24, para. 115; *GAMI Investment, Inc. v. Mexico*, UNCITRAL Arbitration, Final Award, 15 November 2004, para. 126; *Telenor Mobile Communications A.S. v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, para. 65; *LG&E Energy Corp.*, *supra* note 8, paras 188-191; *Enron Corp.*, *supra* note 8, para. 245; *Eastern Sugar B.V. v. Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007; *M.C.I. Power Group L.C. and New Turbine, Inc. v. Ecuador*, ICSID Case No. ARB/03/6, Award, 31 July 2007, para. 300; *Parkerings-Compagniet A.S. v. Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007; *Sempra Energy*, *supra* note 8, para. 284. See, for a brief discussion, OECD, “*Indirect Expropriation*” and the “*Right to Regulate*” in *International Investment Law*, Working Papers on International Investment No. 2004/4; available at: www.oecd.org/dataoecd/22/54/33776546.pdf (last visited 11 August 2005), 10–14.

³³ *Freeman*, *supra* note 29, 189–191; ECHR, *Mellacher and Others v. Austria*, judgment of December 19, 1989, Series A No. 169, para. 45.

³⁴ Posing the same question, see R. Dolzer, ‘Indirect Expropriation: New Developments?’, 11 *New York University Environmental Law Journal* (2002), 74.

³⁵ Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and its first Protocol; available at: www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf (last visited 1 September 2005).

³⁶ Compare Article 53 ECHR; see also C. Grabenwarter, *Europäische Menschenrechtskonvention*, 2nd ed. (2005), §2, mn. 14.

if the other criteria are met: first and foremost, the effect of the State measure on the legitimate expectations of the investor; and the nature of the governmental action.

Finally, as just mentioned, an important factor to be taken into consideration is the nature, i.e. the purpose and context, of the governmental action. This issue directs our attention towards the question of whether the State measure affecting the property rights of the foreign investor promotes a recognized social purpose or the general welfare, e.g. public health, safety, the rule of law, morals or welfare, etc., and whether it is carried out taking due account of the legitimate expectations of the investor³⁷ with a non-

³⁷ “Investors are ready, and can be expected to be ready, to accept the regulatory regime in situations in which they invest [because they are in the position to make a risk/reward assessment of their investment]. Investment protection rather turns around the issues of unexpected changes with an excessive detrimental impact on the foreign investor’s prior calculation.” Wälde & Kolo, *supra* note 19, 819. Courts, tribunals [*cf. Aminoil, supra* note 12, 1034; *Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. C.T.R. (1989), 79 *et seq.*; *Amoco International Finance Corporation v. Iran*, 15 Iran-U.S. C.T.R. (1987), 189 *et seq.*; *Starrett Housing, supra* note 17; *Metalclad, supra* note 23, paras 89, 99; *Feldman, supra* note 15, paras 145 *et seq.*; *Tecmed, supra* note, paras 91, 149 *et seq.*, 154; *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL Arbitration, Arbitral Award, 26 January 2006, para. 147; *LG&E Capital Corp. and LG&E International Inc. v. Argentina*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, para. 195 (hereafter referred to as *LG&E Capital*). Also, the ECHR has relied on this concept; see the ECHR cases quoted by Dolzer, *supra* note 33, 78–79, and commentators *cf. e.g.* AlQurashi, *supra* note 22, 913; see also Wälde & Kolo, *supra* note 19, 821 *et seq.*, who want to rely heavily on jurisprudence of the U.S. Supreme Court] have frequently referred to the interpretative factor of the “disappointment of legitimate expectations”. In order to distinguish regulation from indirect expropriation, one has to ask whether the State has frustrated the legitimate expectations of the investor based on representations and actions of the host State. In order to do so, one must base one’s evaluation on the facts, taking into account all aspects of the specific case at hand. Not only contractual commitments formalize legitimate expectations but also formal governmental promises in treaties, laws and even investment brochures do so. See A. A. Fatouros, *Government Guarantees to Foreign Investors* (1962), 69 *et seq.*; more critical: Sornarajah, *supra* note 1, 100 *et seq.*; just recently, M. W. Reisman & M. H. Arsanjani, ‘The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes’, 19 *ICSID Review* (2004), 328–343, which lacks, however, a dogmatic explanation of how a State can bind itself by unilateral statement - despite its value as evidence for the creation of legitimate expectations within the concept of indirect expropriation or fair and equitable treatment - in international law towards an investor which is very often not a subject of international law; see also *Southern Pacific Properties (Middle East) Ltd. and Southern Pacific Properties Ltd (Hong Kong) v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Decision on Jurisdiction and Dissenting Opinion, 14 April 1988 (hereafter

discriminatory,³⁸ non-protectionist,³⁹ transparent, *bona fide* attitude advancing legitimate State interests. A State measure advances “the common good” if it pursues a legitimate purpose, is necessary and proportionate.⁴⁰ However, even a legitimate, non-discriminatory regulation might require compensation if an individual investor is required to make a special sacrifice, i.e. giving up legitimate expectations for enjoying his investment-backed property, for the benefit of the society at large.⁴¹

referred to as *Southern Pacific Properties*), excerpts of the Decision published in 16 *Yearbook Commercial Arbitration* (1991), 28, para. 46. This concept allows, firstly, to focus on the legal situation in the host State at the time when the investment is placed in that country. Secondly, it contains the idea that an expectation deserves more protection as it is increasingly backed by investment and, thirdly, it harbours an element of flexibility, i.e. legitimate expectations may fade in time and there may be a change of priorities in the host society; Dolzer, *supra* note 33, 78–79.

³⁸ “[A]ny taking that is pursuant to discriminatory or arbitrary action, or any action that is without legitimate justification, is considered to be contrary to the non-discrimination requirement, even absent any singling-out on the basis of nationality. This includes prohibition of discrimination with regard to due process and payment of compensation requirements. Moreover, the non-discrimination requirement demands that governmental measures, procedures and practices be non-discriminatory even in the treatment of members of the same group of aliens.” UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1, 2004, 239. That also means that in order to fall foul of the non-discrimination rule it is not required that the host State discriminates explicitly and formally against the foreign investor; it is sufficient that the State measure is discriminatory in its effect. For the application of this notion in recent NAFTA awards, refer to *S. D. Myers*, *supra* note 24, para. 308. See also Wälde & Kolo, *supra* note 19, 835–837. For an older notion of discrimination and the general problem of its application, consult W. McKean, *Equality and Discrimination under International Law* (1983); E. W. Vierdag, *The Concept of Discrimination in International Law* (1973).

³⁹ It is no easy task to establish the “intention” of a government. However, “formal statements of the responsible Minister or a series of circumstances pointing to the protectionist intent being the main motivator for a policy can be taken to indicate the ‘intention’”; Wälde & Kolo, *supra* note 19, 826, footnote 66. See especially the First Partial Award, paras 171-195 and the separate Concurring Opinion of B. Schwartz, paras 62-63, in *S. D. Myers*.

⁴⁰ Wälde & Kolo, *supra* note 19, 827.

⁴¹ S. Rose-Ackermann & J. Rossi, ‘Disentangling Deregulatory Takings’, 86 *Virginia Law Review* (2000), 1441-1496. See also Bundesgerichtshof (German Federal Supreme Court), BGHZ 6, 280; Bundesverwaltungsgericht (German Federal Administrative Court), BVerwGE 5, 145; BVerwGE 19, 98. The “special sacrifice” (*Sonderopfer*) concept is of primary importance in German constitutional expropriation law but is also known to the U.S. legal order; refer to *Monogahela Navigation Corp. v. U.S.*, 148 US (1893), 312. Its underlying principle is discrimination, but it goes beyond this concept. It is intended to protect the minority against the majority, prevent-

B. Scenarios of State Measures

I. State Measures Which Are Lawful by National Standards

1. First Scenario: A State Measure Which Is Lawful by National Standards But Discriminatory

As mentioned before, as long as a government exercises its administrative powers in a transparent, non-discriminatory and lawful way with beneficial intentions, negative effects on a foreign investment, legal or illegal, are unlikely to be remediable. Rather, they are the result of the changing business conditions inevitably linked to any business venture. Departing from this unlikely ideal world, we turn our attention to the first of our six scenarios.

Under Russian law, raw materials and subsoil resources are the property of the State.⁴² However, Russian law provides for the right of a third party to acquire such assets.⁴³ A mining licence is the legal instrument which is used to acquire title to a good that is being extracted from underground. Due to its importance and special nature, a mining licence is typically acquired through a tender. One of the major criteria for decision under the tender regime is the minimal amount to be extracted (“Minimal Amount”) for the purpose of ensuring the efficient use of subsoil resources.⁴⁴ However, in many cases, the Minimal Amounts are not matched in practice. Also, formal violations of law reportedly take place frequently;

ing the latter from shifting the costs of regulation to the former; see, Wälde & Kolo, *supra* note 19, 845. The authors of this article are aware of the fact that it is critical to derive principles on indirect expropriation from cases decided in national fora, at least if one draws heavily only on the case law developed in one single nation (Wälde and Kolo indeed do so, arguing that U.S. law, as the law of the last hegemonic power, enjoys extra authority; Wälde & Kolo, *supra* note 19, 821–822, even if it might be the most powerful nation at present. One must consider these national principles, but as part of a comparative study of the rules developed in other major jurisdictions. This approach would be in conformity with the teaching on the sources of international law in regard to the “general principles of law” embodied in Article 38 of the Statute of the ICJ; Dolzer, *supra* note 12, 69,76–78.

⁴² Article 1.2 of the Russian Law “On the Subsoil” – “O nedrakh” No. 2395-I dated 21 February 1992.

⁴³ Articles 1.2 and 12 of the Russian Law “On the Subsoil” – “O nedrakh” No. 2395-I dated 21 February 1992.

⁴⁴ Article 13.1 of the Russian Law “On the Subsoil” – “O nedrakh” No. 2395-I dated 21 February 1992.

that is, there are minor procedural deviations from the way the licence is to be issued, for instance the signatures on the licence are not being made on the document as anticipated by legislation.⁴⁵

In our first scenario, a number of investors receive a mining licence. The mining licence of one of these investors is withdrawn because of non-compliance with the terms of the licence (Minimum Amounts) and due to formal violations of the rules on licence issuance at the time of the granting of the licence. As a consequence of the withdrawal, he goes bankrupt. Under similar conditions, other investors' licences remain intact.

a) Russian Law

Under the Subsoil Law, the licensing authority is entitled to withdraw the licence provided that the conditions for doing so are set out in law.⁴⁶ However, in accordance with Articles 20 and 50 of the Subsoil Law, a licensee has the right to challenge the licence withdrawal in court. A licence is seen as an act undertaken by the administration.⁴⁷ Thus, the rules established by the Arbitration Procedure Code of the Russian Federation for challenging administrative acts (including appealing rules)⁴⁸ have been applied. Currently, there is no body of legislation or theory in Russia which would give guidance to public authorities when deciding upon cases dealt with by administrative bodies;⁴⁹ in particular, there is no theory of due process.⁵⁰ As a

⁴⁵ As an example, see M. Pustilnik, Russian authorities show new interest in oil companies, *Moscow News*, 28 July 2005; available at: www.gasandoil.com/goc/news/ntr43548.htm (last visited 29 April 2009).

⁴⁶ Article 20 of the Russian Law No. 2395-I dated 21 February 1992 "On the Subsoil" – "O nedrakh".

⁴⁷ It should be noted that Russian practice or law does not know of the term "administrative act" as such (*Verwaltungsakt*).

⁴⁸ Chapter 24 of the Arbitration Procedure Code of the Russian Federation of 2002.

⁴⁹ M. Gutbrod, 'Aktualnye problemy regulirovaniya Rossiskogo bankovskogo sektora i finansovykh rynkov', *Financial Risks Management*, No. 3/2005, 2 *et seq.*

⁵⁰ For example, the term is only mentioned in Article 4(11) of Federal Law No. 164 – FZ, 8 December 2003 "On the Fundamental Principles of the State Regulation of Foreign Trade Activity": "[...] the basic principles of the state regulation of foreign trade activity shall be: [...] ensuring the right to appeal, either *in due process* of law or in accordance with any other procedure prescribed under the law, against any illegal actions (inaction) of governmental agencies and their officials and also the right to challenge regulatory legal acts of the Russian Federation, derogating from the right of a participant in foreign trade activity to conduct such foreign trade activity." (emphasis added).

consequence, from the perspective of the holder of a licence, there is no body of doctrine he could rely upon when his licence is revoked.⁵¹ In particular, there is no basis in theory to support the argument that purely formal violations of the conditions of licensing that have no material consequences cannot lead to the withdrawal of a licence, and the general view is that the revocation for such formal reasons is lawful.

The argument that other investors in similar situations would not have their licences withdrawn would also not be heard in any of the proceedings. Whilst there is a general prohibition of discrimination under the Russian Constitution, this has not been implemented in procedural law up to now.

Turning to the possibility of proceedings before the Constitutional Court, due to the very complicated procedures, rules, and reasons for initiation of proceedings by the Russian Constitutional Court, it is unlikely to hear the case, although sometimes decisions of the Russian Constitutional Court are unexpected and do not clearly follow established rules.

Furthermore, a licence is not deemed to be a property right.⁵² The fact that investors are willing to pay a higher price for a company when it has a licence would suggest that, if the licence is looked at from an economic perspective, it has a value and therefore is a property right or at least is to be treated as a property right. Nevertheless, in the commentaries⁵³ to the Russian Constitution, licences in general and mining licences in particular are not mentioned as potentially being property rights, and in the few deci-

⁵¹ See, for instance, the Decision of the Federal Russian Arbitrazh Court of the District of Moscow, No. KA-A40/4680-05, 2 June 2005.

⁵² For instance, the relevant statutes in Article 2 of the Law “About licensing of different kinds of activity”, No. 128-FZ, dated 8 August 2001, give no indications in regard to the existence of characteristics resembling property rights: possession, use and disposal. In addition, the term “property right” itself is not mentioned.

⁵³ O. E. Kutafin, *Commentary to the Russian Constitution* (2003), Articles 24(1), 36(2), 55(3), 57, 75(3), and 132(1); L. L. Lasarev, *Commentary to the Russian Constitution*, 2003, Articles 14(6), 9(1), 24(4), 34(4), 37(1), 57(1), 58(4), 75(3), and 114(2) and (4); W. D. Karpovich, *Commentary to the Russian Constitution* (2002), Articles 24(1), 37(1), 43(2), 45(2), 57, 71, 72(1), 74(1), 103(1), and 132(1); L. A. Okunkova, *Commentary to the Russian Constitution* (1994), Articles 41, 45, and 114.

sions⁵⁴ concerning the withdrawals of mining licences, the argument that a licence could be a property right has not played any role.⁵⁵

Moreover, whilst under the Constitution⁵⁶ international contracts and maybe even custom would have precedence over national law,⁵⁷ this has never, to the best of our knowledge, led to issues of due process (according to international standards) or discrimination being discussed in Russian courts.⁵⁸

In summary, the investor is unlikely to succeed with his claim in Russian courts.

⁵⁴ Reportedly, there have been only a few instances in which mining licences have actually been withdrawn. Even in the context of what has often been described in the press as a crusade against Yukos, Yukos has not actually lost any of the mining licences which reportedly violated mining legislation.

⁵⁵ *Northgas v. Gazprom*, Decision of the Federal Arbitrazh Court of the District of Moscow, No. KA-A40/12425-04, dated 11 January 2005.

⁵⁶ Virtually all Russian authors dealing with issues of the application of international treaties in the Russian Federation ground their positions on Article 15(4) of the Constitution of the Russian Federation, which states that “[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system. If an international treaty or agreement of the Russian Federation fixes rules other than those envisaged by law, the rules of the international agreement shall be applied.” See www.constitution.ru/en/10003000-02.htm (last visited 8 April 2009).

⁵⁷ See, for instance, T. N. Neshatayeva, *International Civil Procedure* (2001), 46: “A question on the norms of jus cogens character, which mostly exist in the form of custom has already been touched upon. Considering these norms as principal ones apparently witnesses that the widest application of them is possible in the practice of the RF Constitutional Court [...]. It is possible to assume that the priority of the interpretation of jus cogens norms (norms-principles) by the RF Constitutional Court is a feasible approach to this question for Russian judicial practice in general [...] The issue becomes more complicated when it concerns other international legal norms of customary origin. Article 15 of the RF Constitution, and later Article 7 of the RF Civil Code included the norms of this type (the universally-recognized norms of international law) into the Russian legal system. But their place in the system is less clear in comparison to treaties [...]. While hearing economical disputes in Arbitrazh Courts one can already meet participants’ references to well-known international norms of customary character. First of all, this is true for the substantive norms contained in widely known international conventions which are not mandatory for the Russian Federation [...]. At this time courts are extremely cautious in appraisal of the procedural norms of those conventions that are not in force for Russia yet.”

⁵⁸ *Northgas v. Gazprom*, *supra* note, 54; *Yukos*, Decision of the Constitutional Court, No. 36-O, dated 18 January 2005.

b) International Investment Agreements

The foreign investor's licence,⁵⁹ but not those of his competitors, irrespective of whether they are nationals of the host country or other foreign investors, is revoked (i) due to his non-compliance with the terms of issuance and (ii) due to formal deficiencies with the licence. This scenario clearly raises the issue of discrimination, which we will focus on here.

As aforementioned, the non-discrimination requirement in the event of indirect expropriation "demands that governmental measures, procedures and practices be non-discriminatory even in the treatment of members of the same group of aliens."⁶⁰ It is apparent that this is not the case here. In spite of this, one may argue in favour of the State that the government is "merely" enforcing the law, in other words serving the rule of law when revoking a defective licence whose issuance terms were not followed by the investor.

Regarding the "non-compliance with the terms of the licence," under international law the investor certainly has no legal right to have his licence be held valid if he does not act in conformity with its terms. He was aware of the terms at the moment of receipt and could not have had any legitimate expectations that an illegal situation would be tolerated. A single investor or a group of investors within a larger grouping of investors in a similar situation may have conducted their business not in compliance with the licence conditions and, therefore, also not in compliance with the law; but even if this is tolerated by the administration for some time, the investors cannot rely on continued toleration of the illegal situation. The same applies to an investor whose illegal conduct of business was not tolerated right from the beginning. He cannot claim to be discriminated against simply because he was being treated in compliance with the law. Any other finding would be clearly against the rule of law and the principle of legality (*Legalitätsprinzip*). Likewise, if the administration changes its internal practice in general in regard to the application of administrative discretion after it learns about the illegality and begins to apply the law properly, then of course there is no

⁵⁹ Licences are now clearly protected by IIAs; see for example *Amco Asia Corporation, Pan American Development Limited and P.T. Amco Indonesia v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision Annuling the Award, 16 May 1986 (hereafter referred to as *Amco* (Annulment)), 25 I.L.M. (1986), 1439 *et seq.*; *cf.* also for example *Metalclad*, *supra* note 23; *Tecmed*, *supra* note 24; see also Sornarajah, *supra* note 1, 389 *et seq.*

⁶⁰ UNCTAD, *International Investment Agreements: Key Issues*, Vol. 1 (2004), 239.

expectation which deserves to be protected. A government must have the right to return to a state of legality.⁶¹

This principle was correctly applied in the *Estonian Bank Licence* case (*Genin (U.S.A.) v. Estonia*)⁶² The Central Bank of Estonia cancelled the bank licence of the claimant in conformity with the Estonian Banking Code⁶³ due to the Claimant's severe violations. The Tribunal rejected the claim for compensation due to the fact that the Central Bank of Estonia had carried out its supervision duty in full compliance with the law, non-arbitrarily, and without discrimination; and in doing so, the Tribunal balanced the procedural conduct of the government and the (illegal) conduct of the investor.

However, one must ask whether the same reasoning can be applied if the government fails generally to enforce a certain law – which it was obliged to do without any discretion and was able to enforce – when it just picks one out of a group of investors in a similar (illegal) situation and suddenly enforces the given law only against this one particular investor, while claiming to serve the rule of law? We do not think so.⁶⁴ If a statute fails to create its intended “equal treatment” generally by systematic illegal execution⁶⁵ of the law, then the proper application in one or a few instances would constitute a violation of the non-discrimination requirement. Equality under the law means first and foremost equal application of it.⁶⁶ Even if the investor is not entitled to demand treatment which is against the law, he has the right to demand that the State not apply the law in his case differently from

⁶¹ Of the same opinion but not differentiating: AlQurashi, *supra* note 22, 914.

⁶² *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. The Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001.

⁶³ Even if a revocation of a licence is well justified, the State must act with procedural regularity; otherwise, it would be held liable to pay compensation. In *Middle Eastern Cement Shipping and Metalclad*, the host State was not held liable for the cancellation of the licence but for a lack of due process, especially for a lack of transparency.

⁶⁴ For a more detailed and principled account of this issue *cf.* S. Hindelang, ‘No Equals in Wrong? The Issue of Equality in a State of Illegality’, 7 *Journal of World Investment and Trade* 6 (2006), 883-897.

⁶⁵ This means that the investor should be able to demonstrate that the State, in respect to the other instances, was not acting due to ignorance of these instances or legal obstacles which would bar it from enforcing the law in question but due to reasons unrelated to the aforementioned.

⁶⁶ V. Götz, ‘Über die “Gleichheit im Unrecht”’, in O. Bachof *et al.* (eds), *Verwaltungsrecht zwischen Freiheit, Teilhabe und Bindung: Festgabe aus Anlass des 25jährigen Bestehens des Bundesverwaltungsgerichts* (1978), 254.

how it applies it in other cases.⁶⁷ Thus, the investor has the right to be protected from the burden of an application of a previously unenforced law as long as the State does not return to a state of legality in all similar cases.⁶⁸ In order to avoid abusing the argument regarding intentions to return to a state of legality, which is in principle the obligation of the host State, the host State must demonstrate that it enforces the given law now in all situations similar to that of the investor. If a host State lacks the capabilities to handle all cases at once, it must demonstrate that the enforcement of a given law against the investor is the first instance in a uniform conceptual approach towards the state of legality.⁶⁹

With regard to our scenario, this would mean that the State should be barred from pleading that it serves the principle of legality as long as it fails to demonstrate that it is truly returning to a state of legality.⁷⁰ Thus, the treatment of the investor must be characterized as arbitrary, discriminatory and exposing him to sectional prejudice. The investor “expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments.”⁷¹

The answer to the question of whether a revocation of the licence on the grounds of a “formal violation” of the law on licence issuance is subject to the provisions of the IIAs on indirect expropriation depends, firstly, on whether the investor was able to remedy this revocation immediately at the moment of announcement. If he, however, did not do so due to the fact that the rules on licence issuance lacked clarity or were contradictory, then those formal defects should not destroy the investor’s legitimate expectations for

⁶⁷ It is important to note that this observation applies only to the situation in which the State is obliged by law to interfere with a right of an investor in a certain way without any discretion but does so only on a selective basis. This is not to be confused with the notion of “no equality in wrong” (*keine Gleichheit im Unrecht*), in German constitutional doctrine. For the distinction - a detailed outline would go beyond the scope of this article - refer to C. Kölbl, *Gleichheit “im Unrecht”* (1998).

⁶⁸ *Id.*, 80, especially p. 141 (English summary); an argument stating that the principle of legality demands the immediate proper execution of the law in question against the investor implies that the principle of legality takes precedence of the principle of equality. This is doubtful. The principle of legality carries inherently the demand of due application of the principle of equality; *Id.*, 43, 83.

⁶⁹ *Id.*, 82, 90.

⁷⁰ An exception might be necessary in situations in which immediate action is necessary in order to avert damage to life and limb.

⁷¹ *Tecmed*, *supra* note 24, para. 154.

the continuing validity of the licence.⁷² In the words of one commentator, governments “should not be able to rely on legal and formal technicalities if they consistently (in particular with respect to nationals) disregard such technicalities or if such technicalities were not discernible to the investor and its domestic legal advisers for reasons of lack of transparency.”⁷³ This

⁷² See, in general, on the issue of transparency in IIAs, UNCTAD, *Transparency*, UNCTAD Series on Issues in International Investment Agreements, 2004, especially 63; available at: www.unctad.org/en/docs/iteiit20034_en.pdf (last visited 30 August 2005).

⁷³ T. Wälde, ‘Investment Arbitration under the Energy Charter Treaty: An Overview of Key Issues’, 1 *Transnational Dispute Management* (2004) 2; available at: www.transnational-dispute-management.com (last visited 11 August 2005). The concept of transparency arrived late in international investment law. In regard to the standard of treatment, two cases deserve to be mentioned. In *Metalclad*, *supra* note, 23, para. 76, the NAFTA Tribunal defined the concept of transparency (stated in Article 1802 NAFTA) as requiring the following: “[...] all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party.” If a State becomes aware of “confusion or misunderstanding” among investors concerning the legal requirements to be fulfilled, the Party would have “the duty to ensure that the correct position [would be] promptly determined and clearly stated so that the investors can proceed with all appropriate expedition in the confident belief that they are acting in accordance with all relevant laws” (summary taken from OECD, *Fair and Equitable Treatment Standard in International Law*, Working Papers on International Investment, No. 2004/3, 37). Since Mexico had failed to provide such a framework, it was held liable for breach of the fair and equitable treatment standard. However, this reading was rejected in a review by the Supreme Court of British Columbia on the grounds that the treaty obligation of transparency was outside Chapter Eleven and, thus, outside the fair and equitable treatment standard. Moreover, the NAFTA Tribunal was charged to have failed to have put forward any evidence that the obligation of transparency has become customary international law. Also, in *Maffezini*, a lack of transparency in administrative conduct was established, which led the Tribunal, in connection with other factors, to the conclusion that Spain had violated the fair and equitable treatment standard contained in the Spain–Argentina BIT. No explanation was given on the precise meaning of the lack of transparency. See *Maffezini (Argentina) v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000. See also UNCTAD, *Transparency*, UNCTAD Series on Issues in International Investment Agreements, 2004, especially 63, available at www.unctad.org/en/docs/iteiit20034_en.pdf (last visited 9 April 2009); J. Jr. Hanna, ‘Is Transparency of Governmental Administration Customary International Law in Investor-Sovereign Arbitrations? - Courts and Arbitrators May Differ’, 21 *Arbitration International* (2005), 187.

reasoning is supported by the Decision in the *SwemBalt* case (*Sweden v. Latvia*)⁷⁴ and the *Metalclad* case.⁷⁵

Moreover, even if the investor learns about a violation of national laws and the government continues for some time to tolerate this situation, the investor must be protected. If the government later suddenly started enforcing the law in a discriminatory fashion, the same reasoning as that advanced above would apply. But even if the government acts in a non-discriminatory way, it should be liable for compensation if it fails to enforce the law non-proportionately, for example without a transitional period for the old, by national standards “unlawful”, investments. Keeping in mind that IIAs, among other functions, intend to promote rules of good governance, the requirements for the host State, though depending on the individual circumstances, should not be too low.⁷⁶ One might therefore conclude that a State, by consistently disregarding legal formalities at the time it issues licences, loses its right to withdraw such licences for those formal violations if it does not conduct the withdrawal with procedural regularity and in a non-discriminatory manner.

⁷⁴ Reported by K. Hobér, ‘Investment Arbitration in Eastern Europe: Recent Cases on Expropriation’, 14 *American Review of International Arbitration* (2003), 407. This case was concerned with the removal and subsequent public auctioning of a ship by Latvian governmental officials due to an alleged breach of a lease contract on an anchorage. The Tribunal based its finding of indirect expropriation on the failure of the government to inform the investor about the (alleged) invalidity (retroactive change of laws) of the lease contract in due time (four months inactivity) and cacophonous statements of a governmental official, the participation of governmental officers in the (alleged) illegal activity of concluding the lease contract and the missing proportionality between the (alleged) wrongful act of the investor and State measures; *id.*, 414.

⁷⁵ The NAFTA Tribunal in *Metalclad* dealt with a case in which the investor did not obey the local building and environmental rules and thus acted unlawfully in regard to national rules. However, representations were made by governmental officials who were not aware of their own legal order. It was held that the investor’s legitimate expectations in the lawfulness of his undertaking cannot be destroyed if he learns about the illegality of the investment after it was made. Refer also to J. Paulsson & Z. Douglas, ‘Indirect Expropriation in Investment Treaty Arbitrations’, in N. Horn, (ed.), *Arbitrating Foreign Investment Disputes* (2004), 154-157.

⁷⁶ Wälde, *supra* note 72.

2. Second Scenario: A State Measure Which Is Lawful by National Standards But Discriminatory and Accompanied With *Mala Fide*

In our second scenario, the mining licence is defective as in [scenario 1. The government does not want to withdraw the mining licence because it fears negative consequences for the country's reputation as a location for investment. It therefore suddenly, without giving any prior notice, starts enforcing a certain tax rule or changes the interpretation of a certain tax rule in general, knowing, however, that this change in administrative practice hits only a certain investor or even intending to hit a certain investor. As a consequence, one foreign company goes bankrupt.

a) Russian Law

Russian law does not sanction a State organ changing the interpretation of tax legislation. The fact that the intention of the taxation was not to obtain money but rather to harm (*mala fide*) would not change this analysis. Also, as already mentioned above, outside the Constitution there is no prohibition of discrimination under Russian law. Whilst Russian law, in particular constitutional law, recognizes the principle of non-discrimination, the literature⁷⁷ has apparently only dealt with the implications of this principle for investors at the beginning of their investment activity, and court practice has up to now not taken up these principles.⁷⁸

b) International Investment Agreements

Changing and adapting national taxation regimes is in general not considered to be an illegitimate regulation but something necessary to maintain and further the overall development and prosperity of a society.⁷⁹ As already mentioned, in principle a foreign investor cannot have any legiti-

⁷⁷ S. Krupko, 'Investition agreements and disputes between countries and private foreign investors', in *Business and Law* (Attachment No. 5, 5/2001), 6, 14-15, 17-18; S. Krupko, 'Investment activity in the constituent entities of the Russian Federation', in *Business and Law* (No. 10/2000), 42.

⁷⁸ *Id.*

⁷⁹ Paulsson & Douglas, *supra* note 74, 155-156; R. Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (1985), 252; Newcombe & Paradell, *supra* note 6, 358, para. 7.24.

mate expectation that a given tax regime is not subject to any alterations. This was confirmed, for example, in the awards in *Feldman*⁸⁰ and *Goetz*.⁸¹

In the scenario at hand, however, the situation might be different. If the administration suddenly starts enforcing a certain tax rule in general, knowing, however, that it hits only a certain investor or even intending this, then several conflicting interests need to be balanced. On the one hand, a State must have the right to adapt its tax policy to new situations, maybe even implementing the recommendations of international expert panels. If the tax rules are applied in law and in fact non-discriminatorily, and if this change can be seen as proportionate in regard to the ends pursued with the change, then it is the ordinary risk of doing business when a certain company might not be able to pay its taxes due to its financial situation, i.e. insufficient profits, and this could happen even if the host State was aware of this effect.⁸² On the other hand, a discriminating effect, not in law but in fact, but originating from sudden and unexpected changes accompanied by *mala fide* intentions should be remedied by IIAs if the damage suffered by a foreign investor is “substantial”.⁸³ The investor can reasonably expect that tax laws are not used for protective aims or political purposes totally unrelated to taxation but for the functions usually assigned to them. It was also sudden, unreasonable and unpredictable changes in the application of law, though not a tax law, which led to the finding in favour of the investor in the *CME* case.⁸⁴

From a host State point of view, one could argue in defence of measures taken that the same result (bankruptcy) would have also been inflicted

⁸⁰ *Feldman*, *supra* note 15, para. 109-111.

⁸¹ *Goetz and others v. Burundi*, ICSID Case No. ARB/95/3, Award, 10 February 1999, para. 124. Refer also to Paulsson & Douglas, *supra* note 74, 155. See, for the taxation of windfall profits of the oil industry, the *Aminoil* case, *supra* note 12; for the situation in the United States, *U.S. v. Ptasynki*, 462 US (1983), 74 *et seq.*

⁸² *Kügele v. Polish State*, Upper Silesian Arbitral Tribunal Case, 5 February 1932, *Amtliche Sammlung von Entscheidungen des Schiedsgerichts für Oberschlesien*, Vol. 3 (1931), 20. See also H. Lauterpacht, *Annual Digest of Public International Law Cases*, Vol. 6 (1931/32), 69.

⁸³ “Substantial damage” is understood in the sense that a profitable usage of the investment is impossible; R. Dolzer, *Eigentum, Enteignung und Entschädigung im geltenden Völkerrecht* (1985), 252 *et seq.* Refer also to Dolzer, *supra* note 12, 78.

⁸⁴ *CME*, *supra* note 31. The actions and non-actions of the Czech Media Council were not part of proper administrative process (no justification for the sudden change in the interpretation of the legal situation or other regulatory measures and its enforcement (1996) and the illegal collusion (1999) with a Czech national with a protectionist intent).

upon the investor by a mining licence withdrawal. Such an argument, however, does not seem very convincing. Even if a licence withdrawal could have been conducted in a non-discriminatory, transparent manner with a *bona fide* intention, as referred to in the first scenario, the plea of a “hypothetical alternative lawful conduct” would not rule out the finding of indirect expropriation⁸⁵, but might, and this is certainly a very cautious ‘might’, only have an effect on the determination of the damages.⁸⁶ Thus, to sum up, the conduct of the tax authorities must undoubtedly be attributed to the host State.⁸⁷ The discriminatory application of tax laws coupled with *mala fide* in

⁸⁵ A first, rather simple argument relates to the rules of causality. An infringement of a given right cannot be imputed to someone if it can be demonstrated that the infringement would also have been caused if this person had acted correctly. For the example here, this would mean that the infringement (indirect expropriation) would also have occurred if the host State had lawfully revoked the licence. This apparently is not the case. Thus, the host State must have inflicted the infringement. A second argument may be drawn from the second *Amco v. Indonesia* Award on the Merits, *Amco Asia Corporation and Others v. The Republic of Indonesia*, ICSID Case No. ARB/81/1, Resubmitted, Award on the Merits, 31 May 1990 (hereafter referred to as *Amco II* (Merits)), in para. 143, the Tribunal states: “[E]ven were a decision on grounds other than those stated in the Degree in principle sustainable, they could no more be lawful than the decision made on grounds of shortfall of investment, because of the general background that pervaded the decision-making.” It does not matter that the same result could have been reached in another way, i.e. that the foreign investment could have also been adversely affected by measures which are in principle sustainable; it is only the process of how this result is reached (and that this process was ultimately malconducted) which matters. Of the same opinion: Sornarajah, *supra* note 1, 390.

⁸⁶ It is open to question whether all of the loss inflicted upon the foreign investor by the discriminatory application of certain tax laws can be attributed to the host State due to the fact that substantial damages would have occurred also in the case of a lawful (in terms of public international law) revocation of the licence. The *Amco II* (Merits) Award casts doubts on this; in para. 174, it reads: “To argue, as did Indonesia, that although there had been procedural irregularities, a ‘fair BKPM’ [the governmental body acting on behalf of Indonesia] would still have revoked the licence, because of Amco’s own shortcomings, is to misaddress causality. The Tribunal cannot pronounce upon what a ‘fair BKPM’ would have done. This is both speculative, and not the issue before it. Rather, it is required to characterise the acts that BKPM did engage in and to see if those acts, if unlawful, caused damage to Amco. It is not required to see if, had it acted fairly, harm might then rather have been attributed to Amco’s own fault.”

⁸⁷ See the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf (last visited 22.April.2009) See also Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Commission at its fifty-third session (2001), available at: <http://untreaty.un.org/>

the way described above that has a severe impact on the foreign investment constitutes an indirect expropriation.

As for the standards of proof it will be no easy task for any investor to establish the “intention” of a government.⁸⁸ However, the “formal statements of the responsible Minister or a series of circumstances pointing to the protectionist intent being the main motivator for a policy can be taken to indicate the ‘intention’.”⁸⁹ Therefore, since the internal governmental papers which reveal the true intention of a government are often – understandably – not accessible in their entirety to international tribunals, in order to prevent cacophonous statements, governments are well advised to keep their high ranking officials, to whose statements international tribunals would have to turn, under close check until a final position has emerged within the government;⁹⁰ they are best off developing a public communications strategy handled by experts.

3. Third Scenario: Investor Contributing to Bankruptcy

An investor holds a legally valid mining licence. The government starts enforcing a certain tax rule or changes the interpretation of a certain tax rule in general, with the stated aim to test the ability of companies to pay taxes. As the investor is afraid that his company will not survive, he withdraws money from the company. As a consequence, the company goes bankrupt.

a) Russian Law

When considering a law, a Russian court would typically look at the letter of the law and not at the intention of the lawmaker. As a consequence, if the pure letter of the law does not violate the Constitution, the intention of the lawmaker would not play any role and, to the best of our knowledge, the intention of the lawmaker has not played any role in decisions of courts,

[ilc/texts/instruments/english/commentaries/9_6_2001.pdf](#) (last visited 22.April.2009)
For academic writing, see, instead of others, Brownlie, *supra* note 15, 420-456 with further references.

⁸⁸ Newcombe & Paradell, *supra* note 6, 342.

⁸⁹ Wälde & Kolo, *supra* note 19, 826. See especially the First Partial Award, para. 171-195 and the Separate Opinion of B. Schwartz, para. 62-64 in *S.D. Myers*, *supra* note 24.

⁹⁰ Difficulties in finding officials with adequate training should not serve a host State as a valid defence, since it signed the IIA fully aware of its duties and the quality of its officials.

even in cases where laws have been considered illegal.⁹¹ *A fortiori*, it is not likely to be of importance if the implementation of a law is the means by which an illegal decision is to be implemented. The action of a government would therefore clearly be legal. The same would apply if no new tax provision is enacted but an already existing provision is interpreted in a different way.⁹² In both cases, the outlook for an investor is not promising.

b) International Investment Agreements

In this scenario, much depends on the representations the government made to the foreign investor in regard to the tax regime. Did the government, for example, include a stabilization clause in the licence agreement, ensuring that taxes and other financial liabilities would remain as agreed for the duration of the concession? Then, the investor can reasonably expect that the tax regime will remain unchanged and raise this in the BIT context. If the government changes the law despite these representations and, as a result, the company finds it difficult to continue operations and closes operations, then the government appears to be liable under international law irrespective of the company's decision to close down, as the decision in *Revere* suggests.⁹³ Otherwise, the host State's measures are lawful if executed without any discrimination.

⁹¹ Decision of the Russian Constitutional Court, No. 15, dated 16 July 2005.

⁹² For example, Article 113 of the Tax Code, No. 146-FZ, dated 31 July 1998 (as effective on the date when the *Yukos* Decision of the Constitutional Court was passed), stated that "a person cannot be held liable for a tax offense if three years (the statute of limitations) have expired since the day when the offense was committed or since the first day after the end of the tax period during which the offense committed." (this Article of the Tax Code was amended on 27 July 2006). In the *Yukos* Decision of the Constitutional Court, No. 36-O, dated 18 January 2005, the Court re-interpreted this provision to apply only for "conscientious" taxpayers. It was deemed not to apply to "un-conscientious" taxpayers, which *Yukos* was found to be. However, the wording of the statute does not actually provide a basis for this interpretation.

⁹³ *Revere*, *supra* note 19, 291 "In our view, the effects of the Jamaican Government's actions in repudiating its long term commitments to RJA (the subsidiary of RC), have substantially the same impact on effective control over use and operation as if the properties were themselves conceded by a concession contract that was repudiated [...]" For a discussion, refer to R. Dolzer, 'Indirect Expropriation of Alien Property', 1 *ICSID Review* (1986), 41-65, Sornarajah, *supra* note 1, 378-380. In contrast, in the *Elsi* case, the foreign company, in the view of the Court, went bankrupt because of its own financial situation and not because of the action of the host State; *Elettronica S.p.A. (U.S. v. Italy)*, Award, ICJ Reports 1989, 15, para 119.

4. Fourth Scenario: *Mala Fide*, Investor Acting Unlawfully

An investor holds a legally valid mining licence. He has used money in an unlawful manner, including by bribing officials, to ensure that taxation of revenues derived from the mining licence is not fully enforced against his business. Nevertheless, certain taxation rules are suddenly generally enforced, leading to the bankruptcy of the investor, which had been the ultimate intention of the State.

a) Russian Law

As discussed above, under Russian law the intention of any State action is not relevant. Accordingly, it cannot possibly be relevant to balance various interests against each other.

b) International Investment Agreements

Legitimate expectations can only be vested in a legitimate business venture. In the given case, the entrepreneur uses illegal means to acquire a competitive advantage. If the host State were to enforce its criminal laws to prevent the foreign investor from doing so and bring him to justice, this would be a legitimate exercise of administrative powers. However, the situation at hand poses another question. Is it justifiable that the State intentionally bankrupts an investor using taxation law as means of punishment, thus attributing functions to that law which an investor cannot reasonably foresee, in order to prosecute and remedy the criminal offences committed by the foreign investor?

If the bankruptcy is the consequence of an unbiased, non-discriminatory and proportionate prosecution carried out in good faith, especially if the bankruptcy relates to the payment of taxes owed, penalties due and the conviction of the investor in criminal proceedings, a State should not be held liable for the bankruptcy. However, a host State should by no means be able to plead the *tu quoque* argument, since it is generally bound to the notion of legality, in contrast to a private actor. It should, therefore, not be allowed to (ab)use the violation of the law by the foreign investor as a reason to disregard any due process requirements, one of which is to apply the laws in conformity with the functions assigned to them.⁹⁴ By using

⁹⁴ *Tecmed*, *supra* note 24, para. 154.

taxation law, which does not have a function of acting as penalization for criminal charges (e.g. bribery), those due process requirements are infringed, since no investor can reasonably foresee such an application. Moreover, the host State is also required to conduct the prosecution of allegedly criminal behaviour committed by the foreign investor itself using due process. The investment only “loses” protection in so far as it is erected on illegal groundings. Any deprivation or diminishment of property rights beyond this point cannot be justified. The principle that the taking of property “as means of the exaction of a criminal penalty is lawful”⁹⁵ and that it does not need to be compensated has been overridden by the groundbreaking changes brought by IIAs.⁹⁶

II. State Action Which Is Unlawful by National Standards

1. Fifth Scenario: Unlawful State Action Against the Management, Management Personally Involved in Crimes

In our fifth scenario, a foreign investor runs his business venture in a legal manner. However, the management is personally involved in crimes. The investor is imprisoned, however not for the personal crime that he has allegedly committed, but for a completely unrelated tax matter. The ultimate intention of the government is to hit the business. As a consequence of the management being imprisoned, banks withdraw their loans and, as a consequence of that, the business goes bankrupt.

a) Russian Law

As frequently reported in the press, Mr Khodorkovsky was imprisoned in 2004 for committing violations of tax legislation and subsequently condemned to serve many years for those tax violations. The arguments reportedly made by people close to Mr Khodorkovsky and by himself included that, in reality, the reason for the imprisonment was not the violation of tax legislation but the intention of Mr Khodorkovsky to get involved in politics and the desire of the Russian State to acquire his wealth, namely the Yukos

⁹⁵ Sornarajah, *supra* note 1, 390.

⁹⁶ *Id.*, 390. See, for the old state of the law, A.V. Freeman, *The International Responsibility of States for Denial of Justice* (1938), 518, footnote 2.

Group. However, in the decisions publicly available,⁹⁷ this argument has never been considered, and there is no evidence that it has been used by representatives of Yukos and/or Mr Khodorkovsky as a legal defence. Ignoring the intentions of the State in the results of legal proceedings in this manner does coincide with what most Russian lawyers would confirm as their view, namely that measures taken by the State against an individual would not have any impact when considering the legal merits of an action against a group of companies in the context of assessing an action that could potentially constitute an indirect expropriation.

b) International Investment Agreements

Prosecution of crimes is the duty and prerogative of any State and, thus, is viewed as legitimate State action. As already stated, if the bankruptcy is the consequence of an “orderly” prosecution, then the State is not liable for the bankruptcy. However, it is also generally accepted that an unjustified “attack” on the management is regarded as an “attack” on the investment because the foreign investor is entitled to organize and control his business venture as a part of the bunch of property rights protected by an IIA.⁹⁸ Here again, the intention and the nature of the governmental actions would be the decisive criteria. If charges are only brought up “artificially” with an intention to bankrupt the investor, the State conduct will come within the reach of an IIA. This is necessary in order to protect foreign investment comprehensively as envisaged in the IIAs. Thus, indirectly, IIAs

⁹⁷ *Yukos* Decision of the Russian Constitutional Court, No. 36-O, dated 18 January 2005, the only decision on the *Yukos* case available in a public database, as explained above, deals with technical issues of the interpretation of tax legislation rather than with the overall economical effect of government action.

⁹⁸ See *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 24 April 2004, paras 91–93. In the case at hand: “Tokelés claimed that, following its publication of a book favourable to a leading Ukrainian government opposition leader, Ukrainian government authorities: (1) conducted numerous invasive investigations falsely disguised as tax investigations; (2) initiated frivolous actions in Ukrainian domestic courts, including actions to invalidate contracts entered into by Tokelés's subsidiary; (3) placed the subsidiary's assets under administrative arrest; (4) unreasonably seized financial and other documents and (5) falsely accused its subsidiary of engaging in illegal activities.” The American Society of International Law, *International Law in Brief*, 25 June 2004; available at: www.asil.org/ilib/ilib0711.htm#j3 (last visited 22 April 2009). See also *Sedco, Inc. v. National Iranian Oil Company*, 9 Iran-U.S.C.T.R. (1985), 248 (appointment of directors by the State; not concerned with any criminal prosecution); *Biloune* case, *supra* note 23.

seem to have also a moderating, good governance effect on the prosecution of crimes, at least in regard to a foreign investor. However, a criminal investigation which raises issues of human rights violations would not be remediable in international investment law; it would be a case for an international human rights convention like the ECHR.⁹⁹

2. Sixth Scenario: Illegality “All Around”

The foreign investor uses its company for financing a political campaign against taxation of oil proceeds in order to create a favourable business environment, including gaining significant influence on the State’s legislature and administration for its company. The campaign, however, is partially illegal under the laws of the host country. Also, the investor is involved in murder and in bribing officials responsible for the prosecution of the murders in order to secure its favourable business environment. As a consequence, the foreign investor gains significant influence on the process of forming the host State’s will. The State takes action illegal under the State’s law against the company and the investor with a view to stop these activities. These activities comprise the engineering of arbitrary and unfounded tax claims, the arbitrary and non-proportionate seizure of production facilities, the arbitrary freezing of funds, the harassment of the management, non-transparent investigations and a public auction which from the beginning is anything but open to bidders other than the pre-chosen winner. All these activities are conducted with the view to drive the company out of the business (total loss), at which the State ultimately succeeded.

a) Russian Law

As discussed above, intentions are not relevant under Russian law. This is particularly true for intentions of State action.¹⁰⁰ There is nothing in the literature, practice or in discussions with Russian lawyers suggesting that any interconnection between actions against a shareholder and a company from a legal point of view would be accepted as making a difference under Russian law. In addition, whilst under Russian law there are rather detailed legal provisions about national emergency, no evidence of a theory of extra-

⁹⁹ *Biloune, supra* note 23, para.1.

¹⁰⁰ As above, see as an example the Decision of the Russian Constitutional Court, 18 January 2005, No. 36-O.

legal emergency, for instance during a constitutional breakdown, could be found.¹⁰¹

b) International Investment Agreements

By means of a (partially illegal) political campaign¹⁰² and criminal activities,¹⁰³ a foreign investor created a favourable business environment for his company. In this process he gained significant influence on all three branches of government of the host State and ultimately to a significant extent controlled the process of forming the political will in the host State. An orderly prosecution became impossible due to the political influence of the foreign investor. The corrupting activities of the investor started to threaten the very democratic order in the country. In order to stop these activities and with a view to return to a state of lawfulness, non-corrupted parts of the government take steps to dismantle the influence of the foreign investor by bankrupting him. In the course of action as prescribed above, the title of property is either transferred by auction to another entity or the investment is completely devaluated. This scenario drives the point even further to the extremes and poses the question of where the boundaries of the protection of a foreign investment by an IIA are to be drawn.

By taking the measures described above, the host State pursues legitimate objectives: securing State order, democracy and pluralism and re-erecting the rule of law. However, does this give the State the right to take recourse to any means at its disposal? We would like to suggest that proportionality has to be retained also in such cases. Even if the intention of the government is to return to a state of lawfulness and to secure the continuing operation of such a noble concept as democracy, and even though the for-

¹⁰¹ A search in the most commonly used legal database on “extra-legal emergency” as of 8 April 2009 gave no results.

¹⁰² The interference in domestic politics by foreign investors seen as agents of their home State is a well-known instance (as with Allende in Chile) and has been addressed by prohibition in many soft-law instruments (voluntary codes of conduct). However, no hard-law international obligation has arisen so far. In general, there has been little movement in formulating binding obligations of foreign investors (multinational corporations). Refer to Sornarajah, *supra* note 1, 171, 174-182. Moreover, in general, home States do not carry responsibility for the acts of their nationals not acting on behalf of the home State abroad; refer to Article 4-11 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts.

¹⁰³ It seems that criminal activities of a foreign investor do not automatically render an investment unprotected by IIAs. See Sornarajah, *supra* note 1, 390.

foreign investor could not reasonably expect that his illegal activities would be continually tolerated by the host State, a legitimate expectation of due conduct of the prosecution of investment-related crimes should nevertheless not easily be compromised. Unfortunately, arguments based on the defence of such noble but very broad and vague concepts such as democracy and/or the rule of law are also capable of being (ab)used to cover protectionist activities in a host State and to quieten criticism from abroad.

The situation at hand, however, could come close to a state of necessity¹⁰⁴ within the meaning of Article 25 of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, which is seen to reflect customary international law.¹⁰⁵ The wrongfulness of an act not in conformity with an international obligation is precluded when, inter alia, the act is the only way for the State to safeguard an essential interest against a grave and immanent peril (Article 25(1)(a)). If one is prepared to accept the perpetuation of democracy as essential interest¹⁰⁶ and is, moreover, willing to view a single businessman or a small group of such as grave and immanent peril to the core of democratic system, recourse to the defence of "state of necessity" is still, however, put in doubt by the fact that it is confined to situations to which the respondent State has not contributed (Article 25(2)(b)), at least not in a manner "sufficiently substantial and not merely incidental or peripheral."¹⁰⁷ However, by allowing a foreign investor to gain significant influence on essential functions of government and not fighting corruption effectively, the State contributed to such a situation. If one were, nevertheless, to accept such a defence of the

¹⁰⁴ See, on the customary law doctrine of "state of necessity" in general, Brownlie, *supra* note 15, 447-449 with further references. Cf. also S. Schill, 'Auf zu Kalypso? Staatsnotstand und Internationales Investitionsschutzrecht – Anmerkung zur ICSID-Entscheidung LG&E Energy Corp v. Argentina', 5 *German Arbitration Journal* (2007), 178-186. The state of necessity, though in the context of treatment standards due under a BIT regime, was also invoked and lengthily discussed in a recent ICSID arbitration, *CMS*, *supra* note 8, paras 304-394; *Enron Corp.*, *supra* note 8, para. 93, *Sempra Energy*, *supra* note 8, paras 333-355; *LG&E Capital*, *supra* note 36, para. 201-266.

¹⁰⁵ *CMS*, *supra* note 8, para. 315.

¹⁰⁶ Very high standards of proof are required, and it is doubtful whether an international tribunal would accept a state of necessity in the situation at hand. See *CMS*, paras 319-331.

¹⁰⁷ Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session (2001), Article 25, para. 20; available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last visited 04 April 2009).

host State, this would mean compromising one of the main objectives of IIAs, i.e. to promote good governance standards. By concluding an IIA, the State committed itself to such standards and should have fought corruption right from the beginning. It should not be rewarded for failing to do so.¹⁰⁸

C. Conclusions and Outlook

The task of both the national and international rules governing foreign investment activities is to balance legitimate business interests and the State's sovereign "right to regulate". From a national perspective, our survey reveals that the legal order of a country, in transition like Russia, is hardly prepared to strike an adequate balance between the aforementioned interests. Much more than occasional differences in views of courts,¹⁰⁹ it fails in a systematic manner to dispense any protection against the "common" threats a foreign investor is exposed to in such a business environment. It appears ignorant of notions such as due process, the prohibition of discrimination and transparency. Turning to the international perspective, a comparison of the outcomes produced by the national and international legal orders demonstrates that the former can hardly live up to the standards re-

¹⁰⁸ For case law on the legality of the investment in general see, *Fraport AG Frankfurt Airport Services Worldwide v. Philippines*, ICSID Case No. ARB/03/25, Award, 17 August 2007; see also C. Borris & R. Hennecke, 'Das Kriterium der Einhaltung von Vorschriften nationalen Rechts in ICSID-Schiedsverfahren - Anmerkungen zum Schiedsspruch in der Sache Fraport v. Philippines', 6 *German Arbitration Journal* (2008) 2, 49-58.

¹⁰⁹ As demonstrated, for instance, in the *Media Most Gusinsky* case, in which the partly government-owned Gazprom giant guaranteed two loans to Media Most in 1998 that totalled US\$ 380 million, secured by a 40 per cent piece of the company. After criticizing the politics of the Kremlin, with the Kremlin allegedly being instrumental in bankrupting Media Most by calling in the loans, the owner of Media Most, Mr Gusinsky, was arrested, allegedly without any charges, and he was allegedly compelled to sign an agreement to sell his company. Available at www.mytimes.com/2000/11/15/world/russian-gas-company-pulls-out-of-deal-with-media-tycoon.html (last visited 29 April 2009). In response to this, the ECHR ruled that the Russian government had violated Articles 5 and 18 of the European Convention on Human Rights in relation to Gusinsky, namely his rights to freedom and security. The Court ruled that the violation in itself was enough for moral damages to be awarded. As a result, it asked the Russian Federation to pay €88.000 in damages. Available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=russia%20%7C%2070276/01&sessionId=22944796&skin=hudoc-en> (last visited 29 April 2009). No arguments as to illegal expropriation or moral damages because of such violations seem to have been made before Russian courts.

quired and imposed by international investment instruments, even in “everyday situations”, as the discussion of our scenarios has revealed.

Two possible conclusions can be drawn from this observation. Either the development of international investment law has gone too far, *quasi* overstraining the capabilities (or the willingness) of the legal order to imbibе the international standards, or Russia, as just an example of many other economies in transition, has to start urgently—more than ten years after signing its first BIT—living up to the standards of good governance required by the IIAs it has signed if it does not want to face significant externalization of legal disputes concerned with foreign investment.¹¹⁰ This is no fanciful perspective.

As regards the first possible conclusion, we do not think that the development of international investment law has gone too far. Most IIAs, on the one hand, offer a foreign investor the necessary back-up against sudden protective measures of its host State which is needed to conduct business in a foreign jurisdiction with a certain degree of predictability. On the other hand, IIAs are also capable of accommodating legitimate State interests. Moreover, they encourage and promote “good governance” standards. International commitments are at present the best way to protect foreign investments against internal attacks and differing interests in the political establishment of a State. However, the host State itself will also benefit from an internal legal order which acts transparently and produces reliable, predictable and just outcomes. Thus, with regard to foreign direct investments, the national legal systems of economies in transition should make an effort to live up to the standards set under international investment law. By doing so, these states can create incentives for foreign investors to perceive their domestic legal systems as a genuine alternative to international investment law and arbitration. This bears of course the *caveat* that in view of the amounts usually involved in such a dispute, the potential for protective measures can be minimised, but never be wholly excluded. Of course, sometimes a country subject to international investment arbitration for the first time has to learn the hard way about the obligations it has signed up

¹¹⁰ One way to force an international investor to resort to national jurisdictions is the “local remedies requirement”. However, the exhaustion of local remedies as a precondition for commencing an international investment arbitration is nowadays rarely required by BITs; C. Schreuer, *The ICSID Convention: A Commentary* (2001), 391-393. For an appraisal of alleged new tendencies in arbitration, see C. Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’, 4 *The Law and Practice of International Courts and Tribunals* (2005) 1, 1-3.

for. But at the end of the day, drawing the right conclusions from the lessons learned, it should begin to improve its administrative procedures in particular and its legal system in general so that foreign investors do not feel the need to resort to international arbitration in the first place.

This brings us to our second possible conclusion which, in our view, appears to be the correct analysis. Countries such as Russia should be aware of the costs which they have to bear if they are not capable or willing to offer the necessary legal tools to respond to the needs and problems of foreign investors. They risk that legal issues are litigated far away from the place where the conflict originated, adjudicated by rules they were able to shape only to a limited extent, and decided by people sometimes not fully aware of the local situation. In a nutshell, they risk marginalizing their own legal order, which, in general, should be able to best accommodate the country's specificities.

Whilst countries may ignore individual cases for some time, in the long run there are only two ways out: either to take leave from the IIA regime, which would completely sideline the country in question, in the view of the investors' as well as the state community,; or while globalization is deepening to stop hesitating and tackle the issue.

Geopolitics at Work: the Georgian-Russian Conflict

Peter W. Schulze*

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A. From Frozen Conflicts to Military Protectorates

The guns are silent. The smoke has settled and both war parties have more or less withdrawn to approved lines of a cease fire agreement, brokered by the European Union. In addition and somewhat surprisingly, the assessments in the media war which erupted after the hostilities and fully blamed Russia as an aggressor have changed too.

There is not enough time to list the episodes of the escalating conflict, which started well before the demise of the Soviet Union and led to an outside monitored cease fire agreement which was constantly broken by both sides.

August 8th, 2008 marked a radical change in the relationship between Georgia and the Russian Federation since 2004. The low warfare situation of provocations, accusations, shootings, economic embargos and a creeping policy to turn South Ossetia into a military protectorate of Russia erupted fully into a full-blown military conflict. The Georgian President, Mikhail Saakashvili, waged a “Blitzkrieg” on South Ossetia.¹ Georgian troops pushed forward to conquer Zkhinvali, the capital of South Ossetia and to block the strategically important Roki-Tunnel, so that Russian troops could not enter the war zone with heavy equipment.

Both aims were not achieved. The Russian military intervened 12 hours after the Georgian military offensive.² Russian troops pushed the

¹ A. Golts, ‘The Failure of Realpolitik’, in *The Moscow Times*, 12 August 2008, 9. Golts, Journalist and military expert, who is definitely not a supporter of the Kremlin’s foreign and military policy, draws a parallel between the Georgian attack on Zkhinvali and the case of Sarajewo during the Bosnian-conflict. “Whatever the Georgian army has done is no different from the purported war crimes for which former Bosnian Serb leader Radovan Karadzic is now standing trial in The Hague. Serbian artillery stationed on the hills surrounding Sarajevo systematically destroyed the separatist capital. This is exactly what the Georgian army has done by taking positions overlooking [Z]khinvali”. See as well F. Bomsdorf, (head of the Moscow office of the Friedrich Naumann Stiftung): *Der Krieg im Kaukasus kennt fast nur Verlierer*, *Report*, 13 August 2008.

² Russia did not need the war, but could not avoid it either. The Kremlin was put into a chess like position. It had no choice but to move to counter the Georgians. But Moscow waited until it became clear who started the war. However, this led to speculations about a power struggle between the hawks and the doves in Kremlin politics. One of the leading right wing voices in Washington, Robert Kagan, who became the foreign policy adviser of the former presidential candidate John McCain, immediately tried to whitewash Saakashvili and to put the blame on Russia. “The details of who

Georgian army back. And like recent campaigns in the Balkans in 1999 as well as in Gaza in 2009 have demonstrated, the overarching goal of military operations is to destroy systematically by air and tank attacks most of the offensive military equipment of the enemy. This includes dual useable infrastructure, i.e. means and routes of transportation, port facilities and of course all military hardware and equipment, which can be used for new offensive purposes.

In addition, to provide the conflict from escalating once more, a “cordon sanitaire”, a buffer zone of roughly seven kilometers was created and fortified around the South Ossetian border to disengage both sides and allocate additional security.

At the end of August 2008, both Russian chambers of Parliament, i.e. the State Duma and the Federation Council, as well as the Russian president Dmitry Medvedev signed and ratified a declaration, announcing South Ossetia and the other separatist region, Abkhazia, as sovereign states. By December 2008, bilateral security and cooperation agreements were concluded, allowing Russian troops to be stationed in South Ossetia and Abkhazia. Apart from not being internationally recognized, both regions, Abkhazia and South Ossetia, can now be defined as Russian protectorates. Such a move, the recognition of both separatist bodies as sovereign states, implied a fundamental change in Moscow’s view on principles of international law. Fearing problems at home, the post-Soviet state never recognized separatist entities until then. However, the West’s intransigence in the case of Kosovo, and with the conflict in Chechnya under control, Moscow entered new terrain – much to the dismay of her partners in the Shanghai Cooperation Organization (SCO) and in CIS-countries.

Russia’s military intervention put an end to Saakaschvili’s masterfully played policy of “brinkmanship”, which frustrated the northern neighbor with numerous small incidents of provocation. And as expected, the Kremlin overreacted in return. Saakaschvili could blame the Russians over and over again for using disproportional means, due to an economic embargo for Georgian products and the closure of transport lines. The spiral of confrontations went out of control in 2008.

Now, after the war, the brinkmanship game is over for good. Nevertheless the Kremlin did not achieve all its goals in the short war. Obviously, the Georgian forces were defeated, the issue of the “frozen conflict” was

did what to precipitate Russia's war against Georgia are not very important. [...] This war did not begin because of a miscalculation by Georgian President Mikheil Saakashvili. It is a war that Moscow has been attempting to provoke for some time”. R. Kagan, ‘Putin Makes his Move’, in *The Washington Post*, 11 August 2008, A15.

solved and Saakaschvili humiliated. However the real goal, to topple the Georgian president was not accomplished. Even the sovereignty of South Ossetia and Abkhazia is somewhat an ambivalent victory, because this act paradoxically shields Tbilisi against Russian pressure in the near future. No other country of the world community, apart from Nicaragua, followed Moscow's step. And indeed, despite the refusal of the NATO summit in December 2009 to grant Georgia and the Ukraine access to the Membership Action Plan, it became clear that the Western community would do the utmost to protect Tbilisi against external threats.

Once it was clear that Moscow would support South Ossetia, the outcome of the war was entirely predictable. Therefore it is most astounding that bizarre speculations and rumours accompanied the war and even did not die after its end. And also remarkable, contrary to the one-sided judgment in western media which solely blamed Russia for the offensive and for using disproportional means, was the media coverage and the consensus among Russia's political elite, regardless its attitude to the Kremlin, which was extremely supportive of the Kremlin's action.³

Amidst all the speculation, one set of questions still troubles experts' minds: who won the bluff game - the Medvedev-Putin team or Saakaschvili? In other words, everyone had long expected a military conflict, but the question remained open when and who could trick the other side best into taking the blame.

This appraisal takes into consideration that both sides knew well about the respective buildup of military hardware and manpower thanks to satellite reconnaissance and instructors working in the Georgian army. Ever since the Washington administration discovered the strategic relevance of Georgia as a transit country for energy, the Baku-Tbilisi-Ceyhan pipeline became operative in 2005, and its geopolitical value for monitoring and securing US-interest in the greater Middle East operation/concept, the Bush-administration supported unconditionally Georgia's request for membership of NATO. This was indicated by the resolution to render support for Georgia's membership application by both the House of Representatives and the Senate, in February 2007.

In November 2003, soon after the "Revolution of Roses" which led Mikhail Saakaschvili to power, Washington assisted the modernization of the Georgian military, which by this time was poorly equipped, trained and

³ L. Shevtsova, 'The Kremlin's New Containment Policy', in *The Moscow Times*, 18 August 2008, 8: "The war has intensified a conservative backlash in Russia. The country is now highly unified against the West."

clothed. Military and technological aid was transferred and in addition 2,000 Georgian soldiers were commissioned to participate in the Iraq campaign. Within four years, trained by American and Turkish instructors, the Georgian military became a formidable force in the region. In addition, Israeli technicians upgraded the Soviet hardware, i.e. planes and tanks to NATO standards.

To sum up, Washington knew perfectly well that Saakaschvili was preparing for war. Such military movements were of course depicted by satellites and by the instructors working with Georgian units. Further, it seems to be utterly impossible that the Russian buildup on the North Ossetian border went unnoticed by US-spy satellites. Vice versa, the Russians knew about the Georgian war preparations. No doubt, similar technological devices and undoubtedly teams of informers operating inside Georgia gave respective signals.

Placed in this context that Washington knew about the Georgian and Russian military buildup and that Moscow waited for the Georgians to strike first, only the European Union and NATO seemed to have been left out of the picture. If we accept such a scenario for a moment, it begs some fascinating questions.

The most important ones in need to be answered are the following:

1. Did Washington share the obtained information about the Russian military buildup on the Northern border of South Ossetia with Saakaschvili?
2. Did Washington withhold such information in order to encourage Saakaschvili's war campaign despite the looming Russian counterattack?
3. Did Washington try in vain to stop Saakaschvili from launching the attack on Zkhinvali? This would imply that Washington lost its control over the Georgian president.
4. Did both, Washington and Tbilisi, underrate the decisiveness of the Kremlin to launch a massive counterattack?
5. Did the Bush-administration and the Georgian president jointly play a hazardous game, in which it was assumed that Saakaschvili would be propelled into a win-win situation, regardless of the outcome of the conflict?

Rewarding answers, even six months after the war, are not in sight. However, given the information about the Russian forces in place, it would have been quite bizarre, if the Georgian president had thought to win a military campaign against Russian forces. Therefore three issues remain crucial: first, was the information shared; or second did the Bush administration or leading figures within this administration assure Saakaschvili that the US would support him? And third did the US administration pursue other goals, i.e. linked to the election campaign, as the Russian Prime Minister Putin suggested?⁴ In this respect Saakaschvili would have been a tool in a much larger play.

Nevertheless, the assumed win-win situation demands some time to be discussed. Widen the game of brinkmanship to open warfare: Saakaschvili would indeed move into a comfortable win-win situation, shielded from personal consequences despite military defeat. First, the West would have never allowed him to be toppled as president. Second, the war would reunite the Georgian people against the external aggressor and quell opposition against him. Third, the West would rally behind Tbilisi and Saakaschvili. Fourth, the war would have been won ideologically and even more important, Tbilisi would not lose parts of her territory.

And indeed, the core areas of Georgia remained untouched, the opposition was silenced and the Western media portrayed Georgia as an outpost of Western civilization and democracy in a sea of autocratic regimes. And miraculously, after all the painful and fruitless struggles to regain control over Abkhazia and South Ossetia, these trouble spots would be gone once and forever. Consequently the accession path to NATO would open. That is why the Bush administration immediately jumped on the chance and pushed for NATO membership of Georgia and the Ukraine.⁵ However, at the Meet-

⁴, Interview with Prime Minister Vladimir Putin in Sochi, by Matthew Chance for CNN.com/Europe, 29 August 2008, available at: <http://edition.cnn.com/2008/WORLD/europe/08/29/putin.transcript/index.html> (last visited 13 March 2009): "If my suppositions are confirmed, then there are grounds to suspect that some people in the United States created this conflict deliberately in order to aggravate the situation and create a competitive advantage for one of the candidates for the U.S. presidency. [...] I have said to you that if the presence of U.S. citizens in the zone of hostilities is confirmed, it would mean only one thing: that they could be there only at the direct instruction of their leaders. And if that is so, it means that in the combat zone there are U.S. citizens who are fulfilling their duties there. They can only do that under orders from their superiors, not on their own initiative."

⁵ Chairman's Statement of the NATO Meeting of the NATO Foreign Ministers, NATO HQ, Brussels, 2-3 December 2008 (available at <http://www.nato.int/docu/pr/2008/>

ing of NATO Foreign Ministers at NATO HQ, in Brussels, on 2nd and 3rd of December 2008, a fast track of the Ukraine and Georgia to NATO was blocked by European member states and the Bucharest decision from April 2008 was re-enforced.

B. The Conflict's Purgative Power: The International Dimension

While the regional dimension of the war lost its menacing character, the conflict acquired an international dimension from the beginning. The Russian counter attack, which led to the temporary occupation of core territories of Georgia alarmed the international community. The General Secretary of the UN, the EU and the USA condemned the disproportional use of power, and demanded, together with an immediate cease fire, the withdrawal of Russian forces to the positions held before the war.

As argued above, the Kremlin did not need, nor did it ask for, a military conflict with Georgia. But Moscow welcomed the opportunity to portray its willingness to punish the Georgian president for his anti-Russian politics. By doing so, the Kremlin aimed at drawing a clear line for US-led influence in the CIS countries. The message was clear and meant containment, to limit Western influence in the territorial area, which stretches from the Baltic Sea to the region between the Black and Caspian Sea: an area, I call "Zwischeneuropa" (the Europe in between the Russian Federation and the European Union). Too weak economically, and too heterogeneous politically, the states of this region are unable to organize cross-border cooperation or to look after security and peace by their own means. During the last decade the two waves of NATO expansion towards the East and the successful completion of the eastward extension of the European Union, which relies in its economic, political and military strength on those institutions close to the Russian border and sphere of influence. While the EU's eastern move did not alarm the Kremlin that much, because Moscow underrated the EU still as a predominantly economic power without political or military

p08-154e.html (last visited 13 March 2009): "NATO Ministers briefed their Georgian colleague regarding the decisions on Georgia and Ukraine taken during the North Atlantic Council meeting on 2-3 December 2008. In that meeting, NATO Ministers reaffirmed all elements of the decisions regarding Ukraine and Georgia taken by NATO Heads of State and Government in Bucharest. They noted that Georgia has made progress, yet has significant work left to do. Therefore, they decided to provide further assistance to Georgia in implementing needed reforms as it progresses towards NATO membership."

muscle, NATO's expansion was met with strong opposition. NATO's sphere of influence borders now on the Black Sea and a third round of extension was well under way, aiming at the Ukraine and Georgia.

Since 2004, with the advent of the "orange revolution", this area is in turmoil and plagued by domestic power struggles, which create internal political instability and are often incited by outside forces. The area oscillates between the European Union and Russia, while the US is pulling her own strings in the back, pursuing her interests without sharing information about her policy goals.⁶ And open or covered attempts by Moscow to "roll back" the US-led onslaught or to achieve "regime changes" in states which were feared to be fully pulled into the US-sphere of influence failed miserably, damaging Russia's international standing.

In this respect, Moscow needed a convincing score, a victory, regardless of how the international opinion would react, to demonstrate neighbouring CIS countries that either the US cannot support them, and/or that Russia, after years of neglect for the area, is now ready to fight for her interest in the post-Soviet space.

Signals of such a shift were visible in Moscow's course of foreign and security policy. They were already given earlier to the international community. A change in paradigm, based on a newly acquired strength due to the massive windfall profits from energy exports, which filled the Federal Reserve since 2003, was in the making. Vladimir Putin's address of the international security conference in Munich, February 2007, served as a first alarm bell. The address did not imply a fall back to Cold War attitudes. Quite the opposite, cooperation was the focal point and interest of the Russian leader, however under changed conditions. Putin asked the Western powers to recognize the reality of a changed international environment, which unraveled in front of their eyes and saw Russia's return as a great European power. Accordingly, Putin asked for a treatment of Russia on equal terms in order to enhance cooperation, and to meet challenges to common security and interests. Members of the Russian government, like Foreign Minister Sergei Lavrov, did reiterate this position over and over again.⁷

⁶ For a more detailed analysis see: E. Bahr, 'Geleitwort', in W. Schneider-Deters, & P. W. Schulze & H. Timmermann (eds), *Die Europäische Union, Russland und Eurasien* (2008), 19-25.

⁷ S. Lavrov, 'Die Kaukasus-Krise und die Ukraine', in *Frankfurter Allgemeine Zeitung*, 15 September 2008, 8; see also, P. W. Schulze, 'Russlands Rückkehr als Machtfigur

The Caucasian conflict saw all three key geopolitical players in action, i.e. the EU, Russia and the USA. And of course, their motivations and interests differed quite substantially. However, as indicated, the management of the conflict prefigured in some way the shifts in international power constellations that may allow us to foretell the future working of a multi-polar world – at least for the overall European space.

Let me enhance this thesis with a few suggestions:

1. The European Union staged a dramatic and successful comeback in authority and reputation during the Caucasian crisis. Let us remember: the EU was barely visible and immobilized in her policies towards Eastern Europe after the ambitious project of a European constitution failed in 2005. And even the fate of the watered-down Lisbon Treaty is still in doubt due to the Irish referendum. However, suddenly the EU appeared nearly out of the blue to manage the Caucasian crisis. The answer is not easy and may contain two reasons. Definitely, despite the temporary weakness of the EU, its authority and potential power was never in doubt in Moscow's foreign policy circles. The Kremlin slowly but steadily accepted and feared the EU as a geopolitical rival in this part of the European space. In addition, it seemed to be pure luck, that the EU-presidency was held by the French president Sarkozy. His political skills and authority were at hand at the right time to conclude a cease fire, stop the war and hammer out a de facto peace arrangement which allowed all parties to save face. The Russian president Dmitri Medvedev was well advised to accept the compromise and to pull Russian troops back according to the Six-Points-Agreement reached between the EU and Russia. As a result Russia demonstrated her willingness for a lasting conflict resolution and the EU stated clearly her interests in shaping the fate of "Zwischeneuropa". In addition, it needs to be stated, that contrary to Russia the EU had very little means to pressure Russia into accepting the compromise solution. Russia knew the limits of her power quite well.

2. While active in the preparation of the conflict, Washington and the Bush administration were almost entirely blocked from

its solution. This was of course partly due to the presidential election campaign. But there are other, more structural factors, which kept the US out of the picture. First, changes in the international environment point to an early end of the uni-polar and US-dominated world order. Second, the US seems to suffer from a phenomenon which first appeared at the end of the “imperial presidency” of Richard Nixon, i.e. of “imperial overreach”. The Bush-administration got stuck in a plethora of barely solvable conflicts and issues, which it helped generate by irresponsible policy actions. And, in addition, being to a highly degree responsible for the Caucasian war, Washington could neither be part of, nor a partner in endeavors to look for, a solution. This situation may not change under the new Obama presidency, because a paradigm-shift has also happened in the US: the global economic and financial crisis has moved domestic issues to the top of the agenda in the foreseeable future.

3. As stated, Russia’s return as an active great power to the international scene will limit the range and manoeuvrability of NATO and the European Union to shape the political and security landscape of Europe. Georgia was a test case; the real problem for Russia’s European relations will arise with the future of the Ukraine.

4. Russia’s policy towards the “Near Abroad” has undergone a fundamental change. During the 1990s nearly all projects of closer cooperation among CIS countries failed. Even Putin’s pet project to stem the EU’s eastern move by creating the “United Economic Space” (together with Kazakhstan, Ukraine and Belarus) in Yalta in 2003 broke down due to events in the Ukraine. Ever since, the CIS space has not been abandoned as in the 1990s when the Russian state had no means to engage there. Since 2004, Moscow has tried to bring such countries into closer political, economic and security cooperation, which could or would not embrace the Western calls for pluralism, democracy, and the rule of law.

5. As indicated earlier, the zone of potential conflicts between Russia and the European Union stretches from the Baltic Sea to the space between the Caspian and the Black Sea. The states in

this space lack any preconditions to look for the security and welfare of the region by their own means. They are pulled in opposite directions. And the external powers of attraction, i.e. the EU, Russia, and also the USA, exert considerable influence on their internal political stability. In my view, there are four different scenarios possible for the near future: first, the area and its states will be completely dominated and split up between the EU and Russia; second, Russia and the EU will come to some mutual understanding to contain their rivalry and work commonly with these states on an equal basis. Third, a murky status quo will be preserved in which each side avoids policy actions that could be understood as hostile and could provoke counter-measures in return. Fourth, the issue will be solved by the creation of a new European Security Architecture in which Russia and the European Union, including NATO will form a real strategic partnership for peace and security in Europe.

The purging power of the conflict in Russian-European relations appeared shortly after the war ended.

Russia fulfilled the Six-Points-Agreement and as a reconciliatory signal, the EU invited Moscow again to discuss the future shape and content of their Partnership and Cooperation Agreement (PCA), which expired in 2007. It is only to be hoped that the cardinal mistake of the first PCA, not to define the role of Russia in Europe, will not be repeated. Despite all the bubbled foam about a “strategic partnership” emanating from Brussels, and even from some national governments, the relation between the EU and Russia always lacked clarity. This confusion was of course shared on the Russian side as well. Brussels did not know how to deal with Russia and vice versa. There was no strategy on either side and it was sometimes utterly unclear whether Russia was perceived as a potential enemy, a rival or only a competitor. The integration of the former COMECON countries into the EU added new fuel to complicate the issue.

At least for NATO such doubts did not exist, explaining the two rounds of expansion to the East. And NATO even reopened, in 2009, the temporarily disrupted function of the NATO-Russia-Council. And the new US president seems to be more inclined to invite rather than to alienate the country in meeting challenges both countries and the international community face in the future.

And miraculously, suddenly the highflying idea Russian president Dmitri Medvedev announced during his first visit to Berlin in June 2008,

namely to work for a new Peace and Security Order which would encompass the whole of Europe seems to attract even some transatlantic circles.

Maybe the process Gorbachev tried to set in motion, striving for a “Common European Home”, which then led to the Charter of Paris - in its nature a peace-constitution for the whole of Europe - can be revived again.

The War between Russia and Georgia – Consequences and Unresolved Questions

Angelika Nußberger*

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A. Introduction

“The [Parliamentary] Assembly condemns the recognition by Russia of the independence of South Ossetia and Abkhazia and considers it to be a violation of international law and of the Council of Europe’s statutory principles. The Assembly reaffirms its attachment to the territorial integrity and sovereignty of Georgia and reiterates its call on Russia to withdraw its recognition of the independence of South Ossetia and Abkhazia and to fully respect the sovereignty and territorial integrity of Georgia, as well as the inviolability of its borders.”¹

Such is the wording of the resolution of the Parliamentary Assembly of the Council of Europe half a year after the five-days-war between Georgia and Russia that broke out in the night between 7 and 8 August 2008. The message is clear and unequivocal without much diplomatic balancing between different positions. The strong language used is quite unusual for an international political body such as the Parliamentary Assembly. It thus takes a clear stance in the struggle between Russia and Georgia about the legal status of the break-away regions Abkhazia and South Ossetia and expects Russia as a member State to comply with its harsh resolution. The Russian press denounced the demands to be “unacceptable” as it would lead to another war in the Caucasus, if Russia fulfilled the demands;² the overall negative tone of the resolution was explained as a reaction of the Assembly to the unfortunate lobbying of the Russian delegation and thus as a loss in a political game.³

It is not to be expected that the conflict will be solved on the basis of resolutions of the Parliamentary Assembly, although both Georgia and Russia are members of the Council of Europe and obliged to stick to its basic principles. But the Parliamentary Assembly’s voice is not strong enough to lead the way in this long-lasting conflict. Many international organisations and institutions have already been and still are active in the peace-building

¹ Parliamentary Assembly of the Council of Europe Res. 1647, 28 January 2009.

² Cf. the echo in the Russian press: L. Korotun, ‘The resolution of the Parliamentary Assembly on the consequences of the war in the Caucasus is not objective and brings into discredit this international organisation’, in *Golos Rossii*, 1 February 2009; Dar’ja Iur’eva, ‘Resolution without extreme positions, The Parliamentary Assembly has refused to „punish“ Russia’, *Rossijskaja Gazeta*, 29 January 2009.

³ M. Zygar, ‘Russia was defeated in words’, *Kommersant* No. 15 (4070), 29 January 2009) <http://www.kommersant.ru/doc.aspx?DocsID=1109854> (last visited 23 April 2009).

process in the Caucasus. It was the European Union that brokered the conditions of the cease fire.⁴ The United Nations continue to be „actively seized of the matter“, although they deal explicitly with Abkhazia where the UNOMIG⁵ peacekeeping forces are deployed⁶ and only implicitly with the situation in South Ossetia.⁷ Legal solutions to the conflict are being sought before the International Court of Justice⁸ and the European Court of Human Rights.⁹ Nevertheless, despite all efforts, the conflict is “refrozen“; the basic questions that had been unresolved between the early 1990s and the outbreak of the war in 2008 remain unresolved ever since.

The legal assessment of the situation given by Georgia is completely opposed to the legal analysis of the problems by the Russian authorities. The main purpose of this article is to explain the divergent views of the two opponents and to analyse if South-Ossetia and Abkhazia had a right to secession based on the principle of self-determination.

⁴ Cf. the Six Points Peace Plan of 12 August 2008 available at http://smr.gov.ge/uploads/file/Six_Point_Peace_Plan.pdf (last visited 23 April 2009).

⁵ United Nations Observer Mission in Georgia.

⁶ Cf. SC Res. 1808, 15 April 2008, SC Res.1839, 9 October 2008; SC Res. 1866, 13 February 2009, all available at <http://www.un.org/Depts/dpko/missions/unomig/unomigDrs.htm> (last visited 23 April 2009).

⁷ The affirmation contained in the SC Res. 1808 of 15 April 2008 of the „commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders“ is important for the assessment of the situation both in Abkhazia and in South Ossetia.

⁸ Cf. Georgia institutes proceedings against Russia for violations of the Convention on the Elimination of All Forms of Racial Discrimination, Press Communication of the ICJ, 12 August 2008, available at <http://www.icj-cij.org/docket/files/140/14659.pdf> (last visited 23 April 2008); on the background of the complaint cf. A. Nußberger, ‘Der „Fünf-Tage-Krieg“ vor Gericht: Russland, Georgien und das Völkerrecht’, 11 *Osteuropa* (2008), 19-40; The ICJ has already ordered provisional measures: cf. *Case Concerning Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Request for the Indication of Provisional Measures, available at www.icj-cij.org/docket/files/140/14801.pdf?PHPSESSID=ff0566746dfa5f5f123b2dfe39389430 (last visited 9 March 2009).

⁹ Cf. *State Complaint Georgia v. the Russian Federation*, documented in *Europäische Grundrechte-Zeitschrift* 2007, 242; cf. Nußberger, *supra* note 8, 24-40.

B. The Controversy Over the Legal Status of South Ossetia and Abkhazia – Basic Standpoints

The controversy begins with how to name what happened in August 2008 and triggered all the consequences– was it a “war between Georgia and Russia“ or was it a “military action of the Georgian leadership against the population living on the territory of South Ossetia“? The Russian delegation to the Parliamentary Assembly of the Council of Europe claims that by calling it a “war between Russia and Georgia“ the Parliamentary Assembly “gave a wrong diagnosis, prescribed the wrong medicine and suggested to Russia to cure the illness with the wrong means.”¹⁰ If there is already no consensus on how to qualify the outbreak of the hostilities and who were the real opponents – let alone who was the aggressor¹¹ – there cannot be any common understanding of the consequences.

While the Russian side claims that Georgia has not only illegally waged an aggressive war against South Ossetia, but also violated basic human rights in such a way that the South Ossetians could rely on their right to self-determination and declare their independence from Georgia, Georgia holds that it acted according to international law when it defended the integrity of its own territory. It denies any right to secession based on the principle of self-determination to the South Ossetian people and considers the break-away region still as a part of its territory. Therefore the deployment of the Russian military on the territory of South Ossetia is interpreted as an illegal occupation. The Russians, on the contrary, claim that they have concluded valid international treaties with the independent Republic of South Ossetia;¹² and the stationing of troops¹³ is therefore based on a valid international treaty.

¹⁰ M. Vignanskij & A. Mineev, ‘Wrong diagnosis’, 14 *Vremja Novostej* (online), 29 January 2009.

¹¹ Cf. the analysis of the war in South Ossetia from the international perspective: A. Nußberger, ‘Völkerrecht im Kaukasus – Postsowjetische Konflikte in Russland und Georgien’, *Europäische Grundrechte-Zeitschrift* (2008), 457-466; O. Luchterhandt, ‘Völkerrechtliche Aspekte des Georgien-Krieges’, 46 *Archiv des Völkerrechts* (2008), 435-480 (Völkerrechtliche Aspekte des Georgien- Krieges).

¹² Reference is made to the Russian-South-Ossetian *Treaty on Friendship, Cooperation and Mutual Assistance*, ratified by the Russian Parliament on 4 November 2008.

¹³ According to the Report of the Secretary General on the situation in Abkhazia, Georgia, UN Doc S/2008/631, 3 October 2008; pursuant to the SC Res. 1839, 9 October 2008, there have been deployed 3, 700 troops in South Ossetia.

The situation is somewhat different in Abkhazia. It had not been attacked by Georgian troops during the Russian-Georgian war in 2008. Therefore, according to the Georgian point of view, there cannot be any justification for the break-away of this part of its territory and for the deployment of Russian troops. Russia, on the contrary, argues that a military threat to Abkhazia was imminent. It therefore acted in order to prevent human rights violations similar to those allegedly committed by Georgia in South Ossetia. The stationing of troops¹⁴ is justified on the basis of international treaties concluded with the independent Republic of Abkhazia.¹⁵

Thus there are parallels between the situation in South Ossetia and in Abkhazia. In some international documents such as the resolutions of the Parliamentary Assembly of the Council of Europe they are considered together.¹⁶ This does not apply to the resolutions of the Security Council.¹⁷ Immediately after the war on the 23 October 2008, Georgia has passed a law "On Occupied Territories" which embraces both what is called the "Territory of the Autonomous Republic of Abkhazia" and the "Tskhinvali region (territory of the former Autonomous Republic of South Ossetia)" thus defining one common legal regime for both regions.

The present situations in Abkhazia and South Ossetia are therefore quite similar. Nevertheless, the different roots and developments of the conflicts have to be taken into account. The present article is mainly focussed on the situation in South Ossetia, but also gives some indications on the particularities of the Abkhaz-Georgian conflict.

Despite all the complexities of the situation there is one core question of international law that has to be answered in order to assess the legal situation in South Ossetia and Abkhazia: Did these territories have a right to secession from Georgia based on international law? If yes, the Russian Federation was right to recognize South Ossetia and Abkhazia as independent States. If yes, the Russian Federation could conclude international treaties

¹⁴ According to the Report of the Secretary-General (see *supra* note 13) the same amount of troops is deployed to Abkhazia and South Ossetia.

¹⁵ Reference is made to the Russian-Abkhaz Treaty on Friendship, Cooperation and Mutual Assistance, ratified by the Russian Parliament on 4 November 2008.

¹⁶ Cf. Parliamentary Assembly of the Council of Europe Res. 1633, 2 October 2008, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1633.htm> (last visited 13 March 2009); Parliamentary Assembly Res. 1647, 28 January 2009, Parliamentary Assembly Res. 1648, 12 January 2009, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1648.htm> (last visited 13 March 2009).

¹⁷ See *supra* notes 6 and 7.

with South Ossetia and Abkhazia. If no, the Russian Federation is guilty of an illegal intervention in matters within the domestic jurisdiction of a member State of the United Nations and has violated international law. If no, the deployment of Russian troops in South Ossetia and Abkhazia constitutes an “illegal occupation“.

C. Right to Self-determination and Right to Secession – an On-going Dispute in International Law

I. Basic Antinomy Between the Right to Secession and the Principle of Territorial Integrity

While the right to self-determination, the roots of which can be traced back to the late 18th Century Age of Enlightenment,¹⁸ is quite unanimously recognized in international law,¹⁹ there is a fierce controversy about the consequences that might be drawn from it. The problem is that the right to self-determination does not stand alone, but has to be read together with the principle of territorial integrity. As a matter of fact, these two principles are legal antinomies and cannot be easily harmonized.²⁰ Therefore it can be argued that the right to self-determination implies only the right to an adequate democratic representation within a multi-national, plural-ethnic State and the right to an adequate protection of the rights and interests of the mi-

¹⁸ E. Mc Whinney, *Self-Determination of Peoples and Plural-Ethnic States in Contemporary International Law. Failed States, Nation-building and the Alternative, Federal Option*, (2007), 1; W. G. Grewe, *Epochen der Völkerrechtsgeschichte*, 2nd ed. (1988), 493-495.

¹⁹ Cf. the wording of Article 1 (2) of the United Nations Charter as well as Article 1 of the *International Covenant on Civil and Political Rights* and Article 1 of the *International Covenant on Economic, Social and Cultural Rights*; cf. also the International Court’s holding in the *East Timor Case (Portugal v. Australia)* that the principle of self-determination is „one of the essential principles of contemporary international law“, ICJ Reports 1995, 102, para. 29.

²⁰ See Mc Whinney, *supra* note 18, 5; T. Schweisfurth, *Völkerrecht* (2006), 382; A. Verdross & B. Simma, *Universelles Völkerrecht*, 3rd ed. (1984), 320, K. J. Partsch, ‘Selbstbestimmung’, in R. Wolfrum & C. Philipp (eds), *Handbuch Vereinte Nationen*, 2nd ed. (1991), 745; S. Hobe & O. Kimminich, *Einführung in das Völkerrecht*, Tübingen, Basel 8th ed. (2004), 114-115; M. Herdegen, *Völkerrecht*, 7th ed. (2008), 250-252; T. Stein & C. von Buttlar, *Völkerrecht*, 11th ed. (2005), 258-259; D. Murswiek, ‘The Issue of a Right of Secession – Reconsidered’, in C. Tomuschat (ed.), *Modern Law of Self-Determination*, (1993), 37-38.

minority group, but nothing more. This might justify the demand to a particular constitutional status of the minority group within the general system, although even that is not a necessary conclusion. As the right to self-determination has to be balanced against the principle of „territorial integrity“ it cannot be interpreted as a guarantee of a right to secession unless very specific conditions are met. In this context it is argued that the right to self-determination can mutate into a right to secession if the minority group is categorically and permanently excluded from the participation in the political process and its elementary human rights are violated. It is generally assumed that gross human rights violations such as genocide must occur.²¹

The definition of such preconditions for the exercise of an external right to self-determination can be based on the famous statement contained in the “Friendly Relations Declaration“: “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”²²

Although in theory it might be possible to agree on the above-mentioned prerequisites for the right to secession, in practice the legal assessment is often rendered difficult by the time-factor. Outbreaks of violence between ethnic groups do occur. But do they justify secession if the situation has calmed down afterwards and the multi-ethnic State has even offered far-reaching guarantees of autonomy? Is it still possible to argue that it is intolerable for the minority to stay within the State? The problem is intricate. The principle of self-determination would be a “*nudum ius*“ if it did not grant a relief in situations of continuing violence and hatred within the borders of a State. But on the other hand the principle of territorial integrity is a factor of stability that cannot be underestimated. With the secession of a minority group and the break-up of the unity of the State the former majority will form a new minority within the new State. Thus, as a rule,

²¹ Cf. the examples given by K. Doehring, *Völkerrecht*, 2nd ed. (2004), 347; suppression of religious freedom, prohibition of inter-marriage, abolition of the protection of property and wide-spread confiscations, severe punishments without fair trial; see also H.-J. Heintze, ‘Äußeres Selbstbestimmungsrecht der Völker’, in K. Ipsen (ed.), *Völkerrecht*, 5th ed (2004), 424-425; as well as the authors quoted in *supra* note 20.

²² GA Res. 2625 (XXV), 24 October 1970.

the tensions between the ethnicities are not solved, only the relationship between minority and majority is reversed. The alternative is what often happens: an act of ethnic cleansing that expels the former majority population from the territory of the new “homogeneous“ State. In this case, one gross human rights violation is answered by another one; the chain of hatred and revenge becomes endless. Such developments can never be seen in conformity with international law. In any case, therefore, secession based on the principle of self-determination should be considered to be only the *ultima ratio* solution if all other possibilities have been tried out in vain.

II. The Case of Kosovo

The most relevant and most controversial case – outside the context of de-colonialization – is the case of the Kosovo²³ which declared its independence on 17 February 2008 explicitly alluding to “the years of strife and violence in Kosovo that disturbed the conscience of all civilised people“. The *opinio iuris* of the international community as to the legality of Kosovo’s declaration of independence was completely divided. Russia and Serbia were clearly opposed,²⁴ some European countries as well as the United

²³ There is already abundant literature on the problem of Kosovo’s declaration of independence and the ensuing problems of international law; see e.g. C. Schaller, ‘Die Sezession des Kosovo und der völkerrechtliche Status der internationalen Präsenz’, 46 *Archiv des Völkerrechts* (2008) 2, 131-171; S. Cvijic, ‘Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo’, 8 *German Law Journal* (2007) 1, 57-79; M. Goodwin, ‘Special Issue Introduction – What Future for Kosovo? From Province to Protectorate to State? Speculation on the Impact of Kosovo’s Genesis upon the Doctrines of International Law’, 8 *German Law Journal* (2007), 1; P. Hilpold, ‘Auf der Suche nach Instrumenten zur Lösung des Kosovo-Konfliktes: Die trügerische Faszination von Sezession und humanitärer Intervention’, in J. Marko (ed.), *Gordischer Knoten Kosovo/a: Durchschlagen oder entwirren?* (1999), 157-189; G. Nolte, ‘Kein Recht auf Abspaltung’, *Frankfurter Allgemeine Zeitung* (online), 13 February 2008, available at <http://www.faz.net/s/RubDDBDABB9457A437BAA85A49C26FB23A0/Doc~EDD236A7785834BEDB55B003983C0159B~ATpl~Ecommon~Scontent.html> (last visited 13 March 2009); K. William Watson, ‘When in the Course of Human Events: Kosovo’s Independence and the Law of Secession’, 17 *Tulane Journal of International and Comparative Law* (2008) 1, 267-293.

²⁴ Statement of the Russian Representative Churkin: „The 17 February declaration by the local assembly of the Serbian province of Kosovo is a blatant breach of the norms and principles of international law – above all of the Charter of the United Nations – which undermines the foundations of the system of international relations. [...] The unilateral declaration of independence and its recognition are incompatible with the

States were clearly in favour, many countries were undecided. These divergent attitudes are reflected in the follow-up: 55 States (amounting to roughly more than one quarter of the UN member States) have recognized Kosovo as an independent State. On the initiative of Serbia the UN General Assembly voted to refer Kosovo's declaration of independence to the International Court of Justice in October 2008. The ICJ is asked to give an advisory opinion on the legality of Kosovo's declaration of independence from Serbia. It is interesting to note that 77 countries voted in favour, 6 against and 74 abstained.²⁵

It is also controversial whether the case of Kosovo can be considered as a "precedent" in international law. In the preamble to Kosovo's declaration of independence it is underlined that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation". Those countries which have recognized the independence of Kosovo have set out with all clarity that Kosovo is not a precedent for other territorial conflicts;²⁶ those countries strongly opposed to the step taken by Kosovo argue that, as a matter of fact, it is a precedent.²⁷ From the point of view of international law this debate is somewhat odd as "precedents" are not a source of international law. It might be argued that a new international customary law has developed on the basis of State practice and *opinio iuris*. But even if the requirements for the creation of new rules of customary law are watered down,²⁸ a unique case leading to a major dispute

provisions of the Helsinki Final Act, which clearly specify the principles of inviolability of frontiers and territorial integrity of States." UN-Doc. S/PV.5839, 18 February 2008.

²⁵ Cf. The General Assembly of the United Nations requests an advisory opinion from the Court on the unilateral declaration of independence of Kosovo, Press Communication of the ICJ, 10 October 2008, available at <http://www.icj-cij.org/docket/files/141/14797.pdf?PHPSESSID=e2e2cf31f3715097a4cbbb309856e7d> (last visited 13 March 2009).

²⁶ Cf. on the *sui generis* thesis UN Doc. S/2007/168, para. 15.

²⁷ E.g. Russia argues that the independence of the Kosovo creates a precedent for Europe, see the statement of the President of the Duma Boris Gryshov, 1 April 2008, Ria Novosti; available at <http://de.rian.ru/world/20080401/102673108.html> (last visited 13 March 2009); an analysis of the differences and similarities between Kosovo on the one hand and the break-away regions in Georgia on the other hand is provided by A. Aksenok, 'Self-determination between the law and realpolitik', 5 *Rossija v global'noj politike* (2006) available at <http://www.globalaffairs.ru/articles/6214.html> (last visited 9 March 2009).

²⁸ Cf. on the discussion on "instant custom": J. Kammerhofer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', 15 *European Journal of International Law* (2004) 3, 523-553, R. Kolb, 'Se-

within the international community does not fulfill the requirements set by Article 38 of the Statute of the ICJ for new customary law to come into existence. And even if the declaration of independence and the ensuing recognition of Kosovo as an independent State by many other States were interpreted as triggering off the creation of a new rule, the States denying Kosovo's right would have to be considered as persistent objectors. Therefore they would be excluded from relying on such a new rule themselves.

D. South Ossetia's Right to Secession

The conflict between Russia, Georgia and South Ossetia has a long prehistory dating back to the early days of the Russian Revolution or even further back to the times of the Russian Empire.²⁹ The basic problem is that the Ossetians, who are ethnically different from both the Russians and the Georgians, are divided into two groups, in the North Ossetians and the South Ossetians separated by a high chain of mountains of the Caucasus. Whereas North Ossetia was integrated first into the Russian Empire and then into the Russian Socialist Federative Soviet Republic (RSFSR), South Ossetia had a different fate. It also had belonged to the Russian Empire in the 19th century, but was separated from North Ossetia and integrated into the administrative district of Georgia. When Georgia declared its independence in 1918, a civil war broke out between the Bolshevik South Ossetians and the Menshevik Georgians that led – in the view of the South Ossetians – to genocide.³⁰ After Georgia had been re-conquered by the Red Army South Ossetia was declared to be part of the Georgian Soviet Republic. The autonomous status as an “autonomous region“ was enshrined in all the Soviet constitutions.³¹

Under Soviet rule ethnic tensions and conflicts were suppressed. With the end of the Soviet Union they broke out like eruptions. At several points

lected Problems in the Theory of Customary International Law', 50 *Netherlands International Law Review* (2003) 2, 119-150.

²⁹ Cf. the overview given by O. Luchterhandt, *Gescheiterte Gemeinschaft, Zur Geschichte Georgiens und Südossetiens*, 11 *Osteuropa* (2008), 97-110 (*Gescheiterte Gemeinschaft*); M. S. König, 'Der ungelöste Streit um Südossetien', in M.-C. von Gumpenberg & U. Steinbach (eds), *Der Kaukasus. Geschichte – Kultur – Politik*, (2008), 123; for the perspective of a Russian historian teaching at North Ossetia University cf. M. Blied, *South Ossetia in the Midst of Russian-Georgian conflicts* (2006), 15-303.

³⁰ Cf. Blied, *supra* note 29, 361-375.

³¹ Cf. Article 15 of the Soviet Constitution of 1924, Article 25 of the Soviet Constitution of 1936 and Article 87 of the Soviet Constitution of 1977 determining that the South Ossetian autonomous Oblast is part of the Georgian Socialist Soviet Republic.

in the progression of events – during the collapse of the Soviet Union, after the civil war in 1992, during the period of the frozen conflict between 1992 and 2008 – the South Ossetians might have had a legal right to secession. They tried to secede in 1992, but were not successful, as no other State recognized their independence. The last and decisive step – this time supported by Russia – was taken after the military conflict in August 2008.

I. Separatist Developments in the Final Period of the Soviet Union

According to the Preamble to the Minsk Agreement of 8 December 1991 concluded between the heads of State of the RSFSR, the Ukrainian SSR and the Byelorussian SSR the Soviet Union had “terminated its existence as a subject of international law and a geopolitical reality”.³² This was confirmed in the “Declaration of Alma-Ata” by ten of the fifteen former Soviet Republics.³³ Already before this final step was taken some of the former Soviet Republics faced separatist tendencies within their borders fixed on the basis of Soviet law. This is true for the RSFSR where many of the autonomous regions declared their sovereignty and asked for a redistribution of competences.³⁴ Tatarstan, for example, declared that it was only associated with the RSFSR and based its relationship to Russia on international law. Chechnya as a part of the Ingush-Chechen autonomous region went even one step further and declared its independence on 6 September 1991.³⁵ Similar movements were to be observed in other former Soviet Republics such as in the Moldovan Soviet Socialist Republic concerning

³² Agreement Establishing the Commonwealth of Independent States (Minsk Agreement), 8 December 1991, *Diplomaticeskij Vestnik* (1992) 1; English translation: 31 ILM (1992) 1, 142-146.

³³ Documents of Alma Ata of 21 December 1991, *Diplomaticeskij Vestnik* (1992) 1, 6-13; English translation 31 ILM (1992) 1, 147-154.

³⁴ Cf. M. Kazancev, ‘Rechtliche Probleme der Wechselbeziehung zwischen der Russischen Verfassung und dem Föderationsvertrag’, *Osteuropa Recht* (1994), 383-392.

³⁵ See H. Sauer & N. Wagner, ‘Der Tschetschenien-Konflikt und das Völkerrecht, Tschetscheniens Sezession, Russlands Militärinterventionen und die Reaktionen der Staatengemeinschaft auf dem Prüfstand des internationalen Rechts’, 45 *Archiv des Völkerrechts* (2007), 53-83.

Transnistria and in the Azerbaijan Soviet Socialist Republic concerning Nagornyj Karabach.³⁶

II. South Ossetia's Right to Self-determination During the Collapse of the Soviet Union

The conflict between South Ossetia and Georgia has to be seen as a remnant of the unresolved ethnical conflicts in the Soviet Union as well. It broke out long before the final collapse of the Soviet Union. The first decisive step was the redefinition of the legal status of South Ossetia by the regional South-Ossetian Soviet. Although, according to the Soviet Constitution of 1977, South Ossetia had been an "autonomous region",³⁷ it demanded the status of an "autonomous republic", which, by definition, has a much broader range of competences according to the Soviet Constitution.³⁸ This was not only in contradiction to the Soviet Constitution where the status of all federal parts were clearly and explicitly defined, but also to the Constitution of the Georgian Soviet Socialist Republic. Therefore the Presidium of the Supreme Soviet of Georgia declared the resolution of South Ossetia for null and void.³⁹ Nevertheless, on 20 September 1990 South Ossetia declared its "sovereignty" based on the right to self-determination of the peoples. On 21 December 1991, after a bloody civil war, South Ossetia declared its independence,⁴⁰ right on the same day when the Commonwealth of Independent States was founded in Alma-Ata. Subsequently this resolu-

³⁶ J. Smith, '„Soviet Orphans“: the historical roots of the Transdnister, Nagorny Karabakh, Abkhaz and Southern Ossetian conflicts', *Sravnitel'note Konstitucionnoe Obozrenie* (2006) 4, 128.

³⁷ Cf. Article 86 of the Soviet Constitution: An Autonomous Region is a constituent part of a Union Republic or Territory. The Law on an Autonomous Region, upon submission by the Soviet of People's Deputies of the Autonomous Region concerned, shall be adopted by the Supreme Soviet of the Union Republic.

³⁸ Article 82 of the Soviet Constitution: An Autonomous Republic is a constituent part of a Union Republic. In spheres not within the jurisdiction of the Union of Soviet Socialist Republics and the Union Republic, an Autonomous Republic shall deal independently with matters within its jurisdiction. An autonomous Republic shall have its own Constitution conforming to the Constitutions of the USSR and the Union Republic with the specific features of the Autonomous Republic being taken into account.

³⁹ Resolution of 16 November 1989 based on Article 115 para. 10 of the Georgian Constitution; reprinted in V. S. Chizhevsky (ed.), *Southern Ossetia – eternally together with Russia! Historical-legal foundation of the adherence of the Republic Southern Ossetia to Russia. Collection of documents and materials* (2004), 24.

⁴⁰ Document reprinted in Chizhevsky, *supra* note 39, 91-92.

tion was confirmed by a referendum on 19 March 1992.⁴¹ At the same time the people voted for a re-unification with Russia. But Moscow did not fulfil South Ossetia's plea to be integrated in the Russian Federation, although it was reiterated several times in the following years.⁴² Neither was South Ossetia recognized as an independent State by any member State of the United Nations.

1. South Ossetias Self-definition as an "Autonomous Republic" in 1989

The legal question that arises in this context is whether South Ossetia could rely on the right to self-determination in order to redefine its status. At that time it was a sub-regional unit of a State that itself was integrated in a *de iure* federal State.⁴³ Two questions have to be answered in this context: Were the Ossetians in possession of the right to self-determination? And, if yes, would the right to self-determination be a sufficient basis for claiming a redefinition of the constitutional status – in contradiction to the then valid and applicable Constitution?

The right to self-determination is a collective right. It belongs to the "peoples". Minorities distinct from the majority group of the population can rely on the right to self-determination if they form "a people". The definition of "minorities" comprises objective and subjective criteria. Although there is no consensus on how to define minorities, the definition suggested by Capotorti is generally accepted: "A minority is a group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity directed towards preserving their

⁴¹ Document reprinted in Chizhevsky, *supra* note 39, 94-95.

⁴² On the Russian politics in the Caucasus after the collapse of the Soviet Union *cf.* A. Manutscharjan, 'Russlands Kaukasuspolitik unter den Präsidenten Boris Jelzin und Wladimir Putin', in E. Reiter (ed.), *Die Sezessionskonflikte in Georgien* (2009), 181-217; J. Perovič, 'From Disengagement to Active Economic Competition: Russia's Return to the South Caucasus and Central Asia', 13 *Demokratizatsijy* (Winter 2005), 61-85; A. Y. Skakov, 'Russia's role in the South Caucasus', 2 *Helsinki Monitor* (2005), 120-126.

⁴³ *Cf.* Article 70 of the Soviet Constitution (1977): 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.

culture, traditions, religion or language.”⁴⁴ – In this sense the Ossetian population living in Georgia can be considered as a “minority” people forming a people and can therefore claim to have the right to self-determination. As explained above, this status conveys certain rights on the basis of international law such as the right to political participation and to the protection of the specific interests of the minority. But the right to self-determination does not automatically convey a specific privileged status in a given constitutional system. It is true that according to Soviet constitutional law the legal status of an “autonomous region” was less privileged than the status of an “autonomous republic”. Autonomous republics had the right to take part in decision-making on the Union level and “to ensure comprehensive economic and social development on its territory, facilitate exercise of the powers of the USSR and the union republic on its territory, and implement decisions of the highest bodies of state authority and administration of the USSR and the Union Republic” (Article 83 of the Soviet Constitution). Furthermore, it was stipulated that the territory of an Autonomous Republic could not be altered without its consent (Article 84 of the Soviet Constitution). But such concrete privileges cannot be deduced from the right to self-determination. The determination of the constitutional status of minority groups is a matter of domestic affairs.

2. South Ossetias Declaration of Sovereignty in 1990

The declaration of sovereignty pronounced by South Ossetia on 20 September 1990 has to be seen within the context of the collapse of the Soviet Union. During that period all Soviet Republics and many autonomous republics and autonomous regions first declared their “sovereignty” and subsequently their “independence”. “Sovereignty” was understood as the right freely to determine the political status and economic and social development irrespective of objections from the central government; “independence” was the last step in the process of secession and meant the foundation of a new State on the basis of international law.

In the process of the dissolution of the Soviet Union the international community accepted the move towards sovereignty and independence by the Soviet republics, but denied the same rights to the autonomous republics and autonomous regions. This attitude can be based on the one hand on con-

⁴⁴ F. Capotorti, ‘Minorities’, in Rudolf Bernhardt (ed.) *Encyclopaedia of Public International Law*, Volume 3 (1997), 411.

stitutional considerations and on the other hand on the *uti-possidetis* principle in international law.

The Russian Constitution contained one very famous provision that had been without any practical meaning throughout the whole history of the Soviet Union, but served as a legal lever in the process of dissolution. The provision is short and concise and reads as follows: "Each Union Republic shall retain the right freely to secede from the USSR." (Article 72). But, according to the explicit wording of the Soviet Constitution, such a right is guaranteed only to the Soviet Republics,⁴⁵ but denied to all other regional entities defined in the Constitution such as autonomous republics, autonomous regions and autonomous areas. Therefore South Ossetia had no constitutional right to declare its sovereignty as a first step towards independence.

One of the dominant interests of international law is to guarantee stability. The dissolution of States is unavoidably connected with instability and insecurity. In order to minimise these negative consequences the *uti-possidetis* principle which developed within the context of decolonization is widely acknowledged in international law.⁴⁶ The *uti-possidetis* principle means that former internal State boundaries are regarded as boundaries between newly independent States. In the dissolution process this principle is strictly applied. Thus the inviolability of the former bounda-

⁴⁵ The Soviet Union consisted of the following 15 Republics: the Russian Soviet Federative Socialist Republic, the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic, the Uzbek Soviet Socialist Republic, the Kazakh Soviet Socialist Republic, the Georgian Soviet Socialist Republic, the Azerbaijan Soviet Socialist Republic, the Lithuanian Soviet Socialist Republic, the Moldavian Soviet Socialist Republic, the Latvian Soviet Socialist Republic, the Kirghiz Soviet Socialist Republic, the Tajik Soviet Socialist Republic, the Armenian Soviet Socialist Republic, the Turkmen Soviet Socialist Republic, the Estonian Soviet Socialist Republic.

⁴⁶ Cf. *Case Concerning the Frontier Dispute* (Burkina Faso v. Republic of Mali), ICJ Reports 1986, 554, 565, 566; *Case Concerning the Frontier Dispute* (Benin v. Niger), ICJ Reports 2005, 90, 108. The *uti-possidetis* principle was also applied in the dissolution process of Yugoslavia, cf. the statement of the Arbitration Commission of the International Conference on Yugoslavia responding to a request from Serbia on 20 November 1991: "Third – Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial status quo and, in particular, from the principle *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonization issues in America and Africa, is today recognized as a general principle" (reprinted in 3 *European Journal of International Law* (1992) 1, 182-184); this approach is criticised by S. R. Ratner, 'Drawing a Better Line: *Uti possidetis* and the Borders of New States', 90 *American Journal of International Law* (1996), 590-624 and P. Radan, *The Break-up of Yugoslavia and International Law* (2002), 244-245.

ries between the Soviet Republics is acknowledged in all the founding documents of the Commonwealth of Independent States.⁴⁷ It is once more confirmed in the “Declaration on the recognition of sovereignty, territorial inviolability of the boundaries between the States which are members of the Commonwealth of Independent States”.⁴⁸ The consequence of this principle for sub-regional units of former republics is that they are denied the right to secession. The process of dissolution is stopped on the first federal level and does not continue on subsequent level.

3. South Ossetias Declaration of Independence in 1991

On 26 April 2007 the Parliament of South Ossetia adopted a “Declaration on the genocide of the South Ossetians in the period between 1989 and 1992”.⁴⁹ It states that what happened between 1989 and 1993 had been a national liberation fight of the peoples of South Ossetia against Georgian national chauvinism and separatism”. The actions of Georgia had been “an aggression based on an imperialist and fascist ideology” and the actions of the Georgian leadership had to be qualified as “genocide”.⁵⁰ As a matter of fact there were fights between Georgian troops of the Ministry of the Interior and South Ossetians in 1991 which led to a high death toll and the destruction of many villages.⁵¹ The outbreak of violence was fuelled by ideology, by what can be seen as an over reactive nationalism on both sides after the far-reaching suppression of national culture and heritage under Soviet rule. Under the slogan “Georgia for the Georgians” the Georgian President Gamsakhurdia had promoted a nationalist policy suppressing minority rights, and the possibility that members of ethnic minorities even be denied Georgian citizenship was discussed.⁵² But despite the atrocities of the civil war it is difficult to prove that the South Ossetians were victims of “genocide”. Contrary to the situation in Kosovo the international community did

⁴⁷ See *supra* notes 32.

⁴⁸ Reprinted in *Dejstvujučee meždunarodnoe pravo* (1996), 196-197.

⁴⁹ Regnum News Agency, available at <http://www.regnum.ru/news/630844.html> (last visited 13 March 2009) and http://osgenocide.ru/2007/05/18/print:page,1,deklaracija_o_genocide_juzhnykh_osetin_v_19891992_gg_i_ego_politikopravovaja_ocenka.html (last visited 13 March 2008).

⁵⁰ Cf. paragraphs 1-3 of the resolute part of the declaration.

⁵¹ Cf. Bliev, *supra* note 29, 416; Luchterhandt, *Gescheiterte Gemeinschaft*, *supra* note 29, 107; J. Gerber, *Nationale Opposition und kommunistische Herrschaft seit 1956* (1997), 216-217.

⁵² *Id.*, 217.

not actively intervene. The Russian troops as well as volunteers from North Ossetia engaged in the fighting and pushed back the Georgians. The conflict was ended on 24 June 1992 by the signature of an “Agreement on the principles for the regulation of the Georgian-Ossetian conflict” by the Russian President Yeltsin, the Georgian President Shewardnadze and representatives of North and South Ossetia.⁵³

In this situation, could the South Ossetians invoke the right to self-determination in order to justify secession from Georgia? They had been denied political participation and had suffered from discriminatory human rights violations. Nonetheless, it is difficult to argue that secession was the *ultima ratio* in 1992 as all sides agreed to try to find political solutions to the conflict.⁵⁴ The nationalist Georgian President Gamzachurdia had been replaced by the more moderate President Shewardnadze. The international community did not deem it necessary to intervene. There was a chance of a peaceful solution of the conflict without separation of the territories.

III. South Ossetia’s Right to Secession After the Russian-Georgian War in 2008

Between 1992 and 2008 the conflict between South Ossetia and Georgia was considered to be “frozen”. Neither could the fugitives and internally displaced people return to their houses in South Ossetia, nor did Georgia recognize South Ossetia’s declaration of independence. There were occasionally outbreaks of violence, but no large-scale military confrontations. Despite the declarations of good will to achieve a peaceful solution of the conflict, negotiations on various levels did not bring any tangible results. Georgia tried to arouse awareness of the situation before the international community, but his appeals to the United Nations⁵⁵ were not followed by any diplomatic activities. On 15 October 2004 South Ossetia adopted a new Constitution which stipulates in Article 1: “The Republic of South Ossetia is

⁵³ Bjuulleten meždunarodnyh dogovorov 1993, No. 8, 25.

⁵⁴ Cf. the declaration of principle contained in the Agreement of 24 June 1992: “The parties to the conflict reconfirm their obligation to resolve all controversial questions in a peaceful way without the application or threat of violence.”

⁵⁵ Cf. remarks of H. E. Mikheil Saakashvili, President of Georgia, On the Occasion of the 59th Session of the UN General Assembly, 21 September 2004, 4th plenary meeting, Document A/59/PV.4, 11-16: “a global solution with global guarantees that would lead to the establishment of the fullest and broadest form of autonomy – one that protects culture and language and guarantees self-governance, fiscal control and meaningful representation and power-sharing at the national government level.”

a sovereign democratic State based on the rule of law. It is founded as a result of the self-determination of the people of South Ossetia.” But this was a one-sided action as well, not followed by any reaction of the international community.

The independence of South Ossetia was recognized by Russia almost immediately after the “Five-days-war” between Russia and Georgia. President Dmitry Medvedev justified the adoption of the relevant decrees⁵⁶ with reference to various international legal documents: “A decision needs to be taken based on the situation on the ground. Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN-Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia’s and Abkhazia’s independence. Russia calls on other states to follow its example. This is not an easy choice to make, but it represents the only possibility to save human lives.”⁵⁷

The decisive question therefore is if South Ossetia had a right to secession after what had happened in August 2008. Immediately after the outbreak of the war both the South Ossetian and the Russian side reproached Georgia for having committed “genocide”.⁵⁸ The numbers of people killed were said to be in the thousands.

There are not yet any results of international investigations into the origins and course of the conflict and in the violations of international humanitarian law and human rights committed during the war. Although an international fact finding commission was established by the EU on 2 December 2008, it could not start its work as both Russia and the *de facto* authorities in South Ossetia have refused to allow the EU monitors access to the territory.⁵⁹ Nevertheless, in the retrospective it is clear that the reports on genocide were exaggerated. According to independent estimates quoted by the Council of Europe a month after the end of the conflict about 300 per-

⁵⁶ Decrees of the President of the Russian Federation on the recognition of the Republic of Abkhazia and the Republic of South Ossetia on 26 August 2008, SZRF 2008, No. 35, Pos. 4011.

⁵⁷ Statement by President Dmitry Medvedev on 26 August 2008, available at http://www.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml (last visited 13 March 2009).

⁵⁸ Cf. the statement of President Medvedev on 26 August 2008, *supra* note 57.

⁵⁹ Cf. Parliamentary Assembly of the Council of Europe, Res. 1647 (2009), *supra* note 1.

sons were killed and approximately 500 wounded on the South Ossetian and Russian sides and 364 persons killed and 2,234 wounded on the Georgian side.⁶⁰ Even if the attack during the night from 7 to 8 August 2008 is considered as insidious, there is no proof of an intention to extinguish the South Ossetian people.⁶¹

It might be argued that every military attack against a minority group provides already a pretext for secession. But this cannot be confirmed on the basis of State practice considering the more or less tacit acceptance of federal interventions against separatist movements, e.g. in China (Tibet) or Russia (Chechnya).

Unlike the situation in Kosovo in South Ossetia there were no long-lasting international negotiations with the aim of finding a compromise. Secession and recognition of South Ossetia as a new State therefore cannot be regarded as “*ultima ratio*” in a process without any alternative.

While the “*opinio iuris*” of the international community concerning the declaration of independence of Kosovo is divided, the situation in South Ossetia can be compared to the situation in the Turkish Republic of Northern Cyprus which has been recognized as independent State only by one State, namely Turkey. The same is true in the case of South Ossetia, although the example of Russia has been followed by one State, namely Nicaragua.

E. Abkhazia’s Right to Secession – Differences in Comparison to South Ossetia

I. Historical Roots of Abkhazia’s Independence

Unlike South Ossetia Abkhazia can look back to a long tradition of independent statehood. It was an independent empire since the 15th Century before it came under the reign of the Osman and then the Tsarist Empire (1810). After its annexation in the 19th Century it remained an administrative district up to the end of the Russian Empire. In 1918 after the suppres-

⁶⁰ Cf. Parliamentary Assembly of the Council of Europe, Res. 1633 (2008) on “The consequences of the war between Georgia and Russia”, see *supra* note 16.

⁶¹ For the crime of genocide it is not necessary that a certain amount of people is killed. But, as stated in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, the acts must be “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”, cf. also Luchterhandt, *Völkerrechtliche Aspekte des Georgien-Krieges*, *supra* note 11, 475-480.

sion of a Bolshevik revolt Abkhazia was integrated into Georgia. In 1921, after Georgia had been re-conquered by the Red Army Abkhazia and Georgia were transformed into two independent Soviet Republics. Only in 1931 Abkhazia came fully under the rule of Tbilissi; it was downgraded from a Soviet republic to a Soviet autonomous republic. This was due to the will of Stalin.⁶²

On this background it might be asked if it is fair to apply the *uti-possidetis* principle to Abkhazia and thus to confirm Stalin's arbitrary decision as a basis for all further developments. It is not without irony that Putin stresses that "those who insist that those territories must continue to belong to Georgia are Stalinists - they stick to Yosif Visarionovich Stalin's decision."⁶³ If Abkhazia had remained a Soviet Republic, it would have had the right to secession and independence after the collapse of the Soviet Union. Although there is some truth in this critique of the *uti-possidetis* principle it has to be acknowledged that the case of Abkhazia is no exception in this regard. The *uti-possidetis*-principle was developed in the process of decolonization. As a rule, it served to guarantee the immutability of arbitrarily fixed borders – the borders fixed by the colonial empires. But this negative consequence of the *uti-possidetis* principle was generally accepted for the sake of stability. A re-definition of State borders might be even more dangerous to peace and security worldwide. Therefore it is justified to apply the *uti-possidetis* principle to Abkhazia as well.

II. The Involvement of the Security Council in Abkhazia's Struggle for Independence

After 1989 developments in Abkhazia was quite similar to developments in South Ossetia.⁶⁴ Violent conflicts broke out already in July 1989. In 1990 Abkhazia declared its independence. Civil war began in August 1992 when paramilitary groups and parts of the national guards invaded Abkhazia without the consent of the new President Shevardnadze. On 14

⁶² J. Schmidt, 'Konfliktursachen Abchasien und Südossetien', in E. Reiter (ed.), *Die Sezessionskonflikte in Georgien* (2009), 110.

⁶³ Cf. the interview with Vladimir Putin, available at <http://www.cnn.com/2008/WORLD/europe/08/29/putin.transcript/> (last visited 13 March 2009). Putin refers in his statement both to Abkhazia and to South Ossetia.

⁶⁴ Cf. U. Gruska, 'Abchasien – Kämpfe um den schönsten Teil der Schwarzmeerküste', in M.-C. von Gumpfenberg & U. Steinbach (eds), *Der Kaukasus. Geschichte – Kultur – Politik* (2008), 102-109.

May 1994 the Russian Federation brokered an “Agreement on the ceasefire and separation of forces”⁶⁵ controlled by – mainly Russian – soldiers of the CIS and about 120 military observers of the United Nations. The presence of UNOMIG troops in Abkhazia is a distinctive feature in comparison to the situation in South Ossetia.⁶⁶ Furthermore, it seems that in Abkhazia – with the exception of the Kodori Vally and the Gali region⁶⁷ – it was more or less the total Georgian population that fled to mainland Georgia whereas in South Ossetia in the Tchinvali region there were still Georgian villages.

Abkhazia’s legal struggle for independence was formally accomplished in the early 1990s. The starting point was different from the one in South Ossetia as Abkhazia was an autonomous republic and not merely an autonomous region. When Georgia abolished the Soviet-era constitution and restored the Democratic Republic of Georgia’s 1921 constitution on 21 February 1992,⁶⁸ Abkhazia was granted a status of “autonomy”, but without any specific legal guarantees. Therefore on 23 July 1992 the Abkhaz Supreme Soviet reinstated the 1925 Constitution,⁶⁹ according to which Abkhazia was “united with the Soviet Socialist Republic of Georgia on the basis of a special Union Treaty” (Article 4), providing for federation between Georgia and Abkhazia on equal footing. Abkhazia adopted a new Constitution on 26 November 1994⁷⁰ confirmed by referendum on 3 October 1999.

III. The Subordinate Role of Abkhazia in the Russian-Georgian War

There is no doubt about the attack on Georgian troops on Tsinchvali during the night of 7 - 8 August 2008. However, Abkhazia was not attacked. Nevertheless, Russian troops started a military invasion during the war. Even if Russia’s involvement in the war is considered to be legitimate on

⁶⁵ Available at www.usip.org/library/pa/georgia/georgia_19940514.html (last visited 13 March 2009).

⁶⁶ Cf. Security Council Resolutions, available at <http://www.un.org/Depts/dpko/missions/unomig/unomigDrs.htm> (last visited 13 March 2009).

⁶⁷ According to the resolution of the Parliamentary Assembly of the Council of Europe 1648 (2009), *supra* note 16, 1,500 ethnic Georgian fled from the Kodori valley during the war in August in only 100 remained there.

⁶⁸ Cf. http://www.parliament.ge/files/1_5718_330138_27.pdf (last visited 23 April).

⁶⁹ Available at http://www.abkhaziagov.org/ru/state/sovereignty/constitution_1925.php (last visited 23 April 2009).

⁷⁰ Available at <http://www.abkhaziagov.org/ru/state/sovereignty/index.php> (last visited 23 April 2009).

the basis of the right to self-defence in so far as its peace-keeping soldiers had been attacked,⁷¹ military actions in far-away Abkhazia can never be justified.⁷² In Abkhazia, there were neither human rights violations nor anything comparable to “genocide”. The United Nations had and continue to have a peace keeping mandate. Therefore there was no change in the situation due to what happened in South Ossetia and therefore there is no new factual basis that might justify Abkhazia’s right to secession. *De lege lata* the threat of human rights violations is no justification for secession; otherwise the principle of territorial integrity would be undermined too easily. The recognition of Abkhazia as an independent State by Russia might be considered as a “windfall” in connection with the developments in South Ossetia. It does not have any basis in international law.

In April 2008 the Security Council had confirmed the “commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders.” It has not changed its assessment since.

F. Conclusions

International law is generally hostile towards secessions. Although the right to self-determination is considered as part of *ius cogens* existing State borders are delineated on the basis of the *uti-possidetis* principle and the right to secession is granted only in cases of gross human rights violations and genocide. There might be many compelling political and legal arguments against such a restricted approach. But the consequences of the declaration of independence of Abkhazia and South Ossetia provide instructive examples of the intrinsic dangers of secessions. The information provided by the Resolution of the Parliamentary Assembly on the “Consequences of war between Georgia and Russia” speak for themselves: “The Assembly is especially concerned about credible reports of acts of ethnic cleansing committed in ethnic Georgian villages in South Ossetia and the „buffer zone“ by irregular militia and gangs which the Russian troops failed to stop. It stresses in this respect that such acts were mostly committed after the signing of the ceasefire agreement on 12 August 2008 and continue to-

⁷¹ Cf. Nußberger, *supra* note 11, 460-466.

⁷² Cf. Luchterhandt, ‘Völkerrechtliche Aspekte des Georgien-Krieges’, *supra* note 11, 435-480.

day.”⁷³ – “Some 192,000 persons were displaced as a consequence of the war. The Assembly is concerned that a total of 31,000 displaced persons (25,000 from South Ossetia and 6,000 from Abkhazia) are considered to be “permanently“ unable to return to their original places of residence. These numbers should be seen in the context of the approximately 222,000 persons who remain displaced from the previous conflict in the early 1990s.”⁷⁴

De-facto regimes allegedly based on the right to secession do not seem to be able to secure a life in peace and security to all.

⁷³ Parliamentary Assembly of the Council of Europe, Res. 1633 (2008), *supra* note 16, para. 13.

⁷⁴ Parliamentary Assembly of the Council of Europe, Res. 1633 (2008), *supra* note 16, para. 15.

