

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

**THAWING A FROZEN CONFLICT:
LEGAL ASPECTS OF THE SEPARATIST CRISIS IN MOLDOVA**

***THE SPECIAL COMMITTEE ON EUROPEAN AFFAIRS
Mission to Moldova****

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We would like to thank all of those listed in this report for taking the time to meet with us. We would also like to thank the numerous colleagues who provided helpful comments and suggestions as the mission was being organized and the report was being written.

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Introduction

Moldova is the poorest country in Europe and it is enmeshed in a seemingly intractable separatist conflict involving ethnic tensions, Russian troops, Soviet-era arms stockpiles, smuggling, money-laundering, and corruption. Bordering Romania and Ukraine, with a majority of ethnic Romanians, it is a country that has been largely overlooked by the West.¹ This report examines the key legal issues of this “frozen” conflict and assesses the legal or quasi-legal arguments made by the Government of Moldova and the separatists.

At issue is who should control a strip of land nestled between the Dniestr River and the border of Ukraine. Variouslly called Transnistria, Trans-Dniester and, by Russian speakers, Pridnestrov'ia,² this region is less than 30 kilometers wide, with 4,118 square kilometers in total area, making it roughly the size of

¹ The Soviets, however, labeled this population as ethnically "Moldovan," and asserted that they were not ethnically Romanian. The USSR also called the Romanian language "Moldovan," and underscored this by outlawing the use of the Latin alphabet and requiring the use of Cyrillic letters. Although the reason for this nomenclature was political, rather than ethno-linguistic, it was carried over by the current Moldovan government after independence.

² CHARLES KING, *THE MOLDOVANS: ROMANIA, RUSSIA, AND THE POLITICS OF CULTURE* 178 (2000).

Rhode Island.³ Transnistria has a population of approximately 580,000, while the rest of Moldova has 3.36 million inhabitants.⁴ Nonetheless, Transnistria contains Moldova's key industrial infrastructure, power plants, and, importantly, a significant stockpile of Soviet-era arms. Since 1994, it has been under the effective control of a separatist regime that calls itself the Transnistrian Moldovan Republic ("TMR").⁵

In late May 2005 the Association of the Bar of the City of New York (the "NY City Bar"), through its Special Committee on European Affairs (the "Committee") sent a legal assessment team (the "Mission") to the Republic of Moldova, including Transnistria. The Mission consisted of Barrington D. Parker, Jr., a United States Circuit Court Judge in the Second Circuit; Robert Abrams, a partner at Strock & Stroock & Lavan LLP and former Attorney General of the State of New York; Elizabeth Defeis, Professor of Law and former Dean of Seton Hall University Law School; and Christopher J. Borgen, Assistant Professor of Law at St. John's University School of Law. It was led by Mark A. Meyer, a member of Herzfeld & Rubin, P.C., and the Chair of the Committee.

As will be described below, the Mission met with the key policy leaders in Moldova and in the breakaway region, including the President of Moldova and the leader of the Transnistrian separatists, and has completed the first independent analysis of the legal issues involved in the Transnistrian crisis. Beholden to none of the stakeholders, the NY City Bar is able to consider these issues from an objective standpoint. One should note that the NY City Bar's work historically has not been confined to New York. In fact, the Transnistria mission is not the first foreign mission by a committee of the Association. Over the past twenty-five years, the Association has conducted a number of missions to places as diverse as Cuba, Singapore, Malaysia, Turkey, Hong Kong, Argentina, Uganda, Northern Ireland, and, most recently, India. In addition, the Association has worked with bar organizations in the Czech Republic and Kyrgyzstan to bolster the independence of the bar and judiciary. Perhaps due to this historical involvement in international law, the various interested parties, including the governments of Moldova, Russia, Romania, Ukraine, and the United States, as well as the

³ Id., at 178.

⁴ U.S. Department of State 2004 Country Report on Human Rights Practices for the Republic of Moldova (*hereafter* "Moldova 2004 Country Report") *available at* <http://www.state.gov/g/drl/rls/hrrpt/2004/41697.htm>; a Transnistrian census from November 2004 set Transnistria's population at approximately 555,500, which could indicate the ongoing flight of people from the region. Preliminary Results of the Census in Transnistria, Olvia-press (Tiraspol) Sept. 7, 2005. By contrast, a 1989 census found the region's population to be 679,000. Id.

⁵ This report will use the "Transnistria" nomenclature although when we quote another author's work we will preserve that author's nomenclature within the quotation. For example, the TMR may variously be referred to as the Dniestr Republic, the Pridnestrovian Moldovan Republic (PMR), Transdnistria, or other such name based on the nomenclature adopted by the author being quoted. Similarly, this report's spelling of other proper names normally spelled in the Cyrillic alphabet may differ from the spellings within the quotations of other authors.

leadership of Transnistria, assisted the Mission by making government representatives, policymakers and experts available for interview.

In preparation of this Report, the Mission met with the following individuals, as well as many others not listed here:

In Moldova

President Vladimir Voronin
Prime Minister Vasile Tarlev
Foreign Minister Andrei Stratan
Minister of Reintegration Vasili Sova
Chairperson of the Supreme Court Valeria Sterbert
Chairperson of the Constitutional Court Victor Puscas
Justice Minister Victoria Iftodi
General Ion Ursu, Chief of the Information and Security Services
Leaders of all of the Parliamentary factions
Deputy Attorney General Valeriu Gurbulea
Deputy Speaker of the Parliament Maria Postoico
US Ambassador Heather Hodges
Russian Ambassador Nicolay Ryabov
Ukrainian Ambassador Petro Cealyi
Romanian Ambassador Filip Teodorescu
OSCE Ambassador William Hill
ABA/CEELI Country Director Samantha Healy
Farmers and local municipal and county leaders from the Dubasari area

In Transnistria

President Igor Nikolaevich Smirnov
Chairman of the Supreme Soviet Grigoriy Stepanovich Marakutsa⁶
Foreign Minister Valeriy Anatolevich Litskai
Minister of Justice Viktor Balala
Chairperson of the Constitutional Court Vladimir Grigoriev

In Romania

Foreign Minister Mihai Ungureanu
Experts from the Ministry of Foreign Affairs, the Ministry of Justice, and
the Ministry of Trade and Economy,
US Deputy Chief of Mission Tom Delare

⁶ Marakutsa, who had been in office since the original separatist conflict, was replaced in December 2005 with the election of Yevgeny Shevchuck as the new Chairman of the Supreme Soviet.

In New York

Ambassador Andrey Denisov, Permanent Representative of Russia to the United Nations

Ambassador Seva Grigore, Permanent Representative of the Republic of Moldova to the United Nations

Ambassador Mihnea Motoc, Permanent Representative of Romania to the United Nations

Senior representatives of the Mission of Ukraine to the United Nations

In Washington, D.C.

Ambassador Stephen Mann, Special Negotiator for Eurasian Conflicts

Elizabeth Rood, Deputy Director, Office of the Special Negotiator for Eurasian Conflicts

The National Security Council's Director for Europe, Damon Wilson

Various Department of State experts on Moldova and regional conflicts

Ambassador Sorin Ducaru, Romania's Ambassador to the United States and his staff

Ambassador Mihai Manoli, Moldova's Ambassador to the United States and his staff

The resulting report has five parts. In Part I we review the history of the conflict over Transnistria. Part II is an overview of the work of the Mission of the European Affairs Committee of the New York City Bar regarding the situation in Transnistria. Part III turns to the substantive question of determining the status of the so-called "Transnistrian Moldovan Republic" (TMR) under international law. This will include discussions of self-determination, secession, and the status of *de facto* regimes. Part IV considers what the TMR may or may not do regarding the conversion of property. Part V assesses the legal duties of third parties that become involved in secessionist conflicts. Finally, the Conclusion summarizes the main points of this report.

Executive Summary

This report considers three main legal issues: (a) whether the TMR has a right under international law to autonomy or possibly sovereignty; (b) what the legal concerns are regarding the transfer of property located in Transnistria by the TMR leadership; and, (c) what role “third-party” States have in the ongoing conflict and, in particular, the international legal implications of Russian economic pressure and military presence in the TMR.

The Status of the TMR under International Law

The central question to this report concerns the status of the TMR under international law and, in particular, the evaluation of claims by Transnistrian leaders that the TMR has a legal right either to autonomy within Moldova or to secede. We found neither claim persuasive and conclude that the TMR is best characterized as a “*de facto* regime.”

No Right to Autonomy.

First, under international law there is no “right” to fiscal or governmental autonomy within a state. While the TMR leadership may make political arguments that one may or may not find persuasive, we did not find a legal basis for a claim of autonomy. The two strongest quasi-legal arguments in favor of autonomy are: (a) that due to the denunciation by the USSR of the Molotov-Ribbentrop Pact, which had established the modern boundaries of Moldova, Transnistria should revert to an autonomous state; and, (b) self-determination as a basis for autonomy.

The denunciation argument is a chimera. Simply denouncing a treaty does not revert the political system to the *status quo ante*; it merely means that the treaty will not be in force going forward. This is especially true in treaties that include boundary delimitation provisions.

The second argument made by the Transnistrians, linking autonomy with the right of self-determination, opens up numerous complex issues in public international law. One thing is clear: rather than a right to autonomy—or even a specific set of characteristics that define this term—international law in the last century has focused on the elucidation of the norm of self-determination. Self-determination, and its relation to autonomy and secession, is discussed at greater length below.

In sum, we found that international law has little to say as to any supposed “right” to autonomy, and that grants of “autonomy” are largely issues of domestic law. In the Transnistrian case, the Government of Moldova has proposed various plans that are effectively grants of varying levels of policymaking and regulatory autonomy; all have been rejected by the TMR. We conclude that, based on their words and deeds, the TMR’s leaders seem less interested in autonomy than in full sovereignty.

Self-Determination, Sovereignty, and Secession.

The norm of self-determination is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of “internal self-determination,” the protection of minority rights within a state, and “external self-determination,” secession from a state. While self-determination is an internationally recognized principle, secession is considered a domestic issue that each state must assess itself.

Influential decisions and reports concerning self-determination, such as the report concerning the status of the Aaland Islands in 1921 and the Badinter Commission opinions concerning the former Yugoslavia in the 1990’s, and other examples of state practice have been consistent in the view that a successful claim for self-determination must at least show that: (a) the secessionists are a “people;” (b) the state from which they are seceding seriously violates their human rights; and (c) there are no other effective remedies under either domestic law or international law. None of these prongs are satisfied in the case of Transnistria, with the possible exception of (a).

The term “people” has been generally used in recent state practice to refer to an ethnic group, or a “nation” in the classic, ethnographic, sense of the word. However there are some, such as the TMR’s leadership, who suggest the term should mean something else, perhaps a group with common goals and norms. While the norm of self-determination may evolve such that a people may be more readily identified as merely a like-minded group, we do not find that current state practice supports such a proposition. Regardless, deciding on a single definition of the term “people” is not dispositive in this case, as none of the other requirements for external self-determination are met.

Concerning the second prong, the existence of serious violations of human rights, the argument of the Transnistrians can be organized into three main groupings: (a) violations of linguistic, cultural, and political rights; (b) the brutality of the 1992 War; and (c) the denial of economic rights. Taking into account the significant changes in Moldova since 1992, none of these claims is convincing today.

The actual history of Moldova since the end of the 1992 War shows that the country has improved its respect of minority rights. In contrast, the TMR has had a poor human rights record including a lack of due process, persecution of religious minorities, and retaliation against political dissenters. The 1992 War itself caused 1,000 deaths, but we found that, in light of state practice, the events of the 1992 War in and of themselves do not make a persuasive claim of secession as a legal right. If they did, the world would be rife with secessionist conflicts. Similarly, the economic rights claim, which is essentially about allocation of tax revenues, does not lead to a legal right to dismember a state. This argument is really about policy, not the form of a polity.

Finally, we note that there is a general sense among commentators, opinions, and decisions, that the human rights violations that are cited in support of a claim of secession must be ongoing violations. Although Moldova still has many possible pitfalls on its road to becoming a fully modern democratic state, it

is clear that it is nonetheless traveling the road in the right direction, albeit with some fits and starts. Thus, the second prong—ongoing serious violations of human rights—is not met.

The third prong asks whether there are any other options available besides secession. This conflict has been frozen not so much because there are no other options under domestic and international law besides secession, but because the separatists have chosen to make the conflict *seem* intractable by repeatedly refusing any options short of effective sovereignty for the TMR. For example, while Moldova has sought to decrease ethnic tensions, the TMR has attempted to exacerbate them and subsequently claim that separation is necessary in order to avoid ethnic conflict and possibly genocide. Such “gaming the system” is not persuasive.

We thus conclude that there is no solid basis for a claim of secession under external self-determination. The most basic requirements for a legal claim are not met.

The TMR as a De Facto Regime.

If Transnistria is not a state, then what is it? We considered two issues: (a) the role of recognition in the process of state formation; and (b) whether the TMR is a *de facto* regime.

There is no obligation to recognize the TMR, even if it does have effective control of territory. Rather, it is likely that the forcible acquisition of territory, the ongoing objections by the pre-existing state, Moldova, and the evident reliance of the TMR on military, economic, and political support from Russia for its survival argue *against* recognition and *for nonrecognition* in this case. In similar cases the Security Council and/or the General Assembly call on UN member states not to recognize such seceding entities.

Inasmuch as the TMR has effective control over Transnistria but is not recognized, the TMR can best be understood by using the doctrine of *de facto* regimes. Such *de facto* regimes are treated as partial subjects of international law. Their unique status does give rise to certain rights and responsibilities, primarily related to acts required for the support and well-being of the population. It may conclude agreements that are held at a status below treaties. Besides the right to act in order to support its population, a *de facto* regime may also be held responsible for breaches of international law.

While the *de facto* regime thus has certain rights and responsibilities, the acts of *de facto* regimes have uncertain legal effect. Acts of such a regime may become invalid with the disappearance of the regime, for instance, if the territory is reabsorbed into the parent state. However, the reintegrated state after a failed *de facto* regime may be held liable for the acts of the *de facto* regime that were part of the normal administration of the territory based on the assumption that such acts were neutral and that the state would probably have undertaken similar such acts. If, on the other hand, the *de facto* regime becomes a state, then its acts will be binding on the new state.

The TMR and the Conversion of Property in Transnistria

At the heart of the dispute between the Government of Moldova and the TMR's leadership is the issue of the control of the economic assets of Transnistria. Does the TMR have the right to convert the property in its area of effective control? If the two parts of Moldova are reintegrated, must these decisions of the TMR be respected?

We used two theoretical frameworks to answer these questions. The first, the concept of *de facto* regime, was discussed above. The second is an analogy to the international law of the administration of occupied territories, the most complete statement of which is found in the Fourth Geneva Convention. We use these rules only by analogy as one might argue that the TMR actually is not bound by the Fourth Geneva Convention. Nonetheless, we find the rules concerning the administration of occupied territories and those concerning *de facto* regimes to be useful, especially as they are also remarkably consistent as they both draw from the same root concepts of property rights that tap all the way down to the Roman law of *usufruct*, use of property by one who does not own that asset.

Applying the international law of *de facto* regimes, the TMR does not have the right to sell-off Moldovan state assets or any private property. Any such sales face possible challenge and repudiation should Transnistria become reintegrated into Moldova.

By not only applying the conception of the TMR as a *de facto* regime, but also by analogizing to the international law of the administration of occupied territories, we find that an occupying power or its analog: (a) may confiscate state property, other than real property, if it is usable for military purposes or in the administration of the territory; (b) may only administer non-military state real property without destroying or otherwise converting the economic value of the property; and (c) may not confiscate private property unless it is war materiel.

Based on the foregoing, the TMR's privatization program is thus exceedingly difficult to justify. Any private party taking part in this program as a purchaser consequently does so at its own risk.

Third-Party States and Secessionist Movements

The third and final main legal issue we consider is the role of "third-party" states. States have a basic duty not to intervene or otherwise interfere with the resolution of an internal conflict within another state. Under circumstances where self-determination or, more clearly, external self-determination is implicated, or where the Security Council finds that a conflict has become a threat to international peace, then third-party states may have more freedom of action concerning the conflict. This fundamental norm of non-intervention is linked with concepts of sovereignty, self-determination, and peaceful coexistence.

The role of third-party states is especially important in this case as Russia and Ukraine have taken on the role of "guarantor" states, states that have a special

interest in ensuring an end to the conflict and formally commit to devoting resources to conflict resolution. Being a guarantor puts a state into a position in which it becomes involved in an ongoing crisis in another country, but that state must nonetheless respect international law in its actions. The report considers the actions of Russia and Ukraine in light of these rules of conduct.

Russia

Russia, not least because it maintains troops in Transnistria, is not only a guarantor, but a key player in the conflict. We consider four main issues: (a) the activities of the Russian Army and other organs of the Russian Federation in Transnistria; (b) economic pressure by the Russian Federation on Moldova; (c) ties between the TMR leadership and Russian leadership; and (d) the general diplomatic stance of the Russian Federation.

The role of the Russian Army can be split into two phases: assistance during the 1992 War and ongoing activities, including maintenance of arms stockpiles in Transnistria. The Russian 14th Army played a decisive role in the 1992 War by intervening in the fighting on behalf of the separatists. Despite treaty promises to demobilize and repeated Moldovan requests that Russia remove its troops from Transnistria, the troops remain. Consequently, they prop up the viability of the TMR and make reintegration more difficult. They also provide materiel, expertise, and other support to the TMR on an ongoing basis.

Similarly, the Soviet-era arms stockpile under control of the 14th Army has been used to support the TMR both directly and as a source of revenue through joint Russian-TMR sales of army materiel on the world market. Moldova thus wants the immediate removal of the weapons stockpiles. Russia has so far refused to remove the stockpiles (or the troops) until there is a comprehensive political settlement and has also argued that the Transnistrians will not let them remove the arms.

Besides the use of the army to either hamper the Moldovans or assist the TMR, the second main issue is that Russia has also used economic pressure and economic assistance as a carrot and stick. Economic pressure is generally not barred by international law. However, such pressure on a state or assistance to separatists may make the third-party state liable under the law of state responsibility if its pressure would either frustrate Moldova's sovereign privileges or would breach one of the third-party state's pre-existing commitments to Moldova.

In considering the present situation, there are four areas of particular interest: (a) the use of energy prices as a carrot or a stick; (b) the increased use of tariff barriers against Moldovan goods; (c) economic assistance to the TMR; and (d) the shared economic interests of Russian and Transnistrian elites. Taken as a whole, there is a significant intervention on behalf of the TMR.

On the third issue, the ties between TMR and Russian leadership, there is ample circumstantial evidence. Smirnov, Minister of Justice Balala, and Chief of Internal Security Vladimir Antufeyev all arrived in Moldova at the start or since the start of the separatist crisis. The TMR's ruling elite is largely Russian and, to a lesser extent, Ukrainian, and have Russian citizenship. They have been granted

Russian nationality. Certain members came to the TMR from senior positions in the Russian government, particularly the Russian parliament (the “Duma”) and the Russian Army.

Finally, the various activities described above—the economic pressure, the military assistance to the TMR, the energy politics—need to be understood in light of the constant Russian rhetoric in favor of the TMR and critical of Moldova. While we do not contend that any single activity described could lead to state responsibility (although the troop situation may rise to that level) we believe that these acts seen as a whole, combined with constant Russian statements supporting the TMR and criticizing Moldovan efforts at reintegration, form a compelling picture of inappropriate intervention by Russia into the domestic affairs of Moldova.

Ukraine

Due to its common border with Moldova—and particularly with Transnistria—as well as the significant ethnic Ukrainian population in Transnistria and throughout Moldova, Ukraine is a key stakeholder in the Transnistrian conflict. Ukraine has been critical of Transnistrian separatism and has advocated the complete withdrawal of Russian troops, but has also been perceived (rightly or wrongly) as allowing smuggling through its territory and possibly being open to relations with the TMR. Although Ukraine has acted in many ways as a counterbalance to Russian influence in Transnistria, its attentions have often been viewed by the Moldovans with a mixture of hope and suspicion.

Ukraine has made what may be a good faith effort at plotting a path towards a solution of the crisis; however an actual final plan needs to be seen before its legal implications can be assessed. The stricter border controls that are currently being implemented are a necessary, though not conclusive, step in resolving the Transnistrian crisis. Now that Ukraine has become a more active participant in the Transnistrian crisis, its actions will need to be monitored, as have those of Russia and Moldova, by the various stakeholders.

Conclusions

The report thus concludes:

Concerning the Status of the TMR. Attempted secessions are largely viewed as domestic affairs that need to be resolved by the state itself. There is no right to secede as a general matter. At most, secessions may be accepted in cases where a people have been oppressed and there is no other option for the protection of their human rights. In light of these rules, the TMR has not made a legally sufficient case that it has a right to external self-determination or secession.

Consequently, the effective control of the TMR of the Transnistrian part of Moldova is that of a *de facto* regime and may be viewed as analogous to control by an occupying power. The TMR is thus limited as to what it may legally do with the territory it administers.

Concerning the Conversion of Property by the TMR. The law of occupation recognizes that the occupying power may, as a matter of fact, control the economic resources within a territory but, as a matter of law, the rightful owners are the previous owners. The final disposition of the property is not decided by the current effective control by the occupier and as such, the occupier has the legal duty not to destroy the economic value of the property. Any economic activities undertaken jointly with the separatists or insurgents by another party are at the peril of that party. There is no comfort that such activities will be sanctioned after the final resolution of the separatist conflict and they may, in fact, be “unwound.”

In light of the rules governing de facto regimes and also the law of occupation, the TMR’s privatization program can leave investors with no confidence that these transactions would be enforced if the TMR is reintegrated into Moldova.

Concerning the Responsibilities of Third-Party States. Interventions by third parties are not favored and are assessed in relation to the norms of non-intervention set out in numerous global and regional treaties and legal documents. Sovereignty requires that a state’s wishes concerning affairs within its own territory be respected up to the point that some other core interest of the international system is implicated. Thus, for example, the garrisoning of troops on foreign soil is not allowed if the host state requests that the troops leave. Russia’s activities concerning the Transnistrian situation, particularly the intervention of the 14th Army on behalf of the separatists, the ongoing military assistance to the TMR, the economic support of the TMR, and effectively bargaining on behalf of the TMR using energy process and other levers of power against Moldova, leads to credible claims of state responsibility on the part of Russia for the continuing separatist crisis and its proximate results.

Similarly, in light of the experience with Russia, Ukraine’s increased participation in the conflict should be monitored.

I. Historical Background

A. Pre-Soviet and Soviet Era History

What we now call Moldova is a classic crossroads of cultures. Bessarabia was historically the west bank of the Nistru (or Dniester) River and Transnistria was on the east bank. Prior to the Soviet period, Transnistria “was, at an even deeper level than in Bessarabia, a classic borderland where ethnic identities were fluid and situational, and where Russian, Ukrainian, Romanian, Jewish, and German influences combined to create a mixed culture.”⁷ Transnistria was not part of traditional Romanian territory. From the ninth to the fourteenth centuries Transnistria was part of Kievan Rus’ and Galicia-Volhynia.⁸ Bessarabia was once a part of an independent Moldovan state that emerged briefly in the 15th century under Stefan the Great, but subsequently fell under Ottoman rule in the 16th century. After the Russo-Turkish War of 1806-12, Bessarabia was ceded to Russia, while Romanian Moldova (west of the Prut River) remained in Turkish hands. Transnistria was also part of Russia, but was in the districts of Podolia and Kherson.

The upheaval of the Russian Revolution caused many of Russia’s former provinces to seek and, in some cases, declare independence. Bessarabia, with its overwhelming ethnic Romanian population, voted in a plebiscite to become part of Romania.

By the mid-1920’s Josef Stalin had been successful in recapturing for the Soviet Union most of the provinces that Russia had lost during the revolution. Bessarabia, however, remained part of Romania. In 1924, Stalin established the Moldovan Autonomous Soviet Socialist Republic (or “MASSR”) as an autonomous province within the Ukrainian Soviet Socialist Republic. This was spurred by Moscow’s desire to reclaim Bessarabia and attempt to have a colorable claim to this “Moldavian” territory.⁹ Transnistria became part of the MASSR. In 1940, the USSR and Germany signed the secret Molotov-Ribbentrop Pact, which, among other things, provided for the USSR’s annexation of Bessarabia, which had by then been part of Romania for more than twenty years. Stalin merged Bessarabia and the MASSR into the Moldavian Soviet Socialist Republic (or “MSSR”), which became the fifteenth republic within the USSR.

⁷ KING, THE MOLDOVANS, *supra* note 2, at 181.

⁸ ID., at 179.

⁹ Pal Kolsto & Andrei Edemsky with Natalya Kalashnikova, *The Dniester Conflict: Between Irredentism and Separatism*, 45 EUR.-ASIA STUD. 978 (1993) (hereafter, Kolsto, *et al.*).

Transnistria became the economic and political center of the MSSR.¹⁰ Transnistria manufactured 33% of the industrial goods and 56% of the consumer goods produced in Moldova and it also produced 90% of the energy needed in the rest of the MSSR.¹¹ As part of the USSR, the MSSR used Russian as its primary language and adopted the Cyrillic script for written Romanian and called the language “Moldavian.”¹² Stalin also ordered the forced removal of approximately one third of the ethnic Romanian population of Bessarabia, and sent them to Siberia where most perished. Transnistria, having been part of the USSR for a longer period, had already been collectivized in the 1920’s and 1930’s. Thus, from the beginning of the MSSR there was a greater degree of “sovietization” in Transnistria than in other parts of the Republic.¹³ Leaders from the Bessarabian part of the MSSR were disfavored, such that it was not until 1989 that a first secretary of the MSSR’s Communist Party came from Bessarabia.¹⁴

B. 1989 through 1992: Moldovan Sovereignty and Transnistrian Secession

While a sense of history is important in any discussion of Moldovan politics, the current crisis can be traced to more recent events. While some can show the roots of the conflict in old hurts over the course of centuries, the proximate causes stem from relatively recent policies in the transition from the USSR into the post-Soviet era. For example, contemporaneously with the events leading to the fall of the Berlin Wall, from August to December 1989, the MSSR parliament passed a series of language laws that made the Moldovan language the official state language and that also began a transition from Cyrillic to Latin script.¹⁵ On April 27, 1990, the Supreme Soviet of Moldova adopted a new tricolor flag and a national anthem that was the same as that of Romania.¹⁶ Then, in the summer of 1990, the MSSR declared sovereignty, changing its status within the USSR.

A group of Russian speakers led by Igor Smirnov, a factory manager who came to Moldova in November 1987 to become a director of the Elektromash factory in Tiraspol, expressed concern that the newly sovereign MSSR would

¹⁰ Graeme P. Herd, *Moldova & the Dniestr Region: Contested Past, Frozen Present, Speculative Futures?* 1, Conflict Studies Research Centre, Central & Eastern Europe Series 05/07 (February 2005) at 2, available at <https://da.mod.uk/CSRC/documents/CEE/05%2807%29-GPH.pdf>.

¹¹ Kolsto, *et al.*, *supra* note 9, at 980.

¹² Case of Ilascu (Ilascu v. Moldova) 311 Eur. Ct. H.R., at para. 28 (2004).

¹³ KING, THE MOLDOVANS, *supra* note 2, at 183.

¹⁴ ID.

¹⁵ Kolsto, *et al.*, *supra* note 9, at 981.

¹⁶ Case of Ilascu, *supra* note 12 at para. 29.

soon seek reunification with Romania and take Transnistria along with it. On August 11, 1989, several Transnistrian workers' collectives united under the single banner of the Union of Workers Collectives (OSTK) and pursued a policy of secession from Moldova.¹⁷ Igor Smirnov was the first Chairman of the OSTK.

On September 2, 1990, Transnistria declared its separation from Moldova and its existence as a republic within the USSR. Soon after this announcement, separatists began taking over police stations and government institutions in Transnistria,¹⁸ culminating in a protracted fight between Moldovan police and armed forces and separatists outside the city of Dubosari on November 2 1990.¹⁹

These events were in the context of ongoing tensions between the MSSR and the USSR concerning what their relationship would be in the future. After the November 1990 engagement between Moldovan and Transnistrian forces, Moldovan President Mircea Snegur was willing to accept a "Union treaty," as Mikhail Gorbachev had sought, if Gorbachev would help put an end to the secessionist movement. However, Gorbachev did not accept the offer and, in response, Moldova sought independence from the USSR.²⁰ As a result of these tensions, the March 17, 1991 all-USSR referendum on the future of the Soviet Union was boycotted by Moldova's leadership, although voting did occur in Transnistria, where the vote was supposedly 93% in favor of a unitary Soviet state.²¹

On May 23, 1991, the Moldavian Soviet Socialist Republic changed its name to the Republic of Moldova.

On August 27, 1991, the Moldovan parliament, in the aftermath of the attempted putsch against Gorbachev, declared that Moldova was an independent republic. Its capital would be the city of Chisinau. By contrast, Igor Smirnov, the leader of the Transnistrian separatists, praised the putschists as saviors of the Soviet state.²² Smirnov, arguing that independence was necessary to protect the Russian minority in Transnistria from the possible reunification of Moldova with Romania, rallied the Transnistrian separatists in the creation of the TMR.

On September 6, 1991, the Supreme Soviet²³ of the TMR "issued an order placing all establishments, enterprises, organizations, militia units, public prosecutors' offices, judicial bodies, KGB units and other services in Transnistria, with the exception of military units belonging to the Soviet armed forces, under

¹⁷Complex Power Sharing, Transnistria Case Review, *available at* http://www.ecmi.de/cps/documents_gun_case.html.

¹⁸ KING, THE MOLDOVANS, *supra* note 2, at 189.

¹⁹ Kolsto, *et al.*, *supra* note 9, at 984.

²⁰ Stuart J. Kaufman, *Spiraling to Ethnic War*, 21 INT'L SECURITY 108, 130-31 (Fall 1996).

²¹ Kolsto, *et al.*, *supra* note 9, at 984.

²² KING, THE MOLDOVANS, *supra* note 2, at 191.

²³ The Supreme Soviet is the parliament.

the jurisdiction of the ‘Republic of Transdnistria.’”²⁴ The Government of Moldova, for its part, announced in Decree no. 234 on November 14, 1991, that all property of Soviet military units within the Republic of Moldova were now the property of Moldova.²⁵

During this period, the Moldovan authorities arrested Igor Smirnov. In response to the arrest of Smirnov and other Transnistrian leaders, the TMR “threatened to cut off gas and electricity supplies to the rest of Moldova.”²⁶ Smirnov was released.

In early 1992, as the simmering conflict between the separatists and the government of Moldova continued, Smirnov began a “campaign of harassment” to oust pro-Chisinau police officers from Transnistria.²⁷ Transnistrian forces were augmented in the spring of 1992 with the arrival of Cossacks and other volunteer fighters from other parts of the Soviet Union.²⁸ “The Cossacks and other volunteers were put on the state payroll, receiving 3000 rubles a month.”²⁹

On December 3, 1991, the 14th Army occupied Grigoriopol, Dubasari, Sobozia, Tiraspol, and Ribnita, all of which are in Transnistria.³⁰ Thus, if the Government of Moldova wanted to send troops into its cities to prevent any attempted separation, they could have faced opposition from Russian troops.

Tensions escalated until a large-scale outbreak in the summer of 1992. Much of the fighting took place in and around Bender. The 14th Army intervened on the side of the Transnistrians and, in part due to the 14th Army’s positions, the Moldovan Army was unable to take control of Bender or Dubosari. The fighting resulted in approximately 1,000 deaths and 130,000 people either internally displaced or seeking refuge in other countries.³¹ On July 21, 1992, the fighting ended with Moldova signing a cease-fire agreement that was notably countersigned by Russia, as opposed to the Transnistrians.³² That agreement contemplated, among other things, the establishment of a peacekeeping force including Moldovan, Russian, and TMR forces, the gradual withdrawal of the 14th Army, and the establishment of Bender as a free economic zone.³³

²⁴ Case of Ilascu, *supra* note 12, at para. 35.

²⁵ *Id.*, at para. 37.

²⁶ KING, THE MOLDOVANS, *supra* note 2, at 191.

²⁷ Kaufman, *supra* note 20, at 129.

²⁸ The Union of Cossacks is an association recognized by the Government of Russia. Case of Ilascu, *supra* note 12, at para. 66.

²⁹ Kolsto, et al., *supra* note 9, at 987.

³⁰ Case of Ilascu, *supra* note 12, at para. 53.

³¹ KING, THE MOLDOVANS, *supra* note 2, at 178.

³² Herd, *supra* note 10, at 3.

³³ Kolsto, *et al.*, *supra* note 9, at 994.

C. Events from 1993 to 2003

The result of the Russian intervention was that Transnistria became effectively partitioned from the rest of Moldova. The fighting cooled, and was replaced by a frozen conflict.³⁴

One ongoing issue was the status of the Russian 14th Army that remained garrisoned in Transnistria. Although in October 1994, an agreement was signed between Russia and Moldova guaranteeing that the 14th Army would leave Transnistria within three years, the agreement was never ratified by the Duma. However, between 1992 and 1999, the Russians decreased their troops in the TMR from 9,250 to 2,600 and destroyed a significant amount of munitions. Other armaments were shipped out of Transnistria by the Russians at the expense of the Organization for Security and Cooperation in Europe (the “OSCE”) and over the objections of Mr. Smirnov, who had previously decreed that no Russian Army property would be allowed to leave Transnistria. As of this writing, nearly 20,887 metric tons of ammunition plus ten train loads of Russian military equipment remain in Transnistria.

The pro-Romanian Popular Front was soundly defeated in the February 1994 Moldovan elections and over 90 percent of the population rejected unification with Romania.³⁵ On November 24, 1994, the new Moldovan Constitution was ratified. The new Constitution gave autonomy to Transnistria and to Gagauzia, a region made up primarily of an Orthodox Turkic people.³⁶

These steps forward were followed by steps back by the Transnistrians. The 1994 Country Report on Moldova by the U.S. Department of State noted that:

Moldova remained divided, with mostly Slavic separatists still controlling the Transdnister region. This separatist movement, led by a pro-Soviet

³⁴ Dov Lynch of the European Union Institute argues that the term “frozen conflict” is somewhat misleading because the situation in Moldova (and in the other conflicts typically described as frozen conflicts) has actually been quite dynamic. DOV LYNCH, *ENGAGING EURASIA’S SEPARATIST STATES: UNRESOLVED CONFLICTS AND DE FACTO STATES* 42 (2004). We use the term here in recognition that, although the situation has evolved in significant ways, the overall result is no closer to substantial resolution as of this writing than it was in 1992.

³⁵ Complex Power Sharing, Gagauzia Case Review, *available at* http://www.ecmi.de/cps/documents_gum_case.html.

³⁶ CONSTITUTION OF THE REPUBLIC OF MOLDOVA, art.111 entitled “Special Autonomy Statutes of Gagauzia,” states, in part:

Gagauzia is an autonomous territorial-unit having a special statute and representing a form of self-determination of the Gagauzian people, shall constitute an integrant and inalienable part of the Republic of Moldova and shall independently solve, within the limits of its competence, pursuant to the provisions of the Republic of Moldova Constitution, in the interest of the whole society, the political, economic, and cultural issues.

group, entered negotiations with the Government on the possibility of a special political status for the region. *Progress was blocked, however, by the separatists' demands for "statehood" and the creation of a confederation of two equal states.*³⁷

On May 8, 1997, after mediation by the Russian Federation, Ukraine, and the OSCE, Moldova's then-President, Petru Lucinschi, and Igor Smirnov, as *de facto* leader of the TMR, signed a memorandum regarding the normalization of the relations between the Republic of Moldova and the TMR.³⁸ In the accord, the TMR promised to establish a "common state" with Moldova, although that term was not defined. It has since led to divergent interpretations by the parties. To our knowledge, this memorandum was never submitted to the Moldovan Parliament for ratification and its status under Moldovan law is unclear.

As the years since the 1992 War passed, observers became increasingly concerned that Smirnov and his associates had no intention of allowing formal reintegration into Moldova as that might thwart increasingly profitable smuggling activities. For example,

after the Trans-Dniester Republic and Moldova briefly set up a joint customs operation, 1998 figures uncovered by [Moldovan presidential advisor Oazu] Nantoi showed that Trans-Dniester, with but one-sixth of Moldova's population, imported 6,000 times as many cigarettes as the rest of the country. Mr. Nantoi said he believed that most of the cigarettes were illegal knockoffs of Western brands, illicitly made in Ukraine and exported through the Trans-Dniester Republic as far as Germany. Experts say the region is also a major transit point for smuggled alcohol and up to 700,000 tons a year of petroleum products from Russia and Ukraine.³⁹

Moreover, the head of customs for the TMR is Vladimir Smirnov, the son of Igor Smirnov, "who elevated the department to a cabinet ministry... to free it from constraining oversight."⁴⁰

³⁷ U.S. Department of State 1994 Country Report on Human Rights Practices for the Republic of Moldova (*hereafter* "Moldova 1994 Country Report") *available at* http://dosfan.lib.uic.edu/ERC/democracy/1994_hrp_report/94hrp_report_eur/Moldova.html, at Introduction. (emphasis added.)

³⁸ Memorandum for the Bases of Normalization between the Republic of Moldova and Transdnestrria, 8 May 1997, *available at* http://www.osce.org/documents/mm/1997/05/456_en.pdf; *see also* Herd, *supra* note 10, at 3, referring to agreements "granting further autonomy and calling for more talks."

³⁹ Michael Wines, Trans-Dniester 'nation' resents Shady Reputation, *New York Times*, March 5, 2002. Nantoi became the program director of the Institute for Public Policy in Chisinau. According to *The New York Times*, he had quit his job as a presidential adviser "after the government censored his efforts to expose corruption of the customs agreement with the Trans-Dniester Republic." *Id.*

⁴⁰ *Id.*,

The end of the 1990's saw another series of attempts to resolve the conflict. In July 1999 Chisinau and Tiraspol drafted the Kiev Joint Statement which agreed that their relations would go forward on the basis of common borders and common economic, legal, defense and social policies.⁴¹

In November 1999, at the OSCE summit in Istanbul, Russian President Yeltsin agreed that all Russian arms and equipment would be withdrawn or destroyed by the end of 2001, and all Russian troops would withdraw by the end of 2002. In June 2000, Russian President Vladimir Putin formed a special commission under the chairmanship of Russian Foreign Minister Evgeny Primakov, that sought to turn Moldova into a loose confederation that would have given the TMR extensive influence over Moldovan government policy, and guaranteed a continuing Russian influence, actually increasing its military presence in Moldova. This plan also failed.

However, according to various interlocutors, in November 2001, Moldova and Russia signed a treaty that was never made fully public. Often referred to as the "Base Treaty," it is described as having provided guidance on bilateral relations, detailed that any Gazprom debts, including those incurred in Transnistria, would be accountable by the government of Moldova, and specified that Moldova agreed to take responsibility for \$1 billion of Gazprom debt owed by Transnistria. This treaty was allegedly signed by representatives of the parties, but was never ratified. Russia, by its statements, appears to regard this treaty as in effect, inasmuch as it has not been repudiated by the parties.

A federal state was first proposed in July 2002 in the so-called "Kiev Document" presented by the mediators to the two sides. We understand that this document was actually largely drafted by Moldovan negotiators. In February 2003, as negotiations on the Kiev Document flagged, Moldovan President Vladimir Voronin established a Joint Constitutional Commission to draft a federal constitution for Moldova. A five-sided mediation including Moldova, the TMR, Russia, Ukraine and the OSCE was organized to assist the Commission. However, it also stalled. Eventually, the Russians secured some measure of agreement from the TMR and the government of Moldova on a plan dubbed the "Kozak Plan." The Kozak Plan envisioned a "common state" of Moldova and Transnistria. Under the plan, Russia would maintain 2,000 troops in Moldova until 2020. The memorandum was due to be signed on November 25, 2003 in President Putin's presence in Chisinau, the Moldovan capitol, but that morning, President Voronin telephoned President Putin to cancel the ceremony. It has been reported that this was due to concerns by the OSCE, the EU and the US that the Kozak Plan would have formalized the status quo and endangered the possibility of Moldova ever becoming a viable European state. Subsequent attempts at five-sided negotiations have fallen apart. Moscow did not meet its December 2003 deadline for the withdrawal of its troops and munitions.

Valeriy Litskai, the so-called "foreign minister" of the TMR, has said that Tiraspol and Chisinau had agreed in 2002 to build a "federal state" and that the

⁴¹ Transdnistria Case Review, *supra* note 17.

details were set out in the Kozak Memorandum. “‘We do not renounce the Kozak Memorandum and are ready to sign it even tomorrow,’ Litskai declared.”⁴²

On August 1, 2004, Moldovan customs stopped servicing TMR companies that did not pay Moldovan taxes and the Chamber of Commerce and Industry stopped issuing origin certificates for TMR-based companies.⁴³ The Russian Foreign Ministry and Smirnov called this an economic blockade.⁴⁴

D. The Current Situation in Brief

The recent history of the Transnistrian crisis has had both signs of promise and diplomatic downturns.

President Voronin has proposed a Security and Stability Pact for Moldova to be signed by Russia, Ukraine, Romania, the EU and the US, but Russia seems to consider the Kozak Plan as the template for any solution. By contrast, the EU and the US are both suggesting the establishment of an international peacekeeping operation under OSCE supervision, to which the Russians object. For their part, NATO member states, including the United States, refuse to ratify a key arms reduction pact, the Adapted Conventional Forces in Europe Treaty (which they had signed at the November 1999 Istanbul summit), until Russia withdraws its troops and armaments from Moldova and Georgia.

President Yuschenko of Ukraine has presented a plan for settling the Transnistrian conflict. His plan contains certain provisions that offer the Transnistrian region autonomy, with the right to leave Moldova should Moldova seek any future union with Romania. The plan does not require the withdrawal of Russian troops and armaments from Transnistria. The US and the EU would be observers in negotiations. The plan does provide for strict border controls, and the involvement of the EU in observing their application.

As of August, 2004, approximately 20,887 metric tons of Russian ammunition and approximately ten trains of military equipment were still in Transnistria.⁴⁵ According to the OSCE, at that time the TMR was blocking removal of the armaments for three reasons: (a) Moldova’s refusal to sign the Kozak Memorandum; (b) the so-called “economic blockade” by Moldova; and (c) Moldova’s alleged refusal to cooperate in writing-off Tiraspol’s debt to Gazprom.⁴⁶

⁴² Jan Maksymiuk, Analysis: Transdnierster Wants Talks on ‘Federal System’ With Moldova, Radio Free Europe/Radio Liberty (Friday, Sept. 17 2004) available at <http://www.rferl.org/featuresarticle/2004/09/53bc0d6b-d61b-49bb-8f7a-e563715de8b9.html>

⁴³ Herd, *supra* note 10, at 8.

⁴⁴ *Id.*, at 9.

⁴⁵ Organization for Security and Cooperation in Europe Mission to Moldova, Activity Rep. No. 8/2004 (August 2004) at 3 (*hereafter* “OSCE Mission to Moldova Activity Report”).

⁴⁶ *Id.*

Whether the Russians actually sought to remove the ammunition and other military hardware or whether this situation was simply used as a bargaining chip is an open question. In any case, at about this time the Smirnov regime seemed to deliberately exacerbate the conflict.

First, there was the crisis over the forced closing of Romanian language schools (non-Cyrillic script) in the TMR. The U.S. Department of State summarized the issue in its 2004 Report on Human Rights Practices in Moldova:

In July, Transnistrian authorities closed four Latin script schools that were registered with the Moldovan Ministry of Education and attempted to close two more. Police forcibly closed the Latin-script schools in Ribnita and Tiraspol, removing all furniture and school materials and sealing the premises. They also closed two schools in Dubasari and Corjova; students from these schools were transferred to Latin-script schools in villages under the control of the Moldovan authorities. Police were impeded from closing a Latin-script school and orphanage in Bender by parents, teachers and children who guarded the facilities throughout August and September. Authorities claimed the institutions violated Transnistrian law, which requires the schools to register locally and to use the Cyrillic alphabet for instruction. In September, the OSCE helped negotiate a formula to allow the Latin-script schools in Bender, Dubasari, and Corjova to register, although authorities continued to impose logistical and legal hurdles to prevent the schools from functioning normally. Later, the schools in Ribnita and Tiraspol were also allowed to register for 1 year under the OSCE-negotiated formula. The Tiraspol school was scheduled to open in January 2005 after undergoing substantial repairs for damage in the summer by Transnistrian police. The Ribnita school was open but operating out of a different building after the Transnistrian authorities refused to let the school return to its original building.⁴⁷

As this conflict was proceeding, another one started over the ability of farmers who lived in villages outside of the TMR's control from accessing their fields that were within the TMR's control or allowing them to bring produce from their fields back to their villages.⁴⁸ In August 2004, Transnistrian "customs" officials seized several tractors from Moldovan farmers that were loaded with harvested corn.⁴⁹ Then, in mid-August, TMR officials in Dubosari closed all small roads leading from the Moldovan villages to the farmers' fields, forcing the farmers to only use certain roads controlled by TMR "customs" officials.⁵⁰ Depending on who was describing the situation, the TMR was variously asking

⁴⁷ Moldova 2004 Country Report, *supra* note 4 at sec. 5.

⁴⁸ *Id.* at sec. 2.d.

⁴⁹ OSCE Mission to Moldova Activity Report, *supra* note 45 at 4.

⁵⁰ *Id.*

the farmers to pay rent for or pay a tax on their fields. As of this writing there has been no comprehensive resolution of this problem and the 2004 and 2005 harvest seasons have largely been lost. Since farming is the main economic activity of the region, the hardship to the villagers has been substantial.

Following these events, relations between the government of Moldova and the TMR worsened. In September and October 2004 President Voronin stated that the government would no longer negotiate with the TMR.⁵¹ Voronin explained that “[t]he Dniester region can receive the broadest powers on the condition that the region remains an integral part of Moldova... we have grown cold to the federalization idea and there can be no return to it.”⁵²

It is unclear exactly what Voronin meant by “federalization;” the terminology used by the Moldovan and TMR leadership is often imprecise by Western legal standards. Moreover, the differing plans of federalization, confederalization, autonomy, and the like were Byzantine and arcane. For example, the reference to allowing “broadest possible powers” for the region but not “federalization” is unclear, to say the least. It may be that this statement, more than anything, marks the refusal to entertain a confederacy of two sovereign entities, similar to the May 1997 memorandum. If this interpretation is correct, then the government of Moldova would be unwilling to grant Transnistria anything beyond some version of autonomy within the parent state.

The EU, for its part, has become increasingly involved in the situation in Moldova. In February, 2005, it took an important step in signing an Action Plan on Moldova that would act as a guide for ongoing relations between Moldova and the EU and possible future Moldvan accession into the Union.⁵³ The U.S. and the EU have both joined the Moldova-Transnistria mediation process as official observers. The new “5+2” talks include Chisinau, Tiraspol, Russia, Ukraine, and the OSCE as the main five stakeholders and the U.S. and the EU as the official observers. The first round of the expanded talks were held in October 2005, with subsequent rounds (as of this writing) in December 2005 and January, February and March 2006. The February round ended in an impasse.⁵⁴ The March round also ended in a stalemate, focused on the as-yet unresolved issue concerning the farmers of the Dorotcaia area accessing their fields under TMR control.⁵⁵

⁵¹ Herd, *supra* note 10, at 10.

⁵² *Id.*, at 11.

⁵³ *Id.*, at 12.

⁵⁴ *Refusal to Compromise Dragging Out Transnistria Talks, U.S. Says*, Infotag (Chisinau, Feb. 3 2006); *Moldova Demands from Mediators to Clearly Express Their Attitude to Transnistria's Actors*, Infotag (Chisinau, Feb. 3 2006) (noting that “[d]elegations from Moldova, European Union, United States, GUAM countries, Canada, and Norway expressed regret that last week’s 5+2 negotiations had not resulted in meaningful progress.”); *EU Dislikes Slow Progress of Transnistria Settlement*, Infotag (Chisinau, Feb. 23, 2006)

⁵⁵ *Moldovan Delegation Leaves Negotiations, Proposes to Convene Again in a Week...*; Infotag (Chisinau, March 1, 2006).

The Moldovan Parliament had voted unanimously to demand a total Russian troop and munitions withdrawal from Transnistria by December 2005. Russia continues to argue that withdrawal must be part of a comprehensive political settlement of the Transnistrian situation, a policy which is generally referred to as “synchronization.” In December, 2005, with Russian troops still in Transnistria, the U.S. stated that it would not ratify a new Conventional Forces in Europe (CFE) treaty until Russia withdraws all troops and equipment from Moldova and from Georgia.⁵⁶ The Moldovan Parliament has now sought Russian withdrawal by the end of 2006. Russia has balked and also announced that it may denounce the CFE treaty.⁵⁷

On December 30, 2005, Ukraine and Moldova signed a joint declaration, which included provisions to start allowing goods produced by Transnistrian companies to be legally exported via Ukraine.⁵⁸ In order to comply with WTO protocols for documents indicating the point of origin for goods in international trade, Moldova and Ukraine agreed that Transnistrian companies could register with the government of Moldova at which point they would receive WTO-compliant export documents that would be recognized by Ukraine. The TMR almost immediately denounced the plan, calling it another attempt at economic blockade, and thus against the provisions of the May 8, 1997 memorandum. Ukraine subsequently suspended the agreement.⁵⁹ However, after certain adjustments, a revised version of the agreement went into force on March 3, 2006.⁶⁰ The TMR has once again called this an economic blockade and the Russian Duma has denounced the plan.⁶¹ As of mid-March 2006, the TMR has said it may seek direct financial assistance from Russia and may suspend participation in the 5+2 negotiations during the period it believes it is being pressured economically.⁶²

⁵⁶ *U.S. Refuses Arms Treaty While Russian Troops in Moldova, Georgia*, RFE/RL (Dec. 6, 2005), available at <http://www.globalsecurity.org/military/library/news/2005/12/mil-051206-rferL04.htm>.

⁵⁷ *Russian Army Group Commander Denies Rumours About Theft of Munitions in Transnistria*, Infotag (Jan. 25, 2006).

⁵⁸ *Moldova reiterates New Border Regime is for Legalization of Transnistrian External Trade*, Infotag (Chisinau, Feb. 3, 2006).

⁵⁹ *Transnistrian Leader Grateful to Ukraine for Pedaling Back*, Infotag (Chisinau, Jan. 26, 2006); see, also, *U.S. Puzzled Over Ukraine's Suspension of Agreement*, Infotag (Chisinau, Jan. 26, 2006).

⁶⁰ *Moldova Proposes to Launch New Rules for Transnistria from March 1*, Infotag (Chisinau, Feb. 28, 2006); *Ukraine Introduces New Border Regime*, Infotag (Kiev, March 6, 2006).

⁶¹ *Transnistria Quits Negotiation Process*, Infotag (Tiraspol, March 7, 2006); *Russian State Duma Condemns Moldova's and Ukraine's Actions on the Border*, Infotag (Chisinau, March 10, 2006).

⁶² *Transnistria Asks Russia's Financial Help*, Infotag (Tiraspol, March 10, 2006); *Transnistria Quits Negotiation Process*, *supra* note 61.

At this point the TMR is playing a waiting game; as the then-Chairman of its so-called Supreme Soviet, Grigoriy Marakutsa said in 2003: “Every year we are getting closer to our international recognition.”⁶³ As of November 2005, Marakutsa seemed to think that, in light of the decision by Kosovo’s parliament to seek recognition as an independent state, the TMR would soon abandon negotiations: “Parliament may decide to stop talks with Moldova and start building a fully independent state” he told reporters.⁶⁴

II. The Work of the Mission

It is in the context of the general worsening of the situation in 2004-2005 that the New York City Bar became involved in assessing the situation in Moldova.

Based on the Mission’s meetings and observations, we determined that at the heart of the Transnistrian crisis are a series of legal claims and concerns which can be grouped into three overall categories: (a) the claim of the TMR that it has a right under international law to autonomy or possibly sovereignty; (b) the legal issues concerning the transfer of property located in Transnistria by the TMR leadership; and, (c) the role of “third-party” states in the ongoing conflict, in particular the international legal implications of Russian economic pressure and military presence in the TMR.

This Report will consider each of these three issues in turn and will attempt to set out their relevant international legal aspects.

Two caveats are in order, though. First, the more we learned, the more we realized what we did not know, often because treaties, agreements, and other aspects of the relationships of the government of Moldova, the TMR, Ukraine and Russia, have been conducted in secret. Agreements between the parties went unpublished in any official register and, to the extent we were able to see texts of such agreements, they were often unsigned drafts which we could not be confident were the definitive texts. Consequently, our conclusions are based on the documents which we did see or which we have a reasonable confidence as to content. By some estimates, there have been approximately 97 separate agreements and memoranda signed among Moldova, Ukraine, Russia, and the TMR in the last decade concerning some aspect of this conflict. The parties treat these agreements as one would cards in a poker hand, discarding those that are not useful, keeping those that help their strategy. Moreover, many or perhaps even most of these agreements were never presented to the Moldovan parliament. While the Moldovans often argue that such agreements are not binding, the other parties argue that they are.

⁶³ Herd, *supra* note 10, at 4.

⁶⁴ *Moldova’s Rebel Region May Proclaim Independence, Speaker Says*, Interfax-Ukraine (Nov. 24, 2005).

A second caveat is that we found little evidence to support some of the common assumptions in this crisis. We heard countless allegations, for example, of arms factories in Transnistria being used to churn out high-end weaponry such as rocket launchers which are, in turn, smuggled to various destinations in Africa and the Middle East. We were routinely told that there are thirteen factories operating seven days a week, twenty four hours a day, to produce armaments in the TMR. At no time was there any proof offered for these allegations. Rather, each interlocutor would simply say that another person had the proof and, if we were to ask that person, he could provide it to us. This is not to say that, for instance, there are no arms plants in Transnistria. To the contrary the Transnistrians admit they are producing arms. However, they simply say that they are producing a relatively small amount of machine guns and handguns, along with component parts for the Russian and Ukrainian military and air forces. However, it is irrelevant to our analysis whether the TMR is or is not producing weaponry. The point is that we found that the crisis may, in part, be difficult to resolve because so few people actually have a reliable picture of the situation. Rumor runs rampant, but accurate information is what is needed to address a crisis.⁶⁵

Keeping this in mind, we turn first to the central question of the Transnistrian crisis: whether Transnistria has a right to autonomy or sovereignty under international law.

III. The Status of the Transnistrian Moldovan Republic in International Law

A. Sovereignty and Autonomy

Sovereignty is the basic requirement for statehood. Territorial sovereignty can be described, in short, as full and exclusive authority over the territory in question.⁶⁶ More broadly speaking, key elements of sovereignty include independence, autonomy, international “personhood,” territorial authority and integrity and inviolability.⁶⁷ In sum, there is no higher decision maker over a

⁶⁵ The Team had originally intended to examine the legal status of commercial agreements entered into by the TMS with foreign companies. However, there is little evidence of any large contracts being signed between the TMR and western companies. While foreign companies do operate in some capacity in the TMR, we did not see evidence of much beyond sales outlets, such as a Mercedes-Benz dealership or advertising for Samsung consumer electronics. We did learn of the substantial involvement of Russian and Ukrainian companies in the purchase of assets through the TMR’s “privatization” program. The legality of the conversion of this property, that had previously been titled to Moldova, became an issue of greater importance. Similarly, this implied the role of “third-party” States, such as Russia and Ukraine, more generally.

⁶⁶ Santiago Torres Bernadez, *Territorial Sovereignty*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 823 (R. Bernhardt, ed. 2000).

⁶⁷ LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 10 (1995).

sovereign entity, unless if that sovereign entity willingly cedes decision-making capacity to another.

The modern conception of sovereignty is traced to the Treaty of Westphalia, signed in 1648. Westphalia codified the doctrine in the European state system that no entity—emperor, pope, or other decision-maker—was above the level of the state. The state became the main actor in the international system. No state was allowed to interfere in the domestic issues within another state. Sovereignty meant that each state was the ultimate monarch within its territory and had no right of action within another’s territory.

Although this concept has been modified somewhat, particularly in the defense of human rights, the basic idea that there is a “zone of privacy” within a state’s domestic system still exists.

While sovereignty, with all its complexities, can be readily defined by description, autonomy is not as easy a concept to pin down. While “autonomy” is itself used to describe an aspect of sovereignty, it does not have a single specific meaning under international law. It is generally viewed as allowing decision-making leeway. Within a state, an autonomous region would be able to make its own decisions in key policy areas without any or with only minimal interference from the national government. The precise definition of those policy areas and the extent of national oversight that is or is not allowed are two open issues that make autonomy such a difficult topic to pin down.

B. The Concept of Autonomy in International Law and in Moldovan Law

1. The Arguments of the TMR

The TMR leadership has used many terms to describe what they view as their right under international law: “self-determination,” “sovereignty,” and, most recently, “autonomy” are words often heard in this context. However, we are more concerned with the legal rights that are being claimed than with the vocabulary used at any given juncture.

In the early days of the conflict, Transnistria’s “elites claimed historical justification [for autonomy]: if the rest of Moldova reverted to its pre-1940 status outside the Soviet Union, they argued, then the Dniestr region should have the right to revert to its own pre-1940 status, as an ‘autonomous republic’ in the Soviet Union.”⁶⁸ When we met with the TMR’s leadership in May 2005, they supplemented their historical argument with an economic one: as Grigoriy Marakutsa, the leader of the Supreme Soviet, explained, prior to separation Transnistria comprised only 12% of Moldova and 17% of Moldova’s population but accounted for approximately 40% of Moldova’s GDP. What made this vexing to him was that “our riches went to Chisinau.”⁶⁹ Thus, Transnistrians

⁶⁸ Kaufman, *supra* note 20, at 127.

⁶⁹ Notes from meeting of May 19, 2005 with Grigoriy Marakutsa (*hereafter* “Marakutsa meeting notes”).

want to be able to control the results of the fruits of their labor. They do not want the central government in Chisinau to be able to do so.

Igor Smirnov said much the same thing. He summarized the Transnistrian concept of autonomy as Moldova having control of external policy but the Transnistrians having “full powers” in the economic sphere.⁷⁰

Summarized as such, the Transnistrian claim for autonomy may be a relatively simple issue concerning fiscal decision-making. But further discussions show that this is not the case. Marakutsa went on to explain that the Transnistrians have grounds to claim an independent state but are ready to consider proposals for a common state, so long as in any future federation Transnistria would have a high level of independence. He explained that there could be common energy and defense policies as well as common policies in certain other areas. He also noted that the parliaments of Moldova and the Transnistrian entity in this conception would be equal, each able to block or effectively veto the other. He acknowledged that Moldova was unwilling to build a common state with such characteristics.⁷¹

The further the Transnistrians explained their understanding of “autonomy” the more powers were accreted to the TMR. Fiscal autonomy gave way to a veto power over any act of the Moldovan parliament. Marakutsa concluded by explaining that if Moldova was not ready to agree on a formula—perhaps referring to this specific formula—then the Transnistrians were ready to continue building a separate state.

In responding to a query as to why autonomy was the solution in the view of the TMR, “foreign minister” Valeriy Litskai responded that Transnistrians want the guarantees of a federal state that are not available in a unitary state. Moreover, social and ethnic reasons also require such autonomy as Moldova is comprised of one ethnic group but Transnistria has three ethnic groups.⁷² According to Litskai, this makes it impossible to have a single state. He points to the Russian Federation as an example of one federation comprised of different ethnic republics that follow different laws.⁷³

⁷⁰ Notes from meeting of May 19, 2005 with Igor Smirnov (*hereafter* “Smirnov meeting notes”).

⁷¹ Marakutsa meeting notes, *supra* note 69.

⁷² This description is not supported by data. See Part III.C.4(a), below, concerning ethnographic issues.

⁷³ Notes from meeting of May 19, 2005 with Valeriy Litskai (*hereafter* Litskai meeting notes).

2. Analysis of the Claim of Right under International Law to be an Autonomous Region in the Republic of Moldova

Under international law there is no “right” to fiscal or governmental autonomy within a state. Rather than a right to autonomy—or even a specific set of characteristics that define this term—international law has focused instead on the elucidation of the norm of self-determination. This will be considered at length in Part III.C, below.

At issue here is whether the TMR’s leadership has any legal basis for its claim to economic or political autonomy. While, understandably, the TMR leadership may make political arguments that one may or may not find persuasive, we have been hard-pressed to find a legal argument that can animate this claim. We set out what we believe are the two strongest quasi-legal arguments (*a*) that due to the denunciation by the USSR of the Molotov-Ribbentrop Pact, which had established the modern boundaries of Moldova, Transnistria should revert to an autonomous state; and, (*b*) self-determination as a basis for autonomy. We will consider the first here and defer our discussion of self-determination until Part III.C, as it relates directly to our discussion of secession.

Transnistrian elites have argued that the supposed revival of the MASSR is a “natural corollary” to the denunciation of the Molotov-Ribbentrop pact.⁷⁴ This follows the declaration by the Second Soviet Congress of People’s Deputies in Moscow in December 1989 that the Molotov-Ribbentrop pact was illegal.⁷⁵ The illegality of the pact was alluded to at several points in our discussion with the TMR’s leadership.

At issue, then, is what the legal result would be of the nullification of the Molotov-Ribbentrop pact. While the legal effect of the treaty (in this case the transfer of Bessarabia to the USSR) may be undone, it does not revert the internal politics of the signatories to the *status quo ante*. In other words, simply voiding the treaty only affects what the treaty itself attempted to do; it does not somehow summon the MASSR back into existence. Even though that does not occur as a matter of law, Pal Kolsto and other scholars have persuasively argued that as a matter of politics, this supposed revival of the MASSR is self-contradictory: “[t]he weak point in this line of argument is the fact that the MASSR was created precisely in order to facilitate a Soviet conquest of Bessarabia, and thus was an element in the same expansionist scheme as was the Molotov-Ribbentrop pact.”⁷⁶ If the Molotov-Ribbentrop pact is declared illegal because it was an act of aggressive expansion, then why should the construction of the MASSR, which

⁷⁴ Kolsto, *et al.*, *supra* note 9, at 983.

⁷⁵ *Id.*, at 980

⁷⁶ *Id.*, at 983.

was no more than a pretext for the expansion, be viewed as legitimate? The historical argument for autonomy is thus not persuasive.

3. Autonomy and the Moldovan Constitution

As international law has little to say as to any supposed “right” to autonomy, this becomes largely an issue of domestic law. Although not an identical situation, one can perhaps glean some guidance from the history of the government of Moldova to the Gagauz, a Turkic Christian minority that lives in Moldova, in particular in a Southern area called “Gagauzia.” The Gagauz actually declared independence one month prior to Transnistria, in August 1990.⁷⁷ The result, though, is that Gagauzia accepted a level of autonomy within the state of Moldova. Gagauzian autonomy became part of the Moldovan Constitution of July 1994 in the same section—Article 111—that also provided for Transnistrian autonomy.⁷⁸ The Moldovan parliament subsequently passed a more extensive law giving Gagauzia special autonomous status on December 23, 1994.

Although the Transnistrian authorities balked at the form of power-sharing offered (and accepted by) the Gagauz, a project on complex power-sharing agreements chaired by Marc Weller of Cambridge University noted:

[i]t may be argued that the power-sharing arrangement in Gagauzia is the first case in Central-Eastern Europe and the Soviet Union that establishes territorial autonomy for an ethnic minority. The organic law grants the Gagauz region a special status, awarding it more autonomous rights⁷⁹

The grant of autonomy, at least on paper, seems quite extensive. All economic decision-making, including property regulations, budgetary authority, and socio-economic policy, would be decided within Gagauzia, although, by article 18(2), the Gagauz budget must be in conformity with the overall laws of the Republic of Moldova.⁸⁰

In what may seem ironic in retrospect (particularly in comparison to the claims of the TMR), the Gagauz autonomy plan was originally criticized by the Council of Europe for giving too much power to the autonomous region. By 1996, though, it was reported that the Council of Europe was “extremely satisfied by how Moldova solved the Gagauz conflict.”⁸¹

⁷⁷ Herd, *supra* note 10, at 2.

⁷⁸ The Law on the Special Legal Status of Gagauzia, art 18(2) (1994) states:

The mutual relationships of the budget of Gagauzia and of the state budget shall be established in conformity with the laws of the Republic of Moldova on budgetary system and on the state budget for the corresponding year in the form of fixed payments out of all forms of taxes and payments.

⁷⁹ Gagauzia Case Review, *supra* note 35.

⁸⁰ *Id.*

⁸¹ *Id.*

Yet, Moldova's policy towards Gagauzia also highlights some of the concerns of the Transistrians, particularly regarding whether the Moldovan government can be trusted to keep its promises. Some of our interlocutors have noted that, while the autonomy plan was extensive on paper, in reality the Gagauz did not receive significant powers. In 1995 the Moldovan government replaced Stepan Topol, the governor (or Bashkan) of Gagauzia. His replacement, Georgiy Tabunshik, served from 1995 to 1999 and focused on reintegrating Gagauzia to the rest of Moldova. Tabunshik was considered instrumental in securing a solid electoral victory for President Voronin among the Gagauz. Dmitry Croitor was elected Bashkan in 1999 on a reformist platform. He was removed under threat of arrest by the government of Moldova in 2002. Croitor was re-elected in 2002. The Council of Europe is involved in ongoing monitoring of the situation.

Despite shortfalls of Moldova's Gagauzian policy, the Complex Power-Sharing Study Group has argued that "the 'success story' of Gagauzia may serve as an illustration of a practical power sharing arrangement and could possibly be paralleled with the experience of Transdniestria."⁸² It is important to note the factors that made this story a relative success. First, there was no serious armed conflict between Moldova's governmental authorities and the Gagauz. Additionally, the resolution of the Gagauz conflict was in part due to the responsible actions of stakeholder states; in particular the visit of the President of Turkey to Moldova in 1994 was seen "as being of crucial importance to the resolution of the Gagauzia issue."⁸³ Thus, the role of stakeholders or guarantors must be in the active pursuit of resolution, rather than using delaying tactics or stalling actions.

4. Is the TMR Actually Seeking Sovereignty?

One of the bedeviling aspects of analyzing the TMR's autonomy claim is unraveling whether what they are really seeking is simply sovereignty by another name. By their own words and deeds, this seems to be the case. Smirnov reiterated earlier rhetoric when, in July 2005—two months *after* we met with him and he spoke of autonomy—he stated that Transnistria "won't become part of Moldova, and such a variant is excluded."⁸⁴ Smirnov has also previously demanded that the TMR must maintain its own army and its own currency,⁸⁵ two of the hallmarks of sovereignty.

⁸² Id.

⁸³ Id.

⁸⁴ Tammy Lynch, *Yuschenko Undercutting Moldova in Transnistria?*, THE NIS OBSERVED: AN ANALYTICAL REVIEW, (vol. 10, no. 8 July 26, 2005), available at <http://www.bu.edu/iscip/digest/vol10/ed1008.html>, citing to Novie Izvestia, Jul, 11, 2005, *What the Papers Say*, Part B via Lexis-Nexis (*hereafter* "Lynch, Yuschenko Undercutting?")

⁸⁵ Stephen R. Bowers, Marion T. Doss, Jr., and Valeria Ciobanu, *Gagauzia and Transdniestria: The Moldovan Confederation Conundrum*, The William R. Nelson Institute at James Madison University (February 2001).

Although the TMR's leadership pays lip-service to the idea of a single Moldovan state, its logic and its rhetoric are increasingly convoluted. Consider the following excerpt from an essay by the first secretary of the TMR Communist Party's central committee, Victor Gavrilenco published on June 8, 2005 in the official newspaper of the TMR and note, in particular, the language we highlight:

The [Transnistrian] people has never entrusted to anybody the right to deprive it *of its statehood*. This question may only be solved through a referendum. The Transnistrian people *shall never agree to living in a special-status zone*. We have repeatedly voiced our vision of the problem settlement - through *building a new federative state* with a prior amendment of the Moldova Constitution in order to declare Russian as a second official language in the country, *with denial of the unitarian principle of state structure*, with a clear-cut fixing of the Eastern trend in the external policy, and with preservation of Russian troops in the region.⁸⁶

How there can be “a new federative state” without denying the “statehood” of Transnistria but also denying “the unitarian principle of state structure” was never resolved. Rather, if we are to take the claims of Transnistrian statehood seriously, as well as the TMR leadership's denial of a single Moldovan state, then the goal of the TMR's leadership does not seem to be autonomy (we shall never agree to live in a special-status zone) but complete sovereignty.

Perhaps Marakutsa was saying the same thing as Smirnov and Gavrilenco, though with circumspect language, when he stated that the TMR's leadership planned to have one or more referenda under the aegis of the international community on the subject of Transnistria's future relationship with the Republic of Moldova. In his view, if the inhabitants of Transnistria expressed a desire for sovereignty, the international community should respect that wish because the will of the people is the primary determinant of international law and, to support this, he cited the cases of Eritrea, East Timor, Bosnia and the Czech and Slovak republics.⁸⁷ Elsewhere, Marakutsa has been more straightforward, saying “Pridnestrovye is a sovereign and independent state.”⁸⁸

The TMR's leadership seems to reject plans that are most similar to grants of autonomy. In 1992, for example, Chisinau proposed a draft law which would have given Transnistria administrative autonomy but, in light of the recent conflict, the TMR's leadership found that autonomy was insufficient.⁸⁹

⁸⁶ *Transnistrian Communist Party for Referendum on Accession to Russia*, Infotag (Tiraspol, June 8, 2005) (translation by Infotag).

⁸⁷ Marakutsa meeting notes, *supra* note 69.

⁸⁸ *As quoted by LYNCH, supra* note 34, at 47.

⁸⁹ Kolsto, *et al, supra* note 9, at 996.

In another example,

In May, 2000, the [TMR] rejected Moldova's offer, conveyed by President Petru Lucinshi himself, to give the [TMR] a specified, guaranteed number of seats in the Moldovan Parliament and to make the [TMR] president a vice-prime-minister of the Moldovan Republic. Because this offer did not incorporate the notion of the [TMR] as the equal of the Moldovan Republic, it was rejected.⁹⁰

And, more recently, the Transnistrian Supreme Soviet stated that

the adoption by the Moldovan Parliament of the Declaration and Appeals on [the region's] democratization and demilitarization means, in practice, a variant of forcing the Transnistrian population into an unconditional accession to the constitutional area of the unitarian Republic of Moldova. These documents lead to provoking a stand-off and run contrary to the OSCE fundamental principles of tackling regional conflicts.⁹¹

Marakutsa stated that he had serious doubts about federalism and argued that (a) Gagauzia had no real economic powers and that (b) Moldova's economic and privatization policies are based on building economic groups with ties to whomever is then the Moldovan President. This scepticism is no doubt in part due to Moldova's questionable handling of the situation in Gagauzia. Similarly, Litskai originally showed enthusiasm for American-styled federalism but, as U.S. federalism was described to him by Team members, he quickly retreated from this proposition and instead used analogies to Serbia and Montenegro and to Belgium: one state being in the process of separation and another where federal powers have all but collapsed.

In order to sort through these claims and counter-claims, one must get past vocabulary and focus on underlying concepts. It has become apparent that the parties—even individual representatives of the same party—often mean vastly different things with the same term. In particular the meanings of “federalism,” “confederacy,” and “autonomy” have led to much disagreement. For example, in discussions with the Mission of the New York City Bar, Valeriy Litskai spoke in favor of “federalism” as it exists in the U.S. Upon a description by members of the Mission of how U.S. federalism operates, including the relative rights and obligation of U.S. states and the U.S. federal government, Litskai retracted his statement, saying that that was not what the TMR leadership wanted. For the sake of clarity, in this report we will adopt a single nomenclature and define our terms as follows: a *federal system* is a “system of associated governments with a vertical division of governments into national and regional components having different

⁹⁰ Bowers, *et al.*, *supra* note 85.

⁹¹ *Tiraspol Rejects Unconditional Surrender*, Infotag (Tiraspol, June 17, 2005).

responsibilities...”⁹² A *confederation* shall refer to “[a] league or union of states or nations, each of which retains its sovereignty but also delegates some rights and powers to a central authority.”⁹³ Autonomy will refer to a grant of decision-making powers from the national government to a region that allows for effective self-rule in most policy-areas, although formal sovereignty still resides with the national government.

The TMR’s Supreme Soviet argued that Chisinau “has completely given up the federalization idea - in contravention to agreements signed earlier between the Republic of Moldova and Transnistria.”⁹⁴ Voronin has in fact said that “The Dniester region can receive the broadest powers on the condition that the region remains an integral part of Moldova... We have grown cold towards the federalization idea and there can be no return to it.”⁹⁵ But whether those earlier agreements actually envisioned Moldova as a loose confederation between the central government and the TMR is hotly contested by the parties

The descriptions—if not the outright statements—of the TMR leadership all point to the TMR actually seeking sovereignty as opposed to autonomy within the Moldovan state. As Graeme Herd, an analyst for the Conflict Studies Research Centre, explained: “These proposed actions point to the emergence of a more concrete [TMR] strategy aimed at moving beyond the status quo of frozen conflict to outright independence.”⁹⁶

Consequently we turn to the concept of self-determination and whether it provides any legal basis for the TMR’s attempted secession.

C. Self-Determination and Secession

1. The Law of Self-Determination

The norm of self-determination gained international prominence in Woodrow Wilson’s Fourteen Points. Since then it has had a tumultuous existence, ranging from post-World War decolonization to post-Cold War ethnic wars. Writing the concept of “self-determination” into the UN Charter caused the idea to evolve from a principle to a right without ever fully defining the

⁹² “Federal” in BLACK’S LAW DICTIONARY 625 (7th ed. 1999)

⁹³ “Confederation” in BLACK’S LAW DICTIONARY 293 (7th ed. 1999); a confederation, for purposes of international law is not one, but several States. JAMES BRIERLY, THE LAW OF NATIONS 128 (6th ed. 1963, SIR HUMPHREY WALDOCK, ED), *see also* “Confederation” in PARRY AND GRANT ENCYCLOPAEDIC DICTIONARY OF INTERNATIONAL LAW (2d ed. 2004 JOHN P. GRANT AND J. CRAIG BARKER, EDS).

⁹⁴ *Tiraspol Rejects Unconditional Surrender*, *supra* note 91.

⁹⁵ Herd, *supra* note 10, at 11.

⁹⁶ *Id.*, at 9.

underlying concept.⁹⁷ According to Hurst Hannum of the Fletcher School of Law and Diplomacy, self-determination in the 1960's was simply another term for decolonization.⁹⁸ However, even at this point "self-determination did not allow for secession; instead, the territorial integrity of existing states and most colonial territories was assumed."⁹⁹ Thus, as Hannum explained in a 1996 roundtable held by the U.S. Institute of Peace and the Policy Planning Staff of the Department of State, the idea of self-determination during this time was *not that all peoples* had a right to self-determination but rather that *all colonies* had a right to be independent.¹⁰⁰ The rhetoric of self-determination then changed in the period from the late 1970's until today, in which the Wilsonian discourse concerning the ethnic and cultural rights of minorities was mixed with the territorial concerns of the era of decolonization.¹⁰¹ While there is still controversy as to what this norm is and is not, there is a basic consensus from which we can draw conclusions in the present case.

The right to self-determination is "the right of cohesive national groups ('peoples') to choose for themselves a form of political organization and their relation to other groups."¹⁰² Although self-determination was mentioned in the U.N. Charter,¹⁰³ jurists even in the last decade have found that "international law as it currently stands does not spell out all the implications of the right to self-determination."¹⁰⁴ Nonetheless, ICJ's *Western Sahara Advisory Opinion* confirms "the validity of the principle of self-determination" under international law.¹⁰⁵

The basic norm of self-determination is the right of a people of an existing State "to choose their own political system and to pursue their own economic, social, and cultural development."¹⁰⁶ The assumption is that such a pursuit of

⁹⁷ Patricia Carley, *Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession, Report from a Roundtable Held in Conjunction with the U.S. Department of State's Policy Planning Staff*, United States Institute of Peace (Peaceworks paper no. 7; March 1996) at 3.

⁹⁸ *Id.*

⁹⁹ *Id.*, at 4.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 553 (6th ed. 2003).

¹⁰³ *See* UN CHARTER, art. 1, para. 2 *and also* UN CHARTER, art. 55

¹⁰⁴ European Community Conference on Yugoslavia Arbitration Commission (the "Badinter Commission"), Op. 2.

¹⁰⁵ *Western Sahara, Advisory Opinion*, 1975 ICJ Reports 12, 31-3 (oct. 16). *See also Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion*, 1971 I.C.J. 16, 31 (June 21) and *Case Concerning East Timor (Port. V. Austl.)*, 1995 I.C.J. 90, 102 (June 30); BROWNLIE, *supra* note 102, at 554 n. 121.

¹⁰⁶ Daniel Thurer, *Self-Determination*, in 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 364, 367 (R. Bernhardt, ed. 2000).

economic, social, and cultural, development would occur under the auspices of an existing State, and would not require the establishment of a new State. This conception of internal self-determination makes self-determination closely related to the respect of minority rights. Furthermore, modern views of self-determination also recognize the “federalist” option of allowing a certain level of cultural or political autonomy as a means to satisfy the norm of self-determination.¹⁰⁷

This is what occurred in the famous *Aaland Islands* case from the interwar period. In the 17th century the Aaland Islands were administratively part of Finland, which in turn was part of the Kingdom of Sweden. In the 19th century Sweden ceded Finland, including the Islands, to Russia. In 1917, Finland declared independence from Russia during the course of the Russian Revolution. At this time the Aaland Islanders, who were nearly all Swedish, sought reunification with Sweden. Finland and Sweden brought the case to the League of Nations, who in turn referred the case to a Commission of Jurists to assess the legal issues. The two opinions issued by the Commission, one concerning applicable law and the other on substantive results, have become very influential in questions of self-determination and secession.

As summarized by one commentator, the Commission considered secession as only applicable in the most extreme of cases

As an absolutely exceptional solution, [it may apply] when a state brutally violates or lacks the will or the power to protect human dignity and the most basic human rights; however, in such cases the assumption of a legal claim to self-determination only seems to be justified if a people conscious of its own identity and settling on a common territory is discriminated against as such and *if no effective remedies exist in municipal and international law to adjust the situation* (LoN Council Doc. B7/21/68/106 VII, pp. 22-23)¹⁰⁸

2. Secession

In sum, the norm of self-determination is not a general right of secession.¹⁰⁹ While self-determination is an internationally recognized principle,

¹⁰⁷ Daniel Thurer, *Self-Determination, 1998 Addendum*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364, 373 (R. Bernhardt, ed. 2000).

¹⁰⁸ See, e.g., Thurer, *supra* note 106, at 367 *citing to* the Findings of the Committee of Rapporteurs in the Aaland Islands Case of 1921 (emphasis added).

¹⁰⁹ See, e.g., *id.* (stating “[t]he principle of self-determination does not seem to include a general right of groups to secede from their States of which they form a part.”) The US Institute for Peace/Department of State roundtable stated that the right to self-determination must be separated from right to secession and the establishment of independent statehood. Carley, *supra* note 97, at vi.

secession is a domestic issue, “one for states themselves to decide.”¹¹⁰ State practice in the cases of Tibet, Katanga, Biafra, and Bangladesh support the view that states have not recognized such a right under customary international law.¹¹¹

Although these are political matters—if anything *because* these are contentious political matters—legal principles and right process are all the more important. The summary of the Roundtable stated that in general “the United States should be less concerned about outcomes in these struggles than about the means used; international political stability is more likely to be maintained by focusing on the process than by trying to manipulate events to arrange a predetermined outcome.”¹¹²

The United States should, however, make absolutely clear that secession has not been universally recognized as an international right. It may choose, on the basis of other interests, to support the secessionist claims of a self-determination movement, but not because the group is exercising its *right* to secession, since no such right exists in international law. At the same time, an absolute rejection of secession in every case is unsound, because the United States should not be willing to tolerate another state’s repression or genocide in the name of territorial integrity. Secession can be a legitimate aim of some self-determination movements, particularly in response to gross and systematic violations of human rights and when the entity is potentially politically and economically viable.¹¹³

Issues of self-determination and secession are normally within the purview of domestic law. Classic international law maintains that “[a]lthough a rebellion will involve a breach of the law of the state concerned, no breach of international law occurs through the mere fact of a rebel regime attempting to overthrow the government of the state or to secede from the state.”¹¹⁴ If such attempts to secede impinge upon the peace and security of the international system, the U.N. Security Council may declare it illegal, as in the cases of Rhodesia or the attempted secession of Katanga province from the Congo.¹¹⁵ Illegality thus refers

¹¹⁰ Carley, *supra* note 97 at 9.

¹¹¹ Thurer, *supra* note 106, at 367-68.

¹¹² Carley, *supra* note 97 at vi.

¹¹³ *Id.*, at vii.

¹¹⁴ 1 OPPENHEIM’S INTERNATIONAL LAW (9th ed.1992) (Robert Jennings and Arthur Watts, eds). (*hereafter* “OPPENHEIM”), at §49, p. 161-62.

¹¹⁵ Christine Haverland, *Secession*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 354, 356 (R. Bernhardt, ed. 2000).; regarding Katanga *see* SC Res. 169 (1961) *available at* http://www.un.org/Docs/sc/unsc_resolutions.html.

to municipal illegality at the domestic level or, at the international level, to foreign intervention or a threat to international peace and security.¹¹⁶

State practice has evolved, though, so that self-determination, properly understood, does not allow the redrawing of boundaries. During the Yugoslav War, the Conference on Yugoslavia Arbitration Commission, better known as the “Badinter Commission,” established by the European Community found that the exercise of self-determination “must not involve changes to existing frontiers at the time of independence (*uti possidetis juris*) except where the states concerned agree otherwise.”¹¹⁷ This is reiterated in Opinion 3, which notes that *uti possidetis* has become recognized as a “general principle” of international law.¹¹⁸ The Helsinki Final Act also provided for inviolability of borders, although it does allow for border changes if through peaceful means and based on an agreement.¹¹⁹

Other treaties or declarations that include an explicit or implicit affirmation of *uti possidetis* include:¹²⁰ the Vienna Convention on Diplomatic Relations;¹²¹ the Vienna Convention on the Law of Treaties, (1969);¹²² the Vienna Convention on the Succession of States in Respect of Treaties (1978);¹²³ the Constitutive Act of the African Union¹²⁴ the UN General Assembly Resolution 1514 (XV);¹²⁵ declaration of the UN World Conference on Human Rights in 1993.¹²⁶

¹¹⁶ Id., at 356.

¹¹⁷ Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1497 (1992). (Hereafter, the “Badinter Commission.”) The Badinter Commission was organized by the E.C. to sort through the legal issues concerning the status of Yugoslavia and its possible successor States.

¹¹⁸ Badinter Commission, Op. 3, 31 I.L.M. 1499 (1992).

¹¹⁹ Kolsto, *et al.*, *supra* note 9. *See also*, Conference on Security and Co-operation in Europe Final Act, Helsinki, 1975, Principle 3 (1975) available at http://www.osce.org/documents/mcs/1975/08/4044_en.pdf.

¹²⁰ List adapted from C. Lloyd Brown-John, *Self Determination and Separation*, POLICY OPTIONS 42 (September 1997) .

¹²¹ Vienna Convention on Diplomatic Relations ,500 UNTS 95; 23 UST 3227; 55 AJIL 1064 (1961), entry into force April 24, 1964.

¹²² Vienna Convention on the Law of Treaties, art. 62 UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969).

¹²³ Vienna Convention on the Succession of States 1946 UNTS 3; 17 ILM 1488 (1978); 72 AJIL 971 (1978).

¹²⁴ Constitutive Act of the African Union, art. 4(b), OAU Doc. CAB/LEG/23.15 (2001)

¹²⁵ UN General Assembly Resolution 1514 (XV) at para. 6

¹²⁶ Brown-John, *supra* note 120 at 43 (affirming that all peoples have a right to self-determination but limited this to free-exercise of democratic governance; secession is not part of the right)

The International Court of Justice had also written in *Burkina Faso v. Mali* that *uti possidetis*

is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.¹²⁷

Even more recently, the Supreme Court of Canada grappled with questions of self-determination and secession in *re Secession of Quebec*. In assessing whether Quebec could secede, the Canadian court found that

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances...¹²⁸

This result is consistent with the Friendly Relations Resolution of the UN General Assembly, a special resolution that was passed at the twenty-fifth anniversary of the founding of the United Nations to restate the basic principles of the organization. The resolution excludes secession as a means of forming a sovereign state when the existing state respects equal rights and the self-determination of peoples.¹²⁹

3. The Legal Requirements for Claims of External Self-Determination

Although, as the Badinter Commission noted, the norm of self-determination is not completely defined in any one place, we can infer the main points from *Aaland Islands*, the *Badinter Opinions* concerning the Yugoslav War, *Secession of Quebec*, and other cases. At the very least, an argument for external self-determination would need to prove that (a) the secessionists were a “people,” (b) the state in which they are currently part brutally violates human rights, and (c) there are no other effective remedies under either domestic law or international law.

¹²⁷ Case Concerning the Frontier Dispute (*Burkina Faso v. Mali*), 1986 I.C.J. 554, 565 (Dec. 22).

¹²⁸ Reference re: *Secession of Quebec*, 2 S.C.R. 217 at para. 123 (1998) (hereafter “*Secession of Quebec*”).

¹²⁹ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV); see also Haverland, *supra* note 115, at 355.

In the phrase of the Canadian Supreme Court from the *Secession of Quebec* opinion, the meaning of “peoples” is “somewhat uncertain.”¹³⁰ At various points in international legal history, the term “people” has been used to signify citizens of a nation-state, the inhabitants in a specific territory that is being decolonized by a foreign power, or an ethnic group. The *Aaland Islands* report also added that, for the purposes of self-determination, one cannot treat a small fraction of people as one would a nation as a whole.¹³¹ Thus, the Swedes on the Aaland Islands, who were only a small fraction of the totality of the Swedish “people” did not have a strong claim for secession in comparison to, for example, Finland, when it broke away from Russian rule since Finland contained the near totality of the Finnish people.

Today the term “people” is somewhat ambiguous. Most recently it has been used to mean an ethnic group, or a “nation” in the classic, ethnographic sense of the word. However there are some, such as the TMR’s leadership, who suggest the term should mean something else, perhaps a group with common goals and norms. As will be discussed in the next section, deciding on a single definition of the term “people” is not dispositive in this case, as none of the other requirements for external self-determination are met.

The second requirement, after showing that the claim is being made on behalf of a “people” is that the claimants can show serious violations of their human rights by the pre-existing state. The *Aaland Islands* report actually stated this principle in the negative; the Commission explained that its finding that there was not a right to secede did not include the case of “a manifest and continued abuse of sovereign power to the detriment of a section of population.”¹³² It is an unfortunate fact that human rights abuses exist in every country and that in many countries such abuses are serious and pervasive. However, it is exceedingly rare for the international community to ratify a secession, regardless of the reason upon which it was based. Consequently, we must give a narrow reading to the idea of “serious violations of human rights” in the context of secession.

Third, those claiming secession as a legal right must show that there are no other options under either domestic or international law. The *Aaland Islands* Commission, for example, found that if secession and subsequent incorporation into Sweden was the *only* means of protecting the rights of the Islanders, then this would have been a solution, but there were, in fact, other means of protecting their rights.¹³³ More recently, the Canadian Supreme Court wrote in *Re Secession*

¹³⁰ *Secession of Quebec*, *supra* note 128, at para 123.

¹³¹ The Aaland Islands Question: Report Submitted to the Council of the League of Nations by the Commission of Rapporteurs, League of Nations Doc. B7/21/68/106 (1921) (hereafter “*Aaland Islands 1921 Report*”).

¹³² Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question, League of Nations Off. J., Spec. Supp, No. 3, at 5-10 (1920) (hereafter “*Aaland Islands*”).

¹³³ *Aaland Islands 1921 Report*, *supra* note 131.

of *Quebec* that there *may* be a rule evolving in international law that “when a people is blocked from a meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession.” There are two points worthy of emphasis: first, that the Canadian Supreme Court did not come to a conclusion that such a rule actually existed, it simply noted that some have argued that there is such a rule. Second, even if this rule did exist, secession would only be allowed *as a last resort*.

Based on these criteria, the TMR does not have a persuasive claim.

4. Analysis of the TMR’s Claim for External Self Determination

a. Is there a Transnistrian “People?”

While it is not necessary for the purposes of this Report to define the term “people” in order to conclude that the claim is not persuasive, we can at least note that Transnistrians, as represented by the TMR, are not a “people” in the sense of being an ethnicity. According to Charles King:

There were far more Ukrainians and Russians west of the Dneestr River than in Transnistria, and in some northern *raions*¹³⁴ and in the cities, the Slavic population were just as concentrated as in the *raions* east of the Dneestr. In Transnistria as a whole, Moldovans formed nearly 40 percent of the total population of just over 600,000. Rather, although the Transnistrian dispute was generally portrayed as a revolt by Slavs against the nationalizing policies of Chisinau, the real source of the violence after 1990 lay in fact at the level of elite politics... The reaction to the national movement was not a revolt by minorities, but a revolt by displaced elite against those who threatened to unseat them.¹³⁵

The theory that what is occurring is an ethnic conflict between Romanians and Slavs is shown to be empty rhetoric by the fact that most of the ethnic Russians in Moldova live outside Transnistria. Transnistria’s ethnic mix before the 1992 war was over 40- percent Moldovan, 28 percent Ukrainian, and only 25 percent Russian.¹³⁶ What is happening in Transnistria is more complex, and possibly more difficult to solve than ethnic strife. According to Stuart Kaufman, the Russophones in Transnistria are not so much a single ethnicity as a “coalition of ethnic interests united in opposition to certain ethnic Moldovan interests.”¹³⁷ As Pal Kolsto and his co-authors explain, the conflict was less ethnic than

¹³⁴ Authors’ note: *raions* is a term for “counties” in Moldova.

¹³⁵ KING, THE MOLDOVANS, *supra* note 2, at 187.

¹³⁶ Kaufman, *supra* note 20, at 119.

¹³⁷ *Id.*

internecine: Orthodox Christians killed Orthodox Christians and ethnic Moldovans, Ukrainians, and Russians fought on both sides.¹³⁸ They argue that it would be a “gross oversimplification” to call the conflict one between ethnic Moldovans (or Romanians) and Russophones.¹³⁹ One must remember that “the history of Moldova is one of constant change and contestation of territory and so identities and loyalties.”¹⁴⁰

If not a “people” in the sense of a single ethnicity, the TMR’s leadership falls back on the argument that the Transnistrians form a tight cultural community seeking independence. Litskai argued that Transnistria is a social and cultural region. Rather than a single ethnicity, though, he argues that it is a community of three ethnic groups.¹⁴¹ There is some support for saying that Transnistrians have different political proclivities than “right bank Moldovans.” For example, Transnistria had already been collectivized in the 1920’s and 1930’s and thus was always more “Soviet” than the Bessarabian part of Moldova.

Defining the term “people” for the purpose of self-determination is an exceedingly complex question fraught with issues of political will and state practice for which there is no clear precedent. In the absence of a clear consensus of the states in the international system, our response is to be wary of novel interpretations, especially when argued by an entity that has not been recognized by a single state. In *Secession of Quebec*, the Supreme Court of Canada found that it was unnecessary to precisely define the term “peoples” because, “whatever the correct application of the definition of people(s) in this context, their right to self-determination cannot in the present circumstances be said to ground a right to unilateral secession.”¹⁴² We have come to a similar conclusion in this case. Regardless how one chooses to define people, none of the other requirements for the suggested right to external self-determination are met.

Even assuming Litskai’s formulation, though, that political proclivities could make a “people,” the facts in this case would not support his claim. The TMR’s leadership points out that a January 1990 referendum in Transnistria reportedly had 96% of the voters favoring autonomy within the MSSR and, if necessary, the future creation of an independent state.¹⁴³ But, while there is likely support in Transnistria for independence, the votes that occurred must be considered with a critical eye. In a visit to Tiraspol in September 1992, Kolsto and his co-authors were shown lists in which the votes of the residents had been recorded with their names, “[h]ence the anonymity of the voters had been

¹³⁸ Kolsto, *et al.*, *supra* note 9, at 975.

¹³⁹ *Id.*

¹⁴⁰ Herd, *supra* note 10,.

¹⁴¹ Litskai meeting notes, *supra* note 73.

¹⁴² *Secession of Quebec*, *supra* note 128, at para. 125.

¹⁴³ KING, THE MOLDOVANS, *supra* note 2, at 189.

compromised.” Moreover, the 1993 human rights country report issued by the U.S. Department of State stated that “while there is some question concerning the extent of local Slavic support for the current Transnistrian leadership, it is clear that most ethnic Romanians in the region do not support the Transnistrian authorities.”¹⁴⁴

Identity is, of course, socially constructed and the TMR has put effort into socializing Transnistrians into having a group identity. Transnistrian textbooks, for example, state the following concerning the 1992 Battle of Bender:

The traitorous, barbaric, and unprovoked invasion of Bender had a single goal: to frighten and bring to their knees the inhabitants of the Dnestr republic... However the people’s bravery, steadfastness, and love of liberty saved the Dnestr republic. The defense of Bender against the overwhelming forces of the enemy closed a heroic page in the history of our young republic. The best sons and daughters of the people sacrificed their lives for peace and liberty in our land.¹⁴⁵

Inasmuch as schoolchildren have been educated with such textbooks for the past fifteen years, it would not be surprising if there was a sense of “otherness” by some in Transnistria in comparison to the rest of Moldova. But this alone does not equate to a claim for secession.

It has been consistently held that, as the Commission of Jurists stated in *Aaland Islands*, there is no right of national groups to separate by the simple expression of a wish.¹⁴⁶ (Note that even here the assumption is the existence of a national group—usually meaning an ethnicity, rather than simply a like-minded group.) Moreover, the *Aaland Islands* Commission found that the ability to choose fate by plebiscite must be decided by the State itself (in this case the Republic of Moldova); otherwise such a formulation would infringe upon the sovereign right of states.¹⁴⁷

While the norm of self-determination may evolve such that a people may be more readily identified as merely a like-minded group, we do not find that current State practice supports such a proposition. Rather, as the Canadian Supreme Court concluded,

¹⁴⁴ U.S. Department of State 1993 Country Report on Human Rights Practices for the Republic of Moldova (*hereafter* 1993 Country Report) *available at* http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_eur/Moldova.html *as quoted in* Kolsto, et al., *supra* note 9, at 986.

¹⁴⁵ This is Charles King’s translation of a passage from N.V. Babliunga and V.G. Bomeshko, *Pagini din Historia Plaiului Natal* (Pages from the History of the Fatherland) 98 (Tiraspol: Transnistrian Institute of Continuing Education, 1997), *see* Charles King, *The Benefits of Ethnic War: Undersanding Eurasia’s Unrecognized States*, 53 *WORLD POLITICS* 524, 544 (2001).

¹⁴⁶ *Aaland Islands*, *supra* note 132.

¹⁴⁷ *Id.*

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied their ability to exert internally their right to self-determination.¹⁴⁸

Moreover, regardless of the result of whether the Transnistrians are a “people,” the other prongs of the test are not met by the TMR.

b. Serious Violations of Human Rights

While serious violations of human rights can play a part in supporting a claim for secession, there is a general sense that such violations must be ongoing.¹⁴⁹ The argument of the Transnistrians concerning human rights violations can be organized into three main groupings: (a) violations of linguistic and cultural, and political rights; (b) the brutality of the 1992 War; and (c) the denial of economic rights. Taking into account the significant changes in Moldova since 1992, none of these claims is convincing today.

Linguistic, cultural, and political rights. Although there may have been justifiable concerns due to the proposed language laws, concerns over unification with Romania, and the nationalistic rhetoric in general at the founding of the Republic of Moldova, these concerns turned out to be short-lived. By 1993 the fear of unification with Romania was unfounded, according to the U.S. State Department:

While some groups within Moldova continue to advocate unification with Romania, this idea has generally lost popularity over the past several years. This, in turn, has led to some improvements in the relations between Romanian speakers and Russian speakers. The latter express serious concern about the situation of Russian speakers if unification were to take place. The leadership of the separatist "Transdniester Moldovan Republic" sought to capitalize on fears of discrimination to gain support from the majority Russophone population of the region.¹⁵⁰

¹⁴⁸ Secession of Quebec, *supra* note 128, at para. 138.

¹⁴⁹ Professor C. Lloyd Brown-Jones of the University of Windsor has written that “self-determination and secession to achieve independence are *not* mutually compatible concepts in international law *except* under circumstances where oppression and persecution or a colonial relationship *persists*.” Brown-John, *supra* note 120 at 40. (emphases added).

¹⁵⁰ Moldova 1993 Country Report, *supra* note 144 at Sec 5.

By 1994, the Moldovan government was working to undo the concerns regarding the use of Moldovan. In its annual review of human rights practices in Moldova, the State Department found that “Interethnic relations improved as the new Parliament delayed the implementation of the controversial testing for competence in the state language Romanian (Moldovan), which many members of the minorities do not speak.”¹⁵¹ Moreover, the State Department also found that “[t]o date, no pattern of discrimination has emerged in the judicial system.”¹⁵²

While the Moldovan road to democracy has been a bumpy one, with occasional backsliding (in the areas of the freedom of the press in particular), there has been a general trend of progress. In the 2004 Human Rights Country Report for Moldova, the State Department wrote that “[t]he Government [of Moldova] generally respected the human rights of its citizens; however, there were problems in some areas, and the human rights record of the Transnistrian authorities was poor.”¹⁵³ Keeping in mind that the argument of the TMR is that it needs to secede from Moldova in order to have the human rights of Transnistrians respected, contrast Moldova’s ameliorating human rights record with the TMR’s poor history. One example is the provision of free and fair elections:

In 2001, citizens voted in multiparty parliamentary elections that the OSCE considered to be generally free and fair; however, election observers noted some shortcomings, such as inaccurate and incomplete voter lists and excessively restrictive media provisions in the Electoral Code. Transnistrian authorities interfered with residents’ ability to participate in the country’s elections. International observers were not present at either the Transnistria Supreme Council elections in 2000 nor the 2001 “presidential” elections, and the elections were not considered free and fair.¹⁵⁴

¹⁵¹ Id. at Introduction.

¹⁵² Id. at Sec 1.e

¹⁵³ Moldova 2004 Country Report, *supra* note 4.

¹⁵⁴ Id. at Sec. 3. The Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1465 (2005) “Functioning of Democratic Institutions in Moldova,” on October 4, 2005 which stated, in part, that Moldova

has advanced significantly on the path of democratic reforms but a number of important commitments have not yet been fulfilled. The pace of reforms has been slowed by the fact that Moldova, in addition to its democratic institutions, has been simultaneously building its national identity and dealing with a separatist regime and foreign troops stationed in the Transnistrian region of Moldova.

Council of Europe res. 1465 (2005) available at http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/ta05/ERE_S1465.htm

This poor showing of electoral rights not only undermines the argument that internal self-determination is not possible in Moldova, but it also undercuts the contention that the Transnistrian referenda are good indicators of the will of the Transnistrians.

Similarly, while Moldova attempted to decrease discrimination and tensions after the 1992 War,¹⁵⁵ the TMR's leadership actually increased discrimination within Transnistria on linguistic grounds. As the State Department found:

In the separatist region, however, discrimination against Romanian/Moldovan-speakers increased. The regime continued its insistence that all Moldovan schools in the region use the Cyrillic alphabet only.¹⁵⁶

Marakutsa, by contrast, extolled the tolerance of the TMR in his meetings with the New York City Bar representatives. He explained that the TMR had three official languages, Moldovan, Ukrainian, and Russian, and that the TMR's school regulations allowed for schools in other languages, although they must be privately funded.¹⁵⁷

Consider, in this context, the crisis over the Romanian language schools. Two schools, one in Tiraspol, and one in Ribnita, were closed by TMR representatives in July 2004, leaving approximately 1200 students without a school. Two schools in Bender were guarded by parents and teachers to prevent a feared closing. One of the schools, a boarding school for orphans called the Internat, was surrounded by TMR militia who controlled access to the area. According to the OSCE, there were 70-80 students in one of the schools throughout the month of July, without access to running water, gas, or electricity. At one point, the TMR allowed a water tank to be moved onto the grounds, but then this "privilege" was later withdrawn and the tank was taken away. Students still had access to water, but had to carry it "several hundred meters" to their dorms or the kitchen.¹⁵⁸ For a time, Moldovan police officials were allowed to deliver food to the orphans, then the TMR refused deliveries by the Moldovan police and the OSCE was allowed to deliver food; then the OSCE was no longer allowed to enter but the Moldovans were allowed back in. Finally on August 20, the TMR cordon simply withdrew.

The State Department's summary of the situation in 2004 stated that:

¹⁵⁵ Moldova 1994 Country Report, *supra* note 37 at Sec 5.

¹⁵⁶ *Id.*

¹⁵⁷ Marakutsa meeting notes, *supra* note 69.

¹⁵⁸ OSCE Mission to Moldova Activity Report, *supra* note 45 at 5.

Transnistrian authorities reportedly continued to use torture and arbitrary arrest and detention. Prison conditions in Transnistria remained harsh, and two members of the Ilascu group remained in prison despite a July ruling in their favor by the European Court for Human Rights (ECHR). Human rights groups were permitted to visit prisoners in Transnistria, but obtaining permission from the Transnistrian authorities was difficult. Transnistrian authorities mistreated and arrested one journalist from the government-controlled area, harassed independent media and opposition lawmakers, restricted freedom of association and of religion, and discriminated against Romanian-speakers.¹⁵⁹

Furthermore, “[i]t was common practice for Transnistrian authorities to detain persons suspected of being critical of the regime for periods of up to several months.”¹⁶⁰ Transnistrian authorities refused to comply with the decision of the European Court of Human Rights (ECHR) in the *Ilascu* case concerning the detention of political dissidents. The Department of State noted that “[t]here were no reports of political prisoners [in Moldova] other than those in Transnistria.”¹⁶¹

In light of the comparative record of Moldova and the TMR regime, it becomes clear that not only is there no credible claim of extreme deprivation of social, cultural, and political rights in Moldova but, rather, that such a claim exists for ethnic and linguistic minorities living in the area under the TMR’s effective control.

The Brutality of the 1992 War. The heart of the Transnistrians claim concerning the 1992 War can be summarized as “We Transnistrians did not go into Moldova to fight, they brought the battle to us.”¹⁶² In particular, claims have centered around the fighting in and around Bender. The fighting was, for a time, quite fierce, with a total death toll of about 1,000. Litskai explained that the real issue, though, is that due to the bad feelings that still exist, there is no guarantee that the war could not flare up again in the future.

The Transnistrian argument is not persuasive. This is not to belittle the fact that one thousand people died, but rather to recognize that the international community sets a high bar as to what can justify dismembering a state. Consider Biafra. The Biafran attempt to separate from the rest of Nigeria from 1967-1970 was in part (if not mostly) due to ongoing violence by the government of Nigeria against the Igbo people who live in Biafra. Yet, for the nearly one million people that died in that secessionist conflict, the Republic of Biafra was recognized by only five states: Tanzania, the Ivory Coast, Gabon, Zambia, and Haiti. Those

¹⁵⁹ Moldova 2004 Country Report, *supra* note 4, at Introduction.

¹⁶⁰ *Id.* at Sec. 1.d.

¹⁶¹ Moldova 2004 Country Report, *supra* note 4, at Sec. 1.e.

¹⁶² Smirnov meeting notes, *supra* note 70.

states that did recognize Biafra as a new state often focused on the brutality of the conflict.¹⁶³

Yet, although other countries (notably Portugal, France, and Israel) assisted the Biafrans, no other state recognized the secession. The Organization of African Unity, for its part, strongly supported Nigeria and the norm against the dismemberment of states. The emperor Haile Selassie of Ethiopia said that “The national unity and territorial integrity of member states is not negotiable. It must be fully respected and preserved.”¹⁶⁴

This is not to say that there is some benchmark of human suffering before there can be a claim of secession. Such a contention would be repugnant; it does, however, point to a reality of international politics: there is a deep aversion to allowing secession. In light of this, an argument that a single battle fifteen years ago should be dispositive in a claim for secession today flies in the face of State practice, particularly when one takes into account that the current human rights situation in Moldova is much improved and there is very little ethnic tension. (Both being in contrast to the situation in Transnistria itself.)

War by its nature is brutal. But not all wars—actually as a matter of State practice very few—lead to accepted claims of a right to secession. The 1992 Battle of Bender and its related skirmishes do not rise to the level of such a war.

Denial of Economic Rights. Perhaps the most constant complaint lodged by our interlocutors in Transnistria was that the central government in Chisinau denied them their economic rights. As Marakutsa put it, Chisinau was built on the riches of Transnistria. Both Marakutsa and Litskai stressed that at the outset of Moldovan independence, Smirnov had sought economic autonomy more than anything and that this had been rejected. Now, however, as Marakutsa explained, Gagauzian-style autonomy would not be enough because—in the view of the TMR’s leadership—the Gagauz are unable to push forward their economic claims.¹⁶⁵ Marakutsa explained that the main concerns between Tiraspol and Chisinau are economic, but not so much the economy itself as the “methods and forms” of economic decision-making.

Litskai mentioned a similar theme. He explained that Moldova had lost its industrial base very quickly through the form of privatization it used. And, he continued, while Moldovans can live as agrarians, Transnistrians cannot. The concern is that the Moldovan scheme of privatization will destroy the TMR’s

¹⁶³ See David A. Ijalaye, *Was Biafra At Any Time a State in International Law?*, 65 AM. J. INT’L L. 551, 554 (1971). The brutality of the conflict was used as a reason for accepting secession: Tanzania explained its recognition was in part due to the real and well-founded fears of the Biafrans based on previous pogroms against them; Gabon and Zambia had similar explanations, though more focused on brutality of the civil war

¹⁶⁴ Id. at 556. One notes the irony of this statement in light of the Ethiopian Eritrean War that would embroil his country with the ultimate secession of Eritrea.

¹⁶⁵ Marakutsa meeting notes, *supra* note 69.

industrial base. Conversely, he noted, Moldova refuses to recognize the TMR's privatization plan.¹⁶⁶

When asked again why autonomy is the answer to these problems, Litskai explained that this is necessary to defend against economic exploitation of Moldova.¹⁶⁷ This argument is also not persuasive because, despite the economic assets that the TMR controls and is actively selling off to willing buyers, the economic benefits have not been felt beyond a select group of Smirnov associates. As Dov Lynch of the European Union Institute for Security Studies observed, "the great majority of the PMR population lives in deep poverty, with an average income of one U.S. dollar a day."¹⁶⁸ The TMR has had effective control of the economic assets of Transnistria for fifteen years and, aside from a state-of-the-art soccer stadium and a clean veneer to the main street in Tiraspol, there is little to show for it in terms of general economic benefits to the population.

Over the course of hours of meetings with the TMR's leadership, we were struck by how often the question came back to who gets to decide what to privatize and who gets to decide how that money is spent. These are, without a doubt, pressing policy issues. But secession is not about changing a *policy* but about changing a *polity*, the political organization itself, the State. While the Transnistrians may disagree with Chisinau over how entities should be privatized and what percentage of that revenue should be reinvested in Transnistria, there is nothing that rises to the level of a claim that the only solution is to split the Moldovan State. Rather, if anything, there is a glimmer of hope here: if the parties are really disagreeing over money, then a negotiated solution is more likely, once we strip away the nationalistic rhetoric. But this would be a negotiated solution within the rubric of Moldovan law, not a right to be autonomous or to secede simply because you disagree with fiscal policy.

c. No Other Solution

Litskai argued that the people who have come to power in Chisinau in 1990 aimed the Moldovan State's mechanisms against Transnistria and that to defend themselves Transnistrians had to create a State in order to respond.¹⁶⁹ The unitary Moldovan state would not provide the guarantees that the Transnistrians needed and, as such, separation was sought, although, as Smirnov, Litskai and Marakutsa each emphasized, some form of federation or confederation may now be possible.

So, if the TMR is now willing to consider federation, is it accurate to say there is no other solution? We should consider their argument here in the terms

¹⁶⁶ Litskai meeting notes, *supra* note 73.

¹⁶⁷ *Id.* At this point Litskai said that we should also consider the ethnic differences between Moldovans and Transnistrians.

¹⁶⁸ LYNCH, *supra* note 34, at 66.

¹⁶⁹ *Id.*

that it would need to be made to support a claim for external self-determination. (In any case, as was discussed in Part III.B, above, the TMR's argument seems to actually be for full sovereignty, though approached obliquely.)

Their claim that there is no other solution but for secession is not persuasive. First of all, the actual history of Moldova since the end of the 1992 War shows that minority rights have been respected to a greater extent than feared. Although Moldova does not have a pristine record, if such a human rights record was enough to lead to a right of secession, the world would be rife with secessionist conflicts.

This conflict has been frozen not so much because there are no other options under domestic and international law besides secession, but because the separatists gained by making the conflict seem intractable. As one commentator put it, "Russophone leaders [in Transnistria] used ethnic outbidding to exacerbate mass hostility and the security dilemma in order to preserve and increase their power."¹⁷⁰ Head of TMR internal security Vladimir Antufeyev, for example, "runs a number of social organizations and newspapers that inflate the nature of the Moldovan threat to Transnistria."¹⁷¹ Furthermore, "[s]eparatist violence occurred because Russophone elites had much to gain, especially increased power and career opportunities for themselves, by promoting it."¹⁷²

The problem may not only be in Transnistria. The Infotag news agency has reported that Voronin has said that

he often has an impression that the Moldovan political elite does not need a Transnistrian settlement as such, that it is more advantageous to live in a split country with an open border, with Transnistrian shadowy economy and a foreign military presence.¹⁷³

Dr. Charles King of Georgetown University describes the stalemate in Moldova (and other post-Soviet countries with separatist crises) in this way:

It is a dark version of Pareto efficiency: the general welfare cannot be improved—by reaching a genuine peace accord allowing for real reintegration—without at the same time main key interest groups in both camps worse off.¹⁷⁴

King also notes William Zartman's telling description: if the parties feel that they can get more by fighting than by negotiating, if they have not reached a

¹⁷⁰ Kaufman, *supra* note 20, at 126.

¹⁷¹ LYNCH, *supra* note 34, at 60.

¹⁷² Kaufman, *supra* note 20, at 126.

¹⁷³ *Moldovan Parliament Hears Transnistria Issue*, Infotag (Chisinau, June 10, 2005).

¹⁷⁴ King, *supra* note 145, at 526.

“hurting stalemate”, then they are unlikely to seek peace.¹⁷⁵ In the case of Moldova, a hurting stalemate—and real bargaining from the Transnistrian side—is unlikely while the Russians continue to ameliorate the situation for the Transnistrians. Similarly, the Bertelsmann Foundation, along with the East West Institute, the Open Society Institute and other interested non-governmental organizations, issued a report concerning the Transnistrian crisis that stated that “[n]o durable conflict resolution is possible when the separatist rebels are in a better position than the legitimate state.”¹⁷⁶

King wrote that “[i]t is the multifaceted origins of the Transnistrian conundrum, as well as the political and economic interest spawned by the war itself, that have made the dispute so difficult to resolve.”¹⁷⁷ The International Crisis Group explains that a “wide array of actors play both sides against the middle by maintaining ties with both Moldovan government and the DMR in an effort to preserve lucrative—and often illegal—trading arrangements made possible by the DMR’s parallel economy and customs policies.”¹⁷⁸ These businesspeople from Ukraine, Moldova, and Russia “constitute a well-financed lobby that wishes to uphold the status quo.”¹⁷⁹

Rosa Brooks has referred to the idea of conflict entrepreneurs -- those who profit from ongoing conflicts.¹⁸⁰ Perhaps this is the best way to consider the Smirnov regime and the truest explanation of the conflicts intractability.

¹⁷⁵ Id. at 527.

¹⁷⁶ Bertelsmann Foundation put together a group of foundations including the Center for Applied Policy Research (Munich), Eurisc Foundation (Romania), Euro-Atlantic Center for Moldova, EastWest Institute, Institute for Development and Social Initiative (Moldova), Institute for Public Policy (Moldova), Open Society Institute (Belgium), Romanian Academic Society, South-East European Association.

¹⁷⁷ KING, THE MOLDOVANS, *supra* note 2, at 179. This is exacerbated by the palpable personal dislike between Smirnov and Voronin. While Smirnov came to Moldova in 1987, Voronin is from Transnistria. The conflict over the territory seems more than merely political for these men. In our meetings with the two leaders their personal dislike was apparent and the history of the relationship of Igor Smirnov and Vladimir Voronin is a history of slights, great and small. Smirnov, in particular, complained of Voronin “stealing” his gold coins, in reference to a shipment of commemorative gold coins that were seized by Moldovan customs in transit to the TMR from Poland, their place of minting. Smirnov asked us if Voronin would like it if he stole Voronin’s motorcycle. (Unbeknownst to the Team at the time, Voronin seems to enjoy motorcycle riding.) Smirnov, for his part, had refused to let Voronin cross into Transnistria to visit his ailing (now deceased) mother and did not let Voronin come to Transnistria to watch a match of the Moldovan national soccer team. Yes, although Moldova and the TMR are in an ongoing conflict, until 2003 the Moldovan National Soccer Team played certain “home” games in Transnistria where the TMR had built a lavish soccer stadium complex. How the TMR arrived at the funds to do so is a question of some interest to the Moldovans.

¹⁷⁸ International Crisis Group, *Moldova: Regional Tensions Over Transdnistria*, ICG Europe Report No.157 (17 June 2004) at 1 (*hereafter* “ICG 2004”).

¹⁷⁹ Id.

¹⁸⁰ See, generally, Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275 (2003).

Secession is clearly not the only option available to solve this conflict.

5. Conclusion

There is no solid basis for a claim of secession under external self-determination. The most basic requirements for a legal claim are not met.

Moreover, the analysis of the legal requirements of external self-determination only underscore that this is in part an opportunistic crisis. “The Dniestrian leadership’s main approach to justifying itself, however, was not ideological or historical but military: it stoked violent conflict by provoking a security dilemma between Moldova and Dniestrian Russophones, then cast itself as the Russophones’ defender.”¹⁸¹ The TMR portrays itself as part of the Russian homeland (when seeking support of Cossacks), genuine socialists (when rallying the vestiges of the USSR’s Communist Party), and as progressive capitalists (when seeking support from the New York City Bar, for example).

Perhaps the TMR’s strongest argument for sovereignty is not one stemming from the doctrinal requirements of external self-determination but the argument that it was not part of Moldova historically. The MASSR was merged with Bessarabia only as part of the Molotov-Ribbentrop pact. But the historical argument is itself undercut by history as well as sociology. While it is true that the east and west banks of the Dniester were often separated by a boundary, the historical fact is that they have existed in a single state, without separation, since 1940. That is longer than most states in existence today. Moreover, there is no linguistic, ethnic, or religious justifications for separation as the communities on both sides of the Dniester are heterogenous and multi-ethnic.

The TMR has tried to answer this by arguing that the “average Transnistrian” wants the TMR’s independence. According to one report:

On 12 October 2004, at a conference dedicated to the 80th anniversary of the [MASSR], Igor Smirnov announced that PMR would hold a referendum “to prove the legitimacy” of its independence. The results of the referendum would become law and force the international community to acknowledge the PMR people’s will: “We must hold a national referendum, with international observers to make sure that there can be no doubt about the legitimacy of our state. The results of the referendum will be a law for us, a law that the international community, above all the United States, the European Union and the OSCE, will have to respect.” Smirnov had previously argued in August 2004 that holding separate referendums in Moldova and PMR to settle the PMR-Moldovan conflict was a possibility. Such action would be in accordance with the Cyprus settlement model of conflict resolution, and would afford the people of PMR “the right to self-determination.”¹⁸²

¹⁸¹ Kaufman, *supra* note 20, at 127.

¹⁸² Herd, *supra* note 10, at 9 (citations omitted).

The *Aaland Islands* Commission found that the ability to choose fate by plebiscite must be decided by the state itself; otherwise such a formulation would infringe on the sovereign right of states.¹⁸³

Secession is a serious undertaking. In order to prevent a general breakdown of the state system, it must be a last resort. Situations short of that do not give rise to a right of secession.

Merely wanting to secede does not allow one to secede. The TMR's arguments do not recognize this and, as such, they are not persuasive.

D. Defining the Legal Status of the TMR

In light of the foregoing, what is the legal status of Transnistria? If it is not a state, then what is it? We considered two issues: (a) the role of recognition in the process of state formation; and (b) whether the TMR is a *de facto* regime.

1. Recognition

The extent to which a new state is able to participate in the international community is, in practice, largely determined by the extent of its bilateral relationships with other states which, in turn, depends primarily on its recognition by them.¹⁸⁴ By recognizing a State, the recognizing State gives its opinion that the new State meets the requirements under international law for statehood. When recognition is withheld, the position of the entity in question is in doubt.¹⁸⁵

Although there is no single text that explains what is required to be a "state" the Montevideo Convention sets forth a series of benchmarks which are generally accepted in the international community.¹⁸⁶ The Restatement (Third) of the Foreign Relations Law of the United States gives the modern synopsis of the requisites of statehood:

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that

¹⁸³ *Aaland Islands*, *supra* note 132.

¹⁸⁴ OPPENHEIM *supra* note 114, at §39, p. 129.

¹⁸⁵ Jochen A. Frowein, *Non-Recognition*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 627 (R. Bernhardt, ed. 1992). Recognition itself is not a formal requirement of statehood. Rather, recognition merely accepts a factual occurrence. Thus recognition is "declaratory" as opposed to "constitutive." Nonetheless, no state is required to recognize an entity claiming statehood.

¹⁸⁶ Montevideo Convention on the Rights and Duties of States, 49 Stat. 3097; Treaty Series 881; 165 UNTS 19 (December 26, 1933).

engages in, or has the capacity to engage in, formal relations with other such entities.¹⁸⁷

In considering the situation of the TMR, the Russian Ambassador to Moldova, H.E. Nicolai Ryabov, told us that the TMR is unrecognized by any other nation only because of politics. He argued that other entities—Bosnia and East Timor, for example—were recognized because the political will existed to recognize them. The TMR’s problem, he implied, though did not state explicitly, was not one of law but of politics. In 2000, Vladimir Bodnar, the chair of the Security Committee of the Supreme Soviet of the TMR, put it this way:

We are an island surrounded by states... What defines a state? First, institutions. Second, a territory. Third, a population. Fourth, an economy and a financial system. We have all of these!¹⁸⁸

First, although Ambassador Ryabov’s statement implies (and Bodnar says outright) that the TMR has all the requisites for statehood, such a conclusion has little foundation. As one group of commentators wrote, “[o]ne legacy of the traumatic ‘birth’ of the [TMR] is an almost complete lack of permanent, functioning political structures.”¹⁸⁹ As will be further discussed, below, the TMR is less a functioning state and more a hothouse flower, an entity that is able to survive only because of certain carefully regulated conditions—in this case the ample economic and security support of the Russian Federation—that would be unable to survive under normal circumstances.

Besides the question as to whether the TMR could survive as a state, Ambassador Ryabov’s comment also ignores the fact that non-recognition can be due to policy reasons or for some legal deficiency of the new entity, for example, “[r]ecognition may also be withheld where a new situation originates in an act which is contrary to general international law.”¹⁹⁰ The Restatement (Third) notes that

¹⁸⁷ RESTATEMENT OF THE LAW, THIRD, OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1986) (*hereafter* “RESTATEMENT (THIRD)”) §201 “State Defined.”

¹⁸⁸ *As quoted by* LYNCH, *supra* note 34, at 43. Note Bodnar’s replacement of “the capacity to engage in formal relations with states” with “an economy and financial system” in his description of the criteria for statehood.

¹⁸⁹ Bowers, *et al.*, *supra* note 85.

¹⁹⁰ OPPENHEIM *supra* note 114, at §54, p. 183. and *ID.*, n. 4. See also Daniel Thurer’s 1998 addendum on self-determination in the Encyclopedia on Public International Law, which states that

Rather than formally recognizing a right of secession, the international community seems to have regarded all these processes of transition as being factual rearrangements of power, taking place outside the formal structures of international law: international law only became subsequently relevant within the context of recognition.¹⁹⁰

Daniel Thurer, *Self-Determination, 1998 Addendum, supra* note 107, at 367.

A state has an obligation not to recognize or treat as a state an entity that has attained the qualification for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.¹⁹¹

State practice gives ample support that the non-recognition of the TMR is consistent with the recent norms of state practice as well as accepted rules of international law. Consider the example of Southern Rhodesia, where a white minority government took control and declared the colony's independence from Great Britain. The Rhodesian example shows that a unilateral declaration of independence will not be tolerated if the result would be to then impair the rights of others.¹⁹² In one basic casebook on international law, the co-authors explain that Rhodesia should have met the traditional criteria for statehood, but the Security Council and General Assembly resolutions denying such recognition were nonetheless accepted as definitive.¹⁹³ The issue of an entity's ability to enter in relations with other states is related to the formal recognition by other states of the statehood of the entity in question.¹⁹⁴ Great Britain's refusal to accept the validity of Rhodesia's unilateral declaration of independence, for example, seems to have played a part in the refusal of any other state to recognize Rhodesia which thus denied Rhodesia from gaining the capacity to enter into relations with states.¹⁹⁵

Cyprus provides another instructive example. The combination of different ethnic groups within a single state, the role of guarantor powers, and the ongoing question of recognition provide numerous points of comparison. If anything, Cyprus shows how complex such separatist situations can become if left unresolved.

The modern story of Cyprus starts in the years following World War I where the Mediterranean island came under British control and, in 1925, a formal British colony. However, Cyprus had a mixed Greek and Turkish population and there were ongoing concerns stemming from sectarian discord. In 1950, for example, Greece argued that Cyprus should be united with Greece. During the era of post-World War II decolonization, Britain began the process of granting the island independence and fostering a stable government to rule Cyprus. It had to

¹⁹¹ RESTATEMENT (THIRD) §202(2) "Recognition or Acceptance of States."

¹⁹² Brown-John, *supra* note 120 at 41.

¹⁹³ LORI DAMROSCH, LOUIS HENKIN, ET AL, INTERNATIONAL LAW CASES AND MATERIALS 266 (4th ed. 2001) (*hereafter* "DAMROSCH, ET AL.>").

¹⁹⁴ See Ijalaye, *supra* note 163, at 552. Ijalaye wrote

It would appear that there is no other way of acquiring this 'recognized capacity' than by the grant of formal recognition by existing states. The question of capacity to enter into relations with other states thus shades into the question of the nascent state's being formally recognized by other states.

Id.

¹⁹⁵ Id.

keep the interest of the various communities in mind. In 1960, Cyprus' population was 80% Greek Cypriot, 18% Turkish Cypriot and 2% "Other." With Britain, Greece, and Turkey playing the role of "guarantor states," the Greek and Turkish Cypriot communities signed a series of agreements in 1960 known as the 1960 Accords. These Accords included the Basic Structure, essentially to Constitution of the newly independent Cypriot state, the Treaty of Guarantee in which the guarantor States promised to "recognize and guarantee the independence, territorial integrity and security of Cyprus as well as the Basic Structure, and the Treaty of Alliance, which set up a means for the guarantor states to cooperate.

There was disagreement and factionalization almost from the point of independence. There was widespread civil unrest in 1963. The guarantor powers unfortunately did more to sow discord than heal wounds: in 1974 Greece engineered a coup in Cyprus and as a response Turkey invaded and took control of the Northern third of the island.

In February 1975, the leaders of Turkish Cyprus announced that they had formed the "Turkish Federated State of Cyprus," ("TFSC") which was not an independent sovereign state, but an autonomous part of a federation with a Greek Cypriot state.¹⁹⁶ In this way, Turkish Cyprus attempted to seize territory first, and then re-negotiate the constitutional order. This has similarities to Moldovan-Transnistrian-Russian relations in the 1990's.

In September 1975, the assembly of the TFSC declared full sovereignty. Although the TFSC has effective control of northern Cyprus, the TFSC remains generally unrecognized.¹⁹⁷

While the Security Council did not call for non-recognition of the island, it did note its regret over the proclamations of the TFSC and did say that no action should be taken by any Member State of the UN that would divide the island.¹⁹⁸ The situation further devolved with a November 1983 proclamation by what had been the TFSC that the now newly named Turkish Republic of Northern Cyprus ("TRNC") was an independent state. Security Council Resolution 541 (1983) calls upon states not to recognize any Cypriot state other than the Republic of Cyprus.¹⁹⁹ Only Turkey has recognized the TRNC and the Security Council called the proclamation "invalid."²⁰⁰ This shows the interplay of the legal doctrine concerning the attributes of a state and the political reality of membership in the international community.

¹⁹⁶ See OPPENHEIM *supra* note 114, at §55, p. 189, n. 16.

¹⁹⁷ *Id.* at §55, p. 189-90.

¹⁹⁸ SC Res. 367 (1975) *available at* http://www.un.org/Docs/sc/unsc_resolutions.html; *see also* OPPENHEIM *supra* note 114, at §55, p. 190.

¹⁹⁹ SC Res. 541 (1983) *available at* http://www.un.org/Docs/sc/unsc_resolutions.html; *see also* SC Res. 550 (1984) *available at* http://www.un.org/Docs/sc/unsc_resolutions.html.

²⁰⁰ SC Res. 541 (1983), *supra* note 199.; OPPENHEIM *supra* note 114, at §55, p. 190, n. 20.

Rather than pure politics, as Ambassador Ryabov may have it, what we actually see is an evolving state practice. Effective control of territory, though indisputably a crucial stepping stone towards recognition, is not in and of itself enough for recognition.²⁰¹

A frequent reason for not recognizing an entity as a new state is that territorial changes caused by the use of force are generally seen as unlawful and will not be recognized.²⁰² Recognition of a territorial acquisition achieved from the threat or the use of force “would be an improper interference in the internal affairs of the state of which the unlawfully acquired territory was a part.”²⁰³ The secession of Katanga was not recognized by any state. Biafra is another example of an attempted secession that almost no other state accepted. In light of this, whether the predecessor state recognizes the seceding entity as a new state is an

²⁰¹ Effectiveness in fact should not be confused with legality as a matter of right.

The principle of effectivity...proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

Secession of Quebec, *supra* note 128, at para 146.

The latest iteration of this argument, at the time of this writing, is that the situation in Transnistria is similar to that in Kosovo. As Smirnov complained, “[c]urrently they are preparing a recognition of Kosovo, but would deny this to Transnistria. If this is a really fair, universal approach to conflict settlement, it must be applied also to Transnistria, and Abkhazia, and South Ossetia, and Nagorny Karabakh.” *Transnistrian President Jealous About Kosovo Variant*, Infotag (Tiraspol, Feb. 17, 2006). Moldovan leaders see little resemblance between the situation in Kosovo and that in Moldova and thus one cannot analogize that what may work as a solution in one would be good for the other. *Kosovo Experience is No Good for Transnistria—Voronin*, Infotag (Chisinau, Feb. 21, 2006).

There situation in Kosovo is quite different from that in Moldova. For example, The situation in Kosovo is animated by ethnic conflict between the Kosovars and the Serbs that includes real concerns over ethnic cleansing by the Serbs; there is no such ethnic conflict in Moldova. Kosovo is currently an internationally administered territory; Transnistria is not.

Finally, one should note that, if the international community supports sovereignty for Kosovo, this is the result of a political bargain. The international community has not used the argument that Kosovo is owed sovereignty as a legal right. Here we were concerned with whether Transnistria has a legal right to sovereignty. To this end, therefore, the Kosovo example is neither a fitting analogy nor one that would answer the legal questions that are being considered in this report.

²⁰² Frowein, *Non-Recognition*, *supra* note 185, at 628.

²⁰³ DAMROSCH, ET AL, *supra* note 193, at 267. See also RESTATEMENT (THIRD), §202(2).

important criterion.²⁰⁴ “Third States... may be prevented from according recognition as long as the injured state does not waive its rights since such a unilateral action would infringe the rights of the latter State.”²⁰⁵ We should note that we believe recognition by a predecessor state is an important criterion, but the U.S. has consistently argued that such recognition is not *required* as a matter of law. Nonetheless, in situations such as this, where there is an incomplete secession, the fact that the predecessor state continues to actively deny the validity of the secession is both legally and politically important, though not dispositive.

A second reason for not recognizing an entity as a state is its lack of independence in relation to some state.²⁰⁶ This argument could be made *vis a vis* the TMR’s relationship to Russia. But for Russian assistance, the TMR would probably not be able to survive as a separate entity as it “relies heavily on external political and material support.”²⁰⁷ This will be discussed at greater length in Part V, below, but warrants a brief mention here. Consider three aspects of Russian support: military assistance, energy subsidies, and the provision of political and military leadership.

The Russian 14th Army, or ROG, effectively ensures the separation of the Transnistria from the rest of Moldova. It was Russian intervention that sealed a Transnistrian victory in the 1992 War and a military stalemate since then. Russian military units are essentially the guarantors of a separate Transnistria.

Russia has also made a Transnistrian economy viable by providing low cost energy (at rates lower than what is provided to Moldova). This makes Transnistrian factories able to produce (and sell) goods at lower cost than other manufacturers in the area. Moreover, Gazprom has not sought from the TMR the collection of one billion dollars in debt.

The TMR’s leadership cadre is also largely drawn from Russia. Victor Balala, a former Duma staffer, is the TMR’s “Minister of Justice” and was also a key person in the privatization program until he was fired in July 2005 at the insistence of a majority of the deputies in the Transnistrian Supreme Soviet.²⁰⁸ Renegade Russian General Vladimir Antufeyev is the TMR chief of internal

²⁰⁴ Haverland, *supra* note 115, at 357.

²⁰⁵ Karl Doehring, *Effectiveness*, in 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 43 (R. Bernhardt, ed. 1995) at 47.

²⁰⁶ Jochen A. Frowein, *Recognition*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 33 (R. Bernhardt, ed. 2000).

²⁰⁷ ICG 2004, *supra* note 178, at 1.

²⁰⁸ According to certain interlocutors, although the public explanation cited failure properly to execute his duties, the real cause was Balala’s participation, along with at least two deputies from the Russian Duma, in the theft of \$15 million from the first stage privatization of the Moldovskaia GRES, a gas-fired power station in Cuciurgan.

security.²⁰⁹ And Russia has also admitted that whole military units from the Russian Army have joined the TMR's army.²¹⁰

State practice in Europe since the 1990's and the successor state issues in Yugoslavia and the former-USSR has increasingly established preconditions to recognition. The European Community thus issued a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union²¹¹ and also a Declaration on Yugoslavia²¹² which set out the ground rules for (in the words of the Declaration on the Recognition of New States) "recognition by the Community and its Member States and to the establishment of diplomatic relations." The Declaration on the Recognition of New States reads, in part:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, *have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.*

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to *the rule of law, democracy and human rights*

- guarantees for the *rights of ethnic and national groups and minorities* in accordance with the commitments subscribed to in the framework of the CSCE

- *respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement*²¹³

²⁰⁹ Antufeyev is sought by INTERPOL for his role in the murder of a journalist.

²¹⁰ Case of Ilascu, *supra* note 12, at para. 59.

²¹¹ Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' (16 December 1991) 31 ILM 1486 (1992) (hereafter "Recognition Declaration").

²¹² Declaration on Yugoslavia (Extraordinary EPC Ministerial Meeting, Brussels, 16 December 1991) 31 ILM 1485 (1992).

²¹³ Recognition Declaration, *supra* note 211, at 1486. (Emphases added.)

Moreover, the Declaration explained that “The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.” This goes well beyond the simple reading that recognition simply occurs once there is effective control of territory. In particular, the concern of European states in the protection of democracy, human rights, minority rights and *uti possidetis* should give pause regarding any claim that the TMR deserves immediate recognition. The fact that it exists because of a military conflict, that it has one of the worst human rights record in Europe, and it seeks to redraw the borders of Moldova lead to serious questions as to its recognition under established European and indeed international practice.

The United States has also had a similar practice. Secretary of State James Baker, for example, said in a September 1991 speech to the Conference on Security and Cooperation in Europe that U.S. recognition of new states in Central and Eastern Europe would be based on the new states’ meeting certain criteria. Recognition would be based, in part, on a determination that new states would adhere to the following principles:

- Determining the future of the country peacefully and democratically, consistent with CSCE principles;
- Respect for all existing borders, both internal and external, and change to those borders only through peaceful and consensual means;
- Support for democracy and the rule of law, emphasizing the key role of elections in the democratic process;
- Safeguarding of human rights, based on full respect for the individual and including equal treatment of minorities; and
- Respect for international law and obligations, especially adherence to the Helsinki Final Act and the Charter of Paris.²¹⁴

Thus, while Ambassador Ryabov is correct in saying that recognition is generally a political declaration of a legal fact, he did not actually address the issue that state practice of recognition has evolved such that prospective states can be expected to meet certain criteria before being recognized. Those criteria—no territorial acquisition through force, respect for human rights, respect of borders of existing states, etc.—pose a problem for the TMR. While recognition is a political declaration, it does not ignore legality. Rather, the norms of *nonrecognition* are the means by which a decentralized legal system may enforce its norms. The jurist Sir Hersch Lauterpacht wrote that nonrecognition “is the minimum of resistance which an insufficiently organized but law-abiding

²¹⁴ Testimony of Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, October 17, 1991, Vol. 2, No. 3 Foreign Pol’y Bull. 39, 42 (Nov./Dec. 1991) *as quoted in* DAMROSCH, ET AL., *supra* note 193, at 258.

community offers to illegality; it is a continuous challenge to a legal wrong.”²¹⁵ Thus it is not that the TMR is unrecognized *merely because of politics*; it is unrecognized by even a single state in the world *because it does not meet the most basic standards of legality*.

Rather than arguing that non-recognition is due to purely political factors; the inverse may be more accurate in this case: that there are good reasons for non-recognition and that recognizing the TMR may be imprudent. James Brierly had written:

It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.²¹⁶

One should keep in mind that a struggle need not be military; the norms of the international system, as set out in the UN, seek the peaceful settlement of disputes. It would be against the basic norms of the international system to require that such a struggle must be military. Since the TMR’s original moves towards independence, Moldova has consistently denied the possibility of such separation. Since the end of actual fighting in 1992, the forum has changed from the battlefield to one of diplomatic negotiation, but at no time has Moldova stepped back from its insistence on some form of reintegration (although there have been various plans including varying degrees of autonomy for Transnistria). In such a case recognition may be unduly precipitous. Lauterpacht would go so far as to call such acts *premature* recognition “which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid.”²¹⁷ Without deciding whether Lauterpacht’s conception of premature recognition survives today as a legal concept, there is little doubt its political analog—that recognition can be premature and as such warp the politics of the situation—is apparent. “To grant recognition to an illegal act or situation will tend to perpetuate it and to be of benefit to the state which has acted illegally.”²¹⁸ We

²¹⁵ HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 431 (1947); *see also* DAMROSCH, ET AL, *supra* note 193, at 267. In relation to this, one should note that being unrecognized does not excuse an entity from the norms of international law. The protection of property rights and of treaty obligations are ensured as the rules of State succession still apply. Haverland, *supra* note 115, at 358. Moreover, human rights are also protected. For example, the Second Circuit has held that the Torture Victim Protection Act applied even to unrecognized States. *See, generally*, *Kadic v. Karadjic* 70 F. 3d 232 (2d Cir. 1995).

²¹⁶ BRIERLY, *supra* note 93, at 138; *see also* Ijalaye, *supra* note 163, at 558.

²¹⁷ LAUTERPACHT, *supra* note 215, at 9, *as quoted in* Ijalaye, *supra* note 163, at 559.

²¹⁸ OPPENHEIM *supra* note 114, at §54, p. 184.

recognize though, that practice since the 1930's has been mixed in this regard, especially if the illegal act seems irreversible.²¹⁹

In summary, there is no obligation to recognize the TMR, even if it does have effective control of territory. Rather, it is likely that (a) the forcible acquisition of territory, (b) the ongoing objections by the pre-existing state, and (c) the lack of independence of the TMR may support a norm of *nonrecognition*. In similar cases we have seen the Security Council and/or General Assembly call on UN member states not to recognize such seceding entities.

2. The TMR as a *De Facto* Regime

a. Defined

The TMR is stuck in a political no-man's land. While it has established effective control over Transnistria and the government of Moldova has been unable, as of yet, to oust its leadership, it has not been recognized as a sovereign state by any state. It is an incomplete secession and the status of the TMR can best be understood by using the doctrine of *de facto* regimes.

A rebel force may become "so well established in part of the national territory that, although it has not overthrown the established government, it is entitled to recognition as a *de facto* government, at least in respect of that part of the national territory under its effective control."²²⁰ Remembering the four criteria for statehood (permanent population; defined territory; government; capacity to enter into foreign relations with other states), Dov Lynch argues that the post-Soviet "de facto states fulfill the first three of these requirements and claim to pursue the fourth."²²¹ This doctrine seems to fit the current facts well: "Especially where civil wars last for a long time or parts of a state become factually independent without being recognized as a State, the status of *de facto* regime has gained acceptance."²²²

Such *de facto* regimes are treated as partial subjects of international law.²²³ Their unique status does give rise to certain rights and responsibilities.

²¹⁹ ID. at §55, p. 186.

²²⁰ ID at §49, p. 162; see also §46 n. 6 .

²²¹ LYNCH, *supra* note 34, at 16.

²²² Frowein, *Recognition*, *supra* note 206 at 40. Examples of de facto states from various points in recent history include Taiwan, Eritrea, the Republic of Somaliland, and the Turkish Republic of Northern Cyprus. LYNCH, *supra* note 34, at 19-21. As for the former Soviet space, Abkhazia (in Georgia), Southern Ossetia (also in Georgia), and Nagorono-Karabakh (in Azerbaijan) are generally considered *de facto* regimes.

²²³ Jochen A. Frowein, *De Facto Regime*, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 966 (R. Bernhardt, ed. 1992) (hereafter "Frowein, *De Facto*,") (stating "State practice shows that entities which in fact govern a specific territory will be treated as partial subject of international law").

b. The rights and responsibilities of *de facto* regimes

De facto regimes may undertake normal acts required for the support of its population. They may conclude agreements that are held at a status below treaties.²²⁴ However, as will be discussed in the next section, the legal effectiveness of their decisions is severely curtailed.

Besides the right to act in order to support its population, a *de facto* regime may also be held responsible for breaches of international law. Although states are the primary subject, they are not the exclusive subjects of international law.²²⁵ Our first query then is to what extent the TMR is subject to obligations and/or holds rights under international law. Article 9 of the Draft Articles on State Responsibility, entitled “Conduct carried out in the absence or default of the official authorities,” states:

The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.²²⁶

The commentary specifies that article 9 does not apply to cases when a general *de facto* regime has seized control of a country but *does* apply when a *de facto* regime has seized control of *part of a state*. Professor Crawford wrote:

The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general *de facto* government, on the other hand, is itself an apparatus of the State, replacing that which existed previously.²²⁷

Thus, a *de facto* regime must respect human rights and other rights under international law. In the *Advisory Opinion on South West Africa/Namibia*, the ICJ explained that “Physical control of a territory, and not sovereignty or legitimacy

²²⁴ *Id.*, at 967.

²²⁵ OPPENHEIM *supra* note 114, at §7, p. 16; *see also id.* at §33, p.119-20.

²²⁶ Draft Articles on State Responsibility, Art. 9, in JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002).

²²⁷ *Id.*, at 115.

of title, is the basis of State liability for acts affecting other States...²²⁸ In several cases reparations have been claimed for and paid by *de facto* regimes²²⁹

c. The legal effectiveness of decisions of a *de facto* regime

While the *de facto* regime thus has certain rights and responsibilities, unlike the acts of actual states, acts by of *de facto* regimes have uncertain legal effectiveness. “Acts of an unsuccessful *de facto* regime... will become invalid with the disappearance of the regime.”²³⁰ However, the reintegrated state after a failed *de facto* regime may be held liable for the acts of the *de facto* regime that were “part of the normal administration of the territory concerned” on the assumption that such acts were neutral.²³¹

If, on the other hand, the *de facto* regime becomes a state, then its acts will be binding on the new state.²³²

The law of belligerent occupation supplies further insight into the limits on the powers of a *de facto* regime. If control of territory is gained by military force, the occupation is considered belligerent.²³³ While the territory must have been taken over the objection of the state that has *de jure* control, “[i]t is sufficient that the territory in question did not belong to the occupying power when the conflict broke out.”²³⁴ The law of belligerent occupation can trace its roots to the Lieber Code of 1863 and through the Hague Conventions of 1899 and 1907 to its modern codification in the Fourth Geneva Convention and Additional Protocol I.²³⁵ While the Geneva Conventions apply as of the start of armed conflict, they

²²⁸ *Advisory Opinion on South West Africa/Namibia*, ICJ Reports 1971, p.3 at p. 54; *see also* Frowein, *De Facto*, *supra* note 223, at 966.

²²⁹ *Id.* at 967.

²³⁰ *Id.*

²³¹ *Id.*, at 967-68.

²³² *Id.*, at 967.

²³³ Michael Bothe, *Occupation, Belligerent*, in 3 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 763 (R. Bernhardt, ed. 1997).

²³⁴ *Id.*, at 764; moreover, Common Article 2 paragraph 2 of all four Geneva Conventions state that the Conventions “apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if said occupation meets with no armed resistance.” There is a real argument that the rules of belligerent occupation directly apply here as Moldova became a state party to the 1949 Geneva Conventions as well as Additional Protocols I and II on May 24, 1993. See Ratification and Accession table compiled by the ICRC and *available at* <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=375&ps=P>. However, due to the domestic nature of the conflict, we chose to take a more cautious approach and apply the rules by analogy.

²³⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, entry into force: Oct. 10, 1950 (*hereafter* “Geneva Convention IV”); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of

apply through the end of occupation.²³⁶ It is generally accepted that civil wars are an example of where the law of belligerent occupation can apply in a domestic conflict.²³⁷

In the law of belligerent occupation, one draws a distinction between effectiveness and legality. “The occupying power’s ability to enforce respect for its legitimate interest is not an authority to create law.”²³⁸ An occupier is thus considered *de facto* authority, not *de jure*.²³⁹ In the present case, while Moldova is recognized as having *de jure* control over Transnistria, the TMR has become the region’s effective occupier, its *de facto* regime. Although there is no longer an armed conflict between the Government of Moldova and the TMR, there is still a state of occupation.

The law of belligerent occupation makes the occupier responsible for the well-being of the inhabitants of an occupied territory. “It has a duty of good government;” this applies essentially to protecting the public health and safety. It is not a license to remake the domestic system; to the contrary, the occupying power must apply the pre-existing laws of the occupied territory.²⁴⁰ In a case of secession, of course, it would seem logical that the seceding entity would want to make new laws and apply its own rules. But the critical point is that at issue is an *incomplete* secession, an *attempted* breakaway that has not been successful in garnering recognition from a single other state. While a successfully seceded entity that becomes a new state may of course issue new laws, the TMR’s ability to make fundamental changes in Transnistria is limited inasmuch as it does not have *de jure* control of the territory. As any other such occupying power, it thus “may issue only such laws and decrees which are necessary from the viewpoint of military security.”²⁴¹ Otherwise, the pre-existing laws of Moldova should be applied until the conflict is resolved.

E. Conclusions Concerning the Status of the TMR

The actions undertaken by the TMR are only valid to the extent they are required for the safety, security, and health of the population. Actions beyond this

International Armed Conflicts, 8 June 1977. 1125 UNTS 3, entry into force: Dec. 7, 1978 (*hereafter* “Additional Protocol I”).

²³⁶ Additional Protocol I, Art. 3(b) (stating “the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation.”)

²³⁷ *See, e.g.*, Bothe, *supra* note 234, at 764-65.

²³⁸ *Id.*, at 764.

²³⁹ *Id.*

²⁴⁰ *Id.*, at 765.

²⁴¹ *Id.*

narrow purview that depart from the pre-existing laws of Moldova are enforced only to the extent that the TMR is able to enforce them by force, not as a matter of right. Should Transnistria be reintegrated as a matter of fact into Moldova then the decisions that had been made by the TMR pursuant to the framework of Moldovan law may be imputed to the Government of Moldova. Any other such actions are not imputable to Moldova. “In the absence of a specific undertaking or guarantee... a State is not responsible for the conduct of persons or entities in circumstances not covered by [Chapter II of the Articles on State Responsibility].”²⁴² There is no provision made in Chapter II for ascribing the acts of a secessionist regime to that of the pre-existing state unless, perhaps, if the pre-existing state makes no attempt to ameliorate the situation. That is not the case here, due to Moldova’s ongoing protests to the TMR directly, and to other states more generally, concerning the situation in Transnistria.

In considering the legal issues in this attempted secession more generally, it may be useful to consider the reactions of the international community in similar situations. One analogy that has been repeatedly cited in negotiations as well as in the *Ilascu* decision is the ongoing conflict over the status of Cyprus. As in the present case, Cyprus is a separated state. Turkey maintains troops in, and is intimately involved in the affairs of, the Turkish part of Cyprus. Related to this, *Cyprus v. Turkey*,²⁴³ the ECHR held that the TFSC did not have jurisdiction in northern Cyprus.²⁴⁴

The Russian Government has argued that Cypriot situation is not a good analogy. “The main difference lay on the number of troops as the [Russian force] had only 2,000 soldiers, whereas the Turkish forces had more than 30,000 in northern Cyprus.”²⁴⁵ This argument is not persuasive. At issue is not the raw numbers of troop deployment but rather the effects of the troops deployed in each instance. Moreover, as discussed in Part III.D.1, the constellation of guarantor powers, occupying troops, *de facto* separation without formal recognition, and other points, plots a similar picture to the situation in Moldova. The similarities still outweigh the differences for the purpose of this analogy.

In summary, the TMR is an unrecognized entity that has effective control over territory but whose *de jure* control is not accepted by any state.²⁴⁶ The TMR

²⁴² JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 93 (2002).

²⁴³ 18 YEARBOOK OF THE EUROPEAN COURT OF HUMAN RIGHTS 82, 112-20 (1975), and 21 YEARBOOK OF THE EUROPEAN COURT OF HUMAN RIGHTS 100, 226-34 (1978).

²⁴⁴ See also OPPENHEIM *supra* note 114, at §55, p. 189, n. 15.

²⁴⁵ Case of *Ilascu*, *supra* note 12, at para. 355.

²⁴⁶ Note that the ECHR found in *Ilascu* that “[o]n the basis of all the material in its possession the Court considers that the Moldovan Government, the only legitimate government of the Republic of Moldova under international law, does not exercise authority over part of its territory, namely that part which is under effective control of the [TMR].” Case of *Ilascu*, *supra* note 12, at para. 330. The State Department similarly recognizes that the Government of Moldova does not have control over Transnistria. Moldova 2004 Country Report, *supra* note 4 (stating “The Government does not control this region”).

is thus a *de facto* regime. While it has the right to undertake the basic acts required for the care and security of the population under its effective control, any measures beyond that are legally suspect and may be unwound by the government of Moldova if the TMR is reintegrated into the Moldovan state.

IV. The Transnistrian Moldovan Republic and the Conversion of Property

A. Claims by Moldova and by the TMR

At the heart of the dispute between Tiraspol and Chisinau is the issue of control of the economic assets of Transnistria. As Marakutsa and Litskai each reiterated, the form of privatization is of central concern to the TMR's leadership and they do not want Transnistria's "riches" going to Chisinau. It is unsurprising, then, that in the period of effective control over Transnistria, the TMR leadership has begun "privatizing" or otherwise converting what had been Moldovan state property in the region. Moldova rejects such privatizations, having passed a law stating that any privatization in the territory of Moldova (including Transnistria) must be approved by the Moldovan parliament.

Does the TMR have the right to convert the property in its area of effective control? If the two parts of Moldova are reintegrated, must the decisions of the TMR during this period be respected?

The answers to these questions have far-ranging implications. Since 2002 the TMR has sold 37 major assets for \$51.5 million.²⁴⁷ Part of the concern is that many of these deals were "sweetheart" deals for those close to Igor Smirnov and his entourage. The privatization program as a whole plans to dispose of over 100 facilities. In 2005, "Tiraspol is looking forward to earning over \$38 million in privatization proceeds - nearly one-third of the region's budget"²⁴⁸ In June, 2005 the "Ministry of Economy" of the TMR released data stating that in the year to date the TMR had "privatized" 10 major assets for a price of \$4.8 million.²⁴⁹ This included the Tiraspol bread-making bakery (\$1.49 million), Tiraspol bread-product integrated works (\$1.29 million), and the Odema textile factory (\$1.29 million). The bread-making assets were purchased by Sheriff Corporation.²⁵⁰ Sheriff Company is TMR's largest company. It has been and may still be

²⁴⁷ "Transnistria Extensively Sells Out Major Industrial enterprises," INFOTAG (Tiraspol, June 7, 2005).

²⁴⁸ Id.

²⁴⁹ Id.

²⁵⁰ Id. Sheriff also owns "supermarkets, gasoline filling stations, and many other businesses as well as the region's biggest stadium."

controlled by Smirnov's son.²⁵¹ As of June 2005, the highest price paid for a single asset was \$29 million for the Moldavskaya Power Plant in 2003 by Saint Guidon Invest of Belgium.²⁵² In 2005 Saint Guidon sold 51% of the shares to RAO Nordic, a subsidiary of RAO EES, a Russian company (United Electricity Networks of Russia).²⁵³ Gazprom, the Russian energy company, is seeking to purchase the remaining 49%.

Moreover, in early June, 2005, the TMR commenced the sale of "the region's light-industry flagship - the Tirotext textile factory, which ensures jobs to 20% of the working population in Transnistria;" a minimum tender has been set at \$22.9 million.²⁵⁴

Besides the conversion of these companies that had been Moldovan state assets, one of the largest properties converted—but not privatized—is the part of the Moldovan railway system that is within Transnistria. In August 2004, "Tiraspol announced the establishment of the independent Transnistrian Railroad Company - through alienation of the railroad network existing in the Transnistrian region and of Bendery and Rybnitsa junction stations with all their property."²⁵⁵ Sergei Martsinko, the Director of the new Transnistrian Railroad Company explained that the railway in Transnistria became a separate entity so as to avoid taxation from Chisinau. According to one report, Martsinko's explanation was that

on July 31, 2004 Chisinau demanded that Transnistrian economic entities must draw up all their tax documents only with the Republic of Moldova, which [would cause} a double taxation for Transnistrian companies. Simultaneously with that, the Moldovan side ceased supplying empty freight cars to the left Dniester bank and began stopping cargoes heading to Transnistria via the Moldovan territory.²⁵⁶

²⁵¹ Herd, *supra* note 10, at 5. Moreover, according to Igor Tokovyi, Deputy Chief of Ukraine's Southern Border Control Department, approximately 95% of Transnistrian contraband found in Ukraine originates from the Sheriff Company's storage facilities. "Ukraine Concerned Over Sheriff's Merchandise Smuggling," Infotag (Tiraspol, July 5 2005). Current control of Sheriff is somewhat unclear and we have been unable to confirm its current ownership status.

²⁵² "Transnistria Extensively Sells Out Major Industrial Enterprises," Infotag (Tiraspol, June 7, 2005).

²⁵³ "Transnistrian Parliament demands to Cancel Privatization of Moldavskaya," Infotag (Tiraspol July 15, 2005). The Transnistrian Supreme Soviet appears to be in a struggle with Smirnov and his supporters over this privatization.

²⁵⁴ "Transnistria Extensively Sells Out Major Industrial Enterprises," *supra* note 252.

²⁵⁵ "Tiraspol Claims New Blockade by Moldova," Infotag (Tiraspol, June 13, 2005).

²⁵⁶ *Id.*

According to Infotag, the TMR itself taxes the new entity at “0.1% of the existing rate of tax on every kind of income provided the income is used exclusively for technical modernization of company facilities and incentives for workers.”²⁵⁷

B. Property, State Transitions and International Law

In considering this question, we return to the conception of the TMR as a *de facto* regime. Although, once again, we are applying the rules of belligerent occupation by analogy,²⁵⁸ an underlying theme of the Hague and Geneva rules is instructive: “Insofar as the use of force by States is itself unlawful, save in self defence, it stands to reason that the scope of powers exercised by the Occupant must be considered with care and caution.”²⁵⁹ Similarly, the occupier must respect “unless absolutely prevented, the laws in force in the country.”²⁶⁰ We believe the same holds true for insurgents who chose to attempt to carve out a section of a

²⁵⁷ Id. Smirnov sees the situation in reverse and complains about Moldova expropriating the railroad assets of the TMR:

"However, Chisinau has not paid even a single ruble for using our railroad network, despite our numerous demands of payment for the transit", the minister [of industry Anatoly Blascu]complained...

[He also explained] that the Transnistrian railroad company establishment was "a political rather than economic question, but at any rate that was a forcible measure taken in response to Moldova's destructive actions aimed at strangling Transnistrian economic operators".

Transnistrian leader Igor Smirnov stated recently, "In all the years of our republic's the existence, we have not received a single ruble for exploitation of the Transnistrian railroad network - the entire profit remained with Moldova. It was in Chisinau's plans to carry away to the right Dniester bank the company's entire movable property. And only the Transnistrian Railroad Company establishment prevented that large-scale theft".

“Transnistria Demands Payment for Railroad Transit,” Infotag (Tiraspol, June 24, 2005).

²⁵⁸ Although we note that the analogy is not far from the actual situation. As a matter of international humanitarian law, “occupation formally ends with the reestablishment of a legitimate government (or other form of administration, such as that by the U.N.) capable of adequately and efficiently administering the territory.” Michael N. Schmitt, the Law of Belligerent Occupation, The Crimes of War Project (April 15, 2003) *available at* <http://www.crimesofwar.org/special/Iraq/news-iraq5.html>. Inasmuch as the TMR is the effective (*de facto*) but not the legitimate (*de jure*) power ruling Transnistria, one could say that Transnistria is still an occupied territory and that the relevant rules and norms of occupation, drawn from the Hague and Geneva Conventions, apply. Also, to the extent the Hague and Geneva Conventions are now part of customary international law, these norms apply regardless as to whether Moldova has signed onto the treaties.

²⁵⁹ Kaiyan Homi Kaikobad, *Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003-June 2004*, 54 INT’L & COMP. L. Q. 253, 264 (2005).

²⁶⁰ Id., at 256.

state: insofar as their actions are against domestic law and may be against international law, the scope of powers they use in the territory they occupy must be considered with care and caution. Some may argue that the fact that this is a struggle for self-determination should allow the TMR greater leeway in how they administer the territory they control. But one cannot use justifications for starting a conflict as a justification for how one acts during a conflict.²⁶¹

As a general rule, then, occupants should use their powers only for the immediate needs of administration and not for long-term policy changes. As one commentator summarized:

It appears therefore that the Occupant must remain firmly rooted to the immediate demands of the administration with a view to securing order and safety of the occupied territory. Even if a legislative measure has far-reaching fundamental effects, it is not necessarily an invalid measure if it can be demonstrated that it is substantially linked to the essential criteria, that is, military expediency and the securing of public order and safety.²⁶²

Applying the analogy of belligerent occupation, one finds that Article 46 of Hague Convention IV of 1907 states that private property must be respected and may not be confiscated,²⁶³ except if that private property could be considered war materiel.²⁶⁴ Regarding state property, the occupying power is viewed as the administrator or usufructuary.²⁶⁵ “Ususfructus was the right to enjoy the property of another and to take the fruits, but not destroy it, or fundamentally alter its character...”²⁶⁶ Article 55 of the Hague Convention IV states:

²⁶¹ See, e.g., id., at 259. (stating “it is not appropriate in law to judge belligerent occupation matters, namely matters *jus in bello*, by reference to the *jus ad bellum*; the two categories of law are separate and need to be kept so.”) While in the present case we are not considering *jus ad bellum* as this is not an international conflict, the analogy is nonetheless instructive.

²⁶² Id. at 259-60.

²⁶³ Article 46 states:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.
Private property cannot be confiscated.

Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation Concerning the Laws and Customs of War on Land, 187 CTS 227, art 46, entry into force: Oct 1, 1910. (*hereafter* “Hague Convention IV”).

²⁶⁴ Bothe, *supra* note 233, at 766.

²⁶⁵ Id., at 766.

²⁶⁶ W.W. Buckland, A TEXTBOOK OF ROMAN LAW 269-70 (3d ed. Rev. Peter Stein 1963) as quoted by L.F.E. Goldie, *Title and Use (and Usufruct)- An Ancient Distinction Too Oft Forgotten*, 79 AM. J. INT’L L. 689, 691-92 (1985). See also H. Jolowicz, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 282 (2d ed. 1967).

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.²⁶⁷

Consequently,

Enemy State-owned property other than real property, such as cash, funds, transportation, and other movable property, may be confiscated, i.e., taken without compensation, if it is usable for military purposes or for administering the occupied territory. State-owned real property that is non-military in character, such as public buildings, parks, etc., can only be “administered” by the Occupying Power. That power may use the property, but not in a way that negligently or wastefully reduces its value; moreover, *the property may not be sold or otherwise disposed of*. By contrast, State-owned real property that is military in nature, such as a military post or airfield, is at the absolute disposal of the Occupying Power.²⁶⁸

This interpretation has been criticized at times. One review explained that, due to qualifying language in Article 43 of the Hague Convention IV,²⁶⁹ “tribunals have regarded the terms of Article 43 and other provisions of the [Convention] as being sufficient to support extensive reform of, and modification to, government, especially where the Occupant has total *de facto* control of the State.”²⁷⁰ Concerning economic regulation, orders affecting commodities “essential for the economic welfare of the community such as food and vegetables, olive oil, and timber have been held to be consistent with Article 43.”²⁷¹ Nonetheless, the tribunals have not accepted such broad latitude and more tightly circumscribe the maneuvering room of the occupier. For example, the

²⁶⁷ Hague Convention IV, *supra* note 263, art. 55.

²⁶⁸ Schmitt, *supra* note 258.

²⁶⁹ Article 43 states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention IV, *supra* note 263, art. 43.

²⁷⁰ *But see* Kaikobad, *supra* note 259, at 256.

²⁷¹ *Id.*, at 257 *citing to* Bochart Committee of Supplies of Corneux, 1 ANNUAL DIGEST 462, Belgium Court of Appeal, 1920.

Belgian Court of Appeals held that “the orders of the occupying Powers are not laws, but simply commands of the military authority of the occupant...”²⁷²

Thus, we believe that an occupying power or its analog (a) may confiscate state property, other than real property, if it is usable for military purposes or in the administration of the territory; (b) may only administer in usufruct non-military state real property without destroying or otherwise converting the economic value of the property; and (c) may not confiscate private property unless it is war materiel.

C. Are the TMR’s Acts Tantamount to Expropriation?

The various actions of the TMR listed above, as well as others alleged by Moldova can be grouped into three basic categories: (a) the use of assets; (b) the sale of assets; and (c) the encumbrance of farmland. We will consider each in turn. We assume for the sake of our analysis that the various plants and factories mentioned above were, at the time of the 1992 War, property of the State of Moldova, rather than private property. To the extent that any of these assets were private property then they are protected from confiscation as described in the previous section.

The Use of Assets. Applying the analogy to the law of belligerent occupation and to usufruct, the TMR has the ability to use items so long as their use does not destroy their economic value or exhaust the resource. Thus, ongoing use of facilities as required for the ongoing functioning of Transnistria is allowed, anything beyond that is questionable at best.

The Sale of Assets. As described above, the sale of assets is not allowed under the law of occupation or usufructary rules. While military assets may be destroyed or other assets used for the well-being of the population, seizing and selling property—either private or public—is expressly prohibited. The TMR’s privatization program is thus exceedingly difficult to justify. Any private party taking part in this program as a purchaser consequently does so at its own risk.²⁷³

²⁷² Mathot v. Longue 1 ANNUAL DIGEST 471, as quoted by Kaikobad, *supra* note 259, at 257.

²⁷³ Whether Moldova would actually challenge any sales if Transnistria were effectively re-unified with the rest of Moldova remains to be seen. In the latest diplomatic maneuver, the administration of President Voronin has sought a rapprochement with Russia. According to Infotag, in an interview on a Russian radio station on February 4, 2006,

Voronin voiced satisfaction that a majority of industrial enterprises in Transnistria are privatized by Russian investors, for “this means there exists a guarantee that these enterprises will be working and developing, will not die or [be] plundered...as very many facilities have been plundered out on the right Dniester bank [i.e. in Moldova proper] in the 1990s. In the Law on the main provisions of a future special legal status for Transnistria, we have written that we [Chisinau] shall not be tackling property questions as such—maybe, perhaps, only to an extent in which such questions work for the benefit of the country and of the investors who have put means in the enterprises.”

President Voronin hopes to Resolve Transnistrian Problem, Infotag (Chisinau, Feb. 6, 2006).

The Encumbrance of Farmland. The plight of the farmers in the Dubasari region has been described in Part I.D of this report. Smirnov explained that the TMR has not taken any land in this case. Rather, there is a land tax that farmers are not paying. He claimed that thirty-three farmers have signed an agreement to pay the tax but the Government of Moldova threatens the farmers who pay the tax with prosecution. In his view, this is a local property matter.²⁷⁴ As this is private property, the TMR's actions may be viewed as being confiscatory of the economic value of the land. As such, these activities may not be allowed. The TMR may respond that their taxation of the land is part of the normal administration of the territory. Resolution of this issue would require further fact finding. The local farmers have filed a case against Russia before the ECHR for ultimate responsibility of the acts of the TMR in relation to their fields.

V. Third Parties and Secessionist Movements

A. Duties of Third Party States Under International Law

Significant domestic turmoil within states can at times implicate relations with other “third-party” states. The rights and duties of third-party states regarding domestic conflicts is an issue that is rooted in the concept of sovereignty: states have a basic duty not to intervene or otherwise interfere with the resolution of the conflict by the recognized government of the state. Under circumstances where self-determination or, more clearly, external self-determination is implicated, or if the Security Council finds that a conflict has become a threat to international peace, then third-party states may have more freedom of action concerning the conflict.

The fundamental norm of non-intervention is linked with concepts of sovereignty, self-determination, and peaceful coexistence.²⁷⁵ It is one of the cornerstones of the UN and the modern state system. In light of modern means of projecting power, the idea of non-intervention is broadly applied across a spectrum of possible activities:

The exercise of economic or political pressure, unless covered by legitimate aims of the foreign State to assert or defend its rights or interests... may transgress the limits of non-intervention, depending on the

While the final hedging language does leave the door open to possible suits and/or refusal to recognize property conversions made during the time of the TMR, the tone implies the opposite. The rest of the interview also included Voronin mourning the break-up of the USSR and reassuring Russians that many statues of Lenin have been restored in Chisinau. ... *And Regrets Demise of Soviet Union*, Infotag (Chisinau, Feb. 6, 2006). Whether this is a long term policy shift or simply tacking in the political winds remains to be seen.

²⁷⁴ Smirnov meeting notes, *supra* note 70.

²⁷⁵ Meinhard Schoder, *Non-Intervention, Principle of*, in 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 619 (R. Bernhardt, ed. 1992).

adequacy of the goals and means concerned. Borderlines between admissible economic penetration and unlawful coercive interference are still unsettled.²⁷⁶

It has a particular application in regards to limiting third parties in their activities concerning secessionists:

A general right to military interventions in aid of insurgents would hardly be compatible with the primary purpose of the United Nations to maintaining international peace and security to which, pursuant to Art. 1 of the Charter, the principle of self-determination is subordinated.²⁷⁷

A more complete restatement of the principle is found in the Friendly Relations Declaration, a General Assembly Resolution passed by member states of the UN in 1970.²⁷⁸ Although, as a General Assembly Resolution, the Friendly Relations Declaration is not legally binding upon the member states, it is nonetheless of significant persuasive weight as to the state of customary international law.

The reasoning and substance of the Friendly Relations Declaration, and of the non-intervention norm can be summarized in a couple of clauses:

Recalling the duty of States to refrain in their international relations from military, political, economic, or any other form of coercion aimed against the political independence or territorial integrity of any State...

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.²⁷⁹

The Declaration does flesh out these concepts in greater detail.

In regards to military matters, the Declaration states that “armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law.”²⁸⁰ This applies to the assistance of

²⁷⁶ Helmut Steinberger, *Sovereignty*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 500, 514 (R. Bernhardt, ed. 2000).

²⁷⁷ Thurer, *supra* note 106, at 368.

²⁷⁸ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, GA Res. 2625, 25 UN GAOR Supp. 18 122; 65 AJIL 243 (1971) (Oct 24, 1970) (hereafter “Friendly Relations Decl.”)

²⁷⁹ *Id.*

²⁸⁰ *Id.*

“irregular” forces: “Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State...”²⁸¹

Besides military matters, economic and political coercion can also lead to a breach of international legal obligations:

No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State, or interfere in civil strife in another State.²⁸²

Using these general principles as a guide, we will consider the activities of Russia and Ukraine as third-party states.

B. Third Parties and the Moldovan Situation

1. Russia

Senior Russian political leaders have consistently treated Transnistria as part of a Russian sphere of influence, regardless as to what state it was within. On November 17, 1995, for example, the Duma declared in Resolution no. 1334 IGD that Transnistria was a “zone of special strategic interest for Russia.”²⁸³ Alexander Lebed had called Transnistria “the key to the Balkans.”²⁸⁴ Even when part of the Soviet Union, Transnistria was favored over the rest of the MSSR; it was not until 1989 that a first secretary of the MSSR Communist Party came from Bessarabia, as opposed to Transnistria.²⁸⁵

Perhaps nowhere has the legal responsibility of Russia for certain acts been made clearer than in the European Court of Human Rights’ decision in the *Ilascu* case. *Ilascu*, however, was concerned with a particular set of facts—the detention of Ilascu and his colleagues—while this Report is concerned with the broader question of whether Russia may have over-stepped the norms of what states may do in light of a domestic conflict within another state. To do this more general assessment we will consider (a) the activities of the Russian Army and other organs of the Russian Federation in Transnistria; (b) economic pressure by

²⁸¹ Id.

²⁸² Id.

²⁸³ Case of *Ilascu*, *supra* note 12, at para. 143.

²⁸⁴ Kaufman, *supra* note 20, at 132.

²⁸⁵ KING, THE MOLDOVANS, *supra* note 2, at 183.

the Russian Federation on Moldova; (c) ties between the TMR leadership and Russian leadership; and (d) the general diplomatic stance of the Russian Federation.

a. The activities of the Fourteenth Army

The activities of the 14th Army²⁸⁶ can be divided into combat activities and other support activities such as transfers of arms, ammunition, and personnel.

The Troops. The direct military involvement of the 14th Army can be traced to the May 19, 1991, order of the Minister of Defense of the USSR to the 14th Army to call up reservists. The Minister allegedly stated that “[g]iven that Transdnistria is Russian territory and that the situation there has deteriorated, we must defend it by all means possible.”²⁸⁷ Commentators generally agree that the 14th Army was encouraged by the Soviet Ministry of Defense to “tilt toward Tiraspol.”²⁸⁸ As set out in Part I of this Report, the result was widespread activities by the 14th Army including the occupation of towns throughout Transnistria and eventually engaging Moldovan forces directly. This was immediately objected to by the Government of Moldova. The ECHR noted that

from December 1991 onwards the Moldovan authorities systematically complained, to international bodies among others, of what they called ‘the acts of aggression’ of the former Fourteenth Army against the Republic of Moldova and accused the Russian Federation of supporting the Transdnistrian separatists.²⁸⁹

Moreover, in assessing the 1992 War in the course of the *Ilascu* decision, the ECHR stated that

In 1991-92, during clashes with the Moldovan security forces, a number of military units of the USSR, and later of the Russian Federation, went over with their ammunition to the side of the Transdnistrian separatists, and numerous items of the Fourteenth Army’s military equipment fell into separatist hands.

²⁸⁶ We will use this term for the sake of consistency although, technically, in 1995 the 14th Army became re-designated the Operational Group of Russian Forces (sometimes referred to as the OGRF or the ROG, for Russian Operational Group). ICG 2004, *supra* note 178, at 5.

²⁸⁷ Case of *Ilascu*, *supra* note 12, at para. 46.

²⁸⁸ Kaufman, *supra* note 20, at 130, *citing to* *Krasnaia zvezda*, Sept. 8, 1990, p. 5, trans. in FBIS, Sept. 12, 1990, p. 98 *and* *Krasnaia zvezda*, April 5, 1990, trans. in FBIS, April 23, 1990, p. 135. Moreover, “Soviet KGB and interior ministry units were ordered to work with their (technically illegal) Dniestrian counterparts;” Kaufman, *supra* note 20, at 131, *citing to* *Izvestia*, June 12, 1992, *translated in* CDSP, Vol. 44, No. 24 (July 15, 1992), p. 13.

²⁸⁹ Case of *Ilascu*, *supra* note 12, at para. 380.

The parties disagreed about how these weapons came to be in the possession of the Transdnistrians.²⁹⁰

It is generally accepted that key elements of the central command as well as part of the ranks of the TMR's forces came from defections from the 14th Army.²⁹¹ The Russian government has confirmed to the ECHR that at least one battalion had joined separatists.²⁹² More generally, though, the 14th Army intervened on the side of the TMR.²⁹³ One author wrote that

Instead of deterring Dniestrian aggression, the Russian army provided Tiraspol with the weapons to launch its offensive. Instead of reassuring the Dniestrians that a compromise with Chisinau could be had, Russian officials visiting Tiraspol confirmed their sense for grievance. Instead of providing the Dniestrian elites with inducements to compromise, Russia subsidized their intransigence. Finally, Russia's climactic intervention in the Bendery battle served not only to stop the war—though it did that—but also to ensure the Dniestrian victory. Without Russian support, the Dniestrians probably could not have launched their secessionist war, let alone have won it.²⁹⁴

Due to the Russian troops' active participation in the hostilities on the side of the separatists and also their deterrent effect on further military activity to reintegrate Moldova, their status became an ongoing diplomatic issue and the subject of international agreements between Moldova and Russia.

The Agreement of July 21, 1992, ending hostilities between the Russian and Moldovan stated in its Article 4 that:

The Russian Federation's Fourteenth Army, stationed in the territory of the Republic of Moldova, will observe strict neutrality. Both parties to the

²⁹⁰ *Id.*, at para. 56.

²⁹¹ KING, THE MOLDOVANS, *supra* note 2, at 192.

²⁹² Case of Ilascu, *supra* note 12, at para. 59.

²⁹³ Besides the role of the Russian Army, Cossacks—nationalistic Russian irregular troops officially organized in the Union of Cossacks—also came from Russia and Ukraine to assist the TMR. KING, THE MOLDOVANS, *supra* note 2, at 192. As one commentator put it, “Moscow turned a blind eye” to the Cossacks being dispatched. Kaufman, *supra* note 20, at 131.

It is worthy of note that Cossacks have been involved in other parts of the Russian “near abroad” including the Abkhazian and Ossetian conflicts in Georgia and also in Bosnia. NEAL ASCHERSON, BLACK SEA 102-103 (1996)

It is unclear whether Moscow merely turned a blind eye to these activities or if it actively supported the Cossack involvement.

²⁹⁴ Kaufman, *supra* note 20, at 138.

conflict undertake to observe neutrality and not to engage in any action against the Fourteenth Army's property, its personnel or their families.

All questions relating to the Fourteenth Army's status or the stages and timetable for its withdrawal will be settled by negotiations between the Russian Federation and the Republic of Moldova.²⁹⁵

Of particular importance here is (a) the obligation of neutrality by the Russian troops to which Russia agreed explicitly; and that (b) withdrawal would be negotiated between Moldova and Russia. The July 1992 agreement between Moldova and Russia also enshrined Russia's role as peacekeeper and guarantor. However, from the beginning, "Russia was less than impartial as peacekeeper, not intervening when the DMR established border and customs posts and deployed an armed battalion in Bendery."²⁹⁶ The Russian peacekeeping force also gave the TMR an effective veto on any question as to whether or not peacekeepers should intervene in any situation.

Moldova's dissatisfaction with the ongoing presence of Russian troops is also evident in its reservation to the Alma Ata Agreement, the document that formed the new Commonwealth of Independent States. The original agreement was dated December 21, 1991 but was ratified by the Moldovan parliament on April 8, 1994,²⁹⁷ with the following reservation:

... 2. Article 6, with the exception of paragraphs 3 and 4 ...

The Parliament of the Republic of Moldova considers that within the CIS the Republic of Moldova will make economic cooperation its priority, excluding cooperation in the political and military sphere, which it considers incompatible with the principles of sovereignty and independence.²⁹⁸

Moreover, an agreement between Moldova and Russia, dated October 21, 1994, states in Article 2 that

The stationing of military formations of the Russian Federation within the territory of the Republic of Moldova is an interim measure.

Subject to technical constraints and the time required to station troops elsewhere, the Russian side will effect the withdrawal of the above-mentioned military formations within three years from the entry into force of the present Agreement.

The practical steps taken with a view to withdrawal of the military formations of the Russian Federation from Moldovan territory within the

²⁹⁵ Agreement between Moldova and Russia, art 4, July 21, 1992.

²⁹⁶ ICG 2004, *supra* note 178, at 4.

²⁹⁷ Case of Ilascu, *supra* note 12, at para. 293.

²⁹⁸ Alma Ata Agreement, art. 2, Dec. 21, 1991, 31 ILM 177(1992).

time stated will be synchronised with the political settlement of the Transdnestrian conflict and the establishment of a special status for the Transdnestrian region of the Republic of Moldova.

The stages and timetable for the final withdrawal of the military formations of the Russian Federation will be laid down in a separate protocol, to be agreed between the Parties' Ministries of Defense.²⁹⁹

This agreement was never ratified by the Duma.³⁰⁰

The text of this Agreement is often referred to of its use of the principle of "synchronization," that troop withdrawal would be linked to a final political settlement of the status of Transnistria. This synchronization argument is denied by others. The U.S. and the OSCE, in particular, view Russia's previous promise to follow its CFE obligations for troop withdrawal concerning Moldova as unconditional. According to Graeme Herd, "U.S. Secretary of State Colin Powell stated that the U.S. would make its ratification of the Conventional Forces in Europe (CFE) Adapted treaty conditional upon the willingness of the Russian Federation to honor its commitments on unconditional withdrawal of all troops and ammunition from Moldova and Georgia, assumed at the Istanbul summit."³⁰¹ However, as recently as October 2005, Russia's Ambassador to the EU, Vladimir Chizhov, stated that

The presence of Russian troops in Moldova doesn't play any global or regional role. There are less than 1,100 Russian troops. Their primary task is to guard arms stockpiles on Transnistria territory... But people in Transnistria also count on them as part of their security. So without a settlement it would be difficult to agree to a withdrawal.³⁰²

Nicholas Burns, the Department of State's Undersecretary for Political Affairs explained in December 2005 the U.S.'s decision to oppose a new CFE treaty while Russia maintained forces in Moldova and Georgia:

A basic principle of the CFE (Conventional Forces Europe) Treaty is the right of sovereign states to decide whether to allow the stationing of foreign forces on their territory... Moldova and Georgia have made their choice. The forces should depart and all OSCE member-states should respect that choice.³⁰³

²⁹⁹ Agreement between Moldova and Russia, art. 2, October 21, 1992.

³⁰⁰ ICG 2004, *supra* note 178, at 5.

³⁰¹ Herd, *supra* note 10, at 12-13.

³⁰² David Ferguson, *Russia to EU: 'Hands off Moldova,'* Euro-reporters.com (October 11, 2005).

³⁰³ *U.S. Refuses Arms Treaty While Russian Troops in Moldova, Georgia,* *supra* note 56.

By contrast, in July 2005 Vladimir Antufeyev, the former Russian general who is now the head of the TMR's internal security apparatus, had requested an increase of Russian peacekeepers by 1,900 troops and for the deployment of a Russian helicopter squadron in Tiraspol.³⁰⁴

By this point the ongoing presence of the troops plays a twofold purpose for the Russian Federation: (a) they are a bargaining chip that Russia uses to extract concessions from the Moldovans and (b) they protect the TMR.

The troops allow the Russians to link issues—no troop withdrawal without a satisfactory political solution of Transnistria or, perhaps more generally, no troop removal until there is a satisfactory resolution on the place of Moldova as the new frontier between Russia and the EU. The Russians have used issue-linkage as a negotiating style elsewhere in its periphery; for example Russia had argued that withdrawal of its troops from Georgia was contingent on the resolution of the Ossetian separatist dispute.³⁰⁵ The troops not only allow Russia to exert control over Moldova, but of course over the TMR as well. One little reported aspect is that the payment in rubles of the salaries of the Russian peacekeepers has ensured that the TMR would “remain economically tied to Russia rather than to [its] recognized central government[], because local goods and services are purchased using rubles rather than national currencies.”³⁰⁶ But keep in mind that the TMR leadership, in any case, want and need the Russian troops to remain in place. Russian officers, for example, had trained TMR forces at least until late 2001.³⁰⁷ In a 2004 interview with Radio Free Europe, Litskai said “We think that [Transnistria] is a sphere of Russian interests. We are under the guarantees of Russia as a country, and these guarantees should have a military component.”³⁰⁸ This was reiterated in the Team's meeting with Litskai, where he referred to Russia as Transnistria's only ally.

Geopolitical strategy notwithstanding, the ECHR concluded that:

The Russian army is still stationed in Moldovan territory in breach of the undertakings to withdraw them completely given by the Russian Federation at the OSCE summits in Istanbul (1999) and Porto (2001). Although the number of Russian troops stationed in Transdnistria has in fact fallen significantly since 1992..., the Court notes that the ROG's weapons stocks are still there.

³⁰⁴ *Transnistria Asks Russia to Build Up its Military Presence*, Infotag (Tiraspol, July 11, 2005).

³⁰⁵ See, e.g., King, *supra* note 145, at 540.

³⁰⁶ *Id.*, at 541.

³⁰⁷ ICG 2004, *supra* note 178, at 8.

³⁰⁸ Maksymiuk, *supra* note 42.

Consequently, in view of the weight of this arsenal..., the ROG's military importance in the region and its dissuasive influence persist.³⁰⁹

The Russian 14th Army thus (a) played a decisive role in the 1992 War; (b) props up the viability of the TMR and makes reintegration more difficult; and (c) provides materiel, expertise, and other support to the TMR on an ongoing basis.

The Weapon Stockpiles. Beyond the presence of the Russian troops, there is also the issue as to how the stockpile of Russian weapons and war materiel have been used to assist the TMR. According to some, Soviet civil defense and paramilitary organizations supplied Transnistrian separatists with weapons as early as 1990.³¹⁰ Due to Russian assistance, the TMR forces were able to out-gun the Moldovan army with T-64 and T-72 tanks and Grad and Alazan rocket systems.³¹¹ One of the organizations implicated was DOSAAF, "The Voluntary Association for the Assistance of the Army, Air Force and Navy" a civilian organization that was established in 1951 to prepare the civilian population for war.³¹²

While there may be denials and disagreements over how the Transnistrian forces came to possess arms from the Russian stockpiles, the ECHR noted that

By a decree of 5 December 1991, Mr. Smirnov decided "[to place] the military units, attached for the most part to the Odessa military district, deployed in the Moldavian Republic of Transdniestria under the command of the Head of the National Defense and Security Department of the Republic of Transdniestria". The Head of that Department, Mr. Gennady I. Iakovlev, who was also the commander of the Fourteenth Army..., was requested to take all necessary measures to put an end to transfers and handovers of weaponry, equipment and other property of the Soviet Army in the possession of the military units deployed in Transdniestria. The declared aim of that measure was to preserve, for the benefit of the Transdniestrian separatist regime, the weapons, equipment and assets of the Soviet army in Transdniestria.³¹³

³⁰⁹ Case of Ilascu, *supra* note 12, at para. 387.

³¹⁰ Kaufman, *supra* note 20, at 130.

³¹¹ KING, THE MOLDOVANS, *supra* note 2, at 194. The Alazan rocket system was designed for cloud seeding, however the Government of Moldova contends that it was converted for battlefield use to carry explosive or radiological payloads.

³¹² Case of Ilascu, *supra* note 12, at para. 34. DOSAAF has been described by one interlocutor as a Soviet equivalent of ROTC, giving basic military education to young people between graduation from school and entry onto the formal military.

³¹³ *Id.*, at para. 48.

Some are suspicious that similar activities are still occurring today and that the Russian forces are using “withdrawal” as a cover to actually transfer arms to the TMR.³¹⁴ The International Crisis Group believes that the 14th Army transferred substantial amounts of non-offensive military assets in the post-2000 withdrawal.³¹⁵ The ECHR also noted that the interpretation given by the Russian Government of the term “local administrative authorities”—which is in various Russo-Moldovans agreements including the 21 October 1994 agreement concerning the weapons stockpiles—is different from that put forward by the Moldovan Government, and, in the Russian interpretation allowed them to transfer the military assets directly to the TMR, as the “local administrative authority” of Transnistria.³¹⁶

Moreover, Ambassador-at-Large Valery Nesteroushkin, Russia’s representative in the Transnistrian negotiations, is quoted as saying, regarding the stockpile

One should realize that although this is Russian property, it is situated in the territory of Transnistria. It is impossible to evacuate it from the region without the local government's consent, as that could trigger unnecessary, dangerous complications.³¹⁷

Similarly, as summarized by Infotag, Russian Defense Minister Ivanov has stated that

the railroad to the Russian military depots has been dismantled by Transnistrians, so it is impossible to use trains for ammunition evacuation. He is convinced that this deadlock is solely due to political problems still unresolved between the two conflicting sides. Until these problems have been settled, the Tiraspol administration will never agree to Russian weaponry withdrawal. But the longer the arsenals are kept there, the more dangerous they will be for the local population. For example, some ammunition consignments were manufactured as long ago as in 1932-1934. They are so old that cannot be evacuated and have to be blasted up on the site...³¹⁸

³¹⁴ Id., at para. 151.

³¹⁵ ICG 2004, *supra* note 178, at 8.

³¹⁶ Case of Ilascu, *supra* note 12, at para. 388.

³¹⁷ *No Proper Conditions for Troop Withdrawal Have Been Created Yet, Russia Says*, Infotag (Sept. 1, 2005).

³¹⁸ *Russian Arsenal in Transnistria Present Danger to Local Popultaion-Minister Ivanov*, Infotag (Chisinau, June 9, 2005).

Voronin is incredulous at such statements. He said in a speech in October 2005:

When the Russian defence minister [Sergey Ivanov] or anyone else tells us that they cannot withdraw their arms... because of a certain Smirnov,... then excuse me, Smirnov is a citizen of Russia and most of the ministers [of the TMR]... are from the Russian FSB [Federal Security Service].³¹⁹

Whether the majority of the TMR's leaders are actually from the FSB is an allegation that needs to be proven although, as will be discussed below, it is clear that the majority of the leaders do have Russian government ties and/or are Russian nationals. Besides Ivanov and Nesteroushkin's arguments seeming more pretextual than substantive, the TMR has a great interest in keeping the arms stockpile. There is, first and foremost, the link that remains between the TMR and Russia while the stockpile is in Transnistria. Nesteroushkin explains:

What we have in Transnistria today are the remains of the formerly gigantic military stocks of the Russian 14th Army... The Transnistrian government and public perceive the arsenals topic as kind of an ultimate guarantee that the region will not be left all alone, and that its interests will be duly taken into consideration.³²⁰

But there is also a financial incentive. Russia signed an agreement with the leadership of the TMR, dated March 20, 1998, allowing for the sale of military property with the revenue being split by the Russian Federation and the TMR.³²¹

³¹⁹ *Moldovan President Accuses Russia of Shielding Separatists*, Interfax-Ukraine (Oct. 29, 2005).

³²⁰ *No Proper Conditions for Troop Withdrawal Have Been Created Yet, Russia Says*, Infotag (Sept. 1, 2005).

³²¹ As quoted by the ECHR, Case of Ilascu, *supra* note 12, at para. 299, the March 20 Agreement is as follows:

1. At the close of negotiations on questions relating to military property linked to the presence of the Russian forces in Transdnistria, agreement has been reached on the following points:

all the property concerned is divided into three categories:

- the first category includes the standard-issue weapons of the United Group of Russian forces, its ammunition and its property;
- the second includes weapons, ammunition and surplus movable military property which must imperatively be returned to Russia;
- the third includes weapons, ammunition and military and other equipment which can be sold (decommissioned) directly on the spot or outside the places where they are stored.

Revenue from the sale of property in the third category will be divided between the parties in the following proportions:

Russian Federation: 50%

Transdnistria: 50%, after deducting the expenses arising from the sale of military property in the third category.

The situation is thus that (a) Moldova wants the immediate removal of the weapons stockpiles; (b) Russia seems to apply the synchronization doctrine to the stockpiles as well as the troop withdrawal; (c) the materiel has been and may still be used to support the TMR both directly and as a source of revenue; and (d) the stockpile likely poses a health and safety risk to Moldova and Transnistria and Ukraine.

b. Economic activities linked to Transnistrian situation

In assessing the economic and financial assistance of Russia to the TMR, the ECHR summarized the situation by emphasizing the financial support enjoyed by the TMR by virtue of the following agreements it has with the Russian Federation:

- the agreement signed on 20 March 1998 between the Russian Federation and the representative of the TMR, which provided for the division between the TMR and the Russian Federation of part of the income from the sale of the equipment of the Fourteenth Army;
- the agreement of 15 June 2001, which concerned joint work with a view to using armaments, military technology and ammunition;

Conditions for the use and transfer of property in the third category shall be laid down by Russia with the participation of Transdnistria.

2. The parties have agreed to pay their debts to each other on 20 March 1998 in full by offsetting them against the income from sale of military property or from other sources.

3. Russia will continue to withdraw from Transdnistria the military property essential to the requirements of the Russian armed forces as defined in the annex to the present agreement. The Transdnistrian authorities will not oppose the removal of this property.

4. In agreement with Transdnistria, Russia will continue to destroy the unusable and untransportable ammunition near to the village of Kolbasna with due regard for safety requirements, including ecological safety.

5. To ensure the rapid transfer of the immovable property, the representatives of the Russian Federation and Transdnistria have agreed that the premises vacated by the Russian forces may be handed over to the local authorities in Transdnistria in accordance with an official deed indicating their real value.

6. It is again emphasised that the gradual withdrawal of Russian armed forces stationed in Transdnistria and the removal of their property will be effected transparently. Transparent implementation of the withdrawal measures can be ensured on a bilateral basis in accordance with the agreements signed between Moldavia and Russia. The essential information on the presence of the Russian forces in Transdnistria will be transmitted in accordance with the current practice to the OSCE, through the OSCE mission in Chişinău.

- the Russian Federation’s reduction by 100 million US dollars of the debt owed to it by the TMR; and
- the supply of Russian gas to Transdniestria on more advantageous financial terms than those given to the rest of Moldova.³²²

Moreover, the Court also noted that

the information supplied by the applicants and not denied by the Russian Government to the effect that companies and institutions of the Russian Federation normally controlled by the State, or whose policy is subject to State authorization, operating particularly in the military field, have been able to enter into commercial relations with similar firms in the [TMR]...³²³

For the purposes of this report, we are particularly concerned with how Russia may use economic ties to put political pressure on Moldova and/or assist the TMR in a manner that goes beyond the norms of non-intervention. For example, according to Russian press reports, a mid-October 2005 Russian delegation, led by Yuri Zubakov, Deputy Secretary of Russia’s Security Council and former Russian Ambassador to Moldova, to Chisinau on the Transnistrian crisis asked Voronin if he was prepared to resolve the situation according to Russian conditions or otherwise face “economic blockade” from Russia. (Voronin rejected the ultimatum.)³²⁴

Economic pressure is generally not barred; rather such pressure on a state or assistance to separatists must not be used to the extent that Russia has inserted itself into the conflict in a manner that would frustrate either Moldova’s sovereign privileges or would breach one of Russia’s pre-existing commitments to Moldova. In considering the present situation, there are four areas of particular interest (*a*) the use of energy prices as a carrot or a stick; (*b*) the increased use of tariff barriers against Moldovan goods; (*c*) economic assistance to the TMR; and (*d*) the shared economic interests of Russian and Transnistrian elites.

Energy prices as political pressure.

Energy politics are crucial in the post-Soviet space. In Moldova we see energy used as both a carrot and a stick; Russia typically supports the TMR with sub-market energy prices but has been increasing the cost of energy to the rest of Moldova.

Transnistria has received approximately \$50 million per year in energy subsidies from Moscow which, calculated from the early 1990’s to today, totals

³²² Case of Ilascu, *supra* note 12, at para. 390. We have been told that the debt write-off has not been completed.

³²³ *Id.*

³²⁴ Vladimir Soloviev, *Russia Was Not Understood in Chisinau...But Well Received in Tiraspol*, Kommersant.com (Oct. 14, 2005).

(including interest) approximately \$1 billion. According to some of our interlocutors, this Transnistrian debt to Gazprom was assigned to Moldova in an agreement between Moldova and Russia signed in 2001. We have not seen a copy of this agreement and we understand that it has never been ratified by the Moldovan parliament, although we were told that Russia views that if it has not been officially denounced then it is effective. If this agreement were effective, then Moldova would now be responsible for repaying to Russia the remaining energy debts of the TMR. The irony is that much of the energy being used in the TMR is used by factories, such as the Ribnita plant, which reportedly receive their energy from the TMR at highly subsidized rates. These factories are now owned by Russian and Ukrainian companies. The result would be that Moldova would pay for a large amount of the energy used by Russian and Ukrainian companies that operate plants in Transnistria.

This energy issue has become tied with the status of the Russian arms caches still stored in Transnistria. The TMR has claimed that assets of the Soviet military are now rightfully their own and they have attempted to sell some of these weapons in the open market. Russia has allegedly adopted this view, agreeing to write-off part of the debt.

By contrast to this easing of pressure on Transnistria, Russia has been increasing pressure on Moldova concerning Moldova's energy needs. In October 2005, Moldovan Prime Minister Vasily Tarlev announced that Moldova was entering into negotiations via Paris Club members for the timing of the full repayment of Moldova's \$120 million debt in gas payments to Russia.³²⁵ Then, on November 29th, 2005 Gazprom announced that it would raise the price of natural gas being sold to Moldova from \$80 to \$150-\$160 per cubic 1,000 meters. Although this is part of a broader policy of charging closer to market prices with its trading partners, commentators note that the price that would be charged to Moldova (and also to Ukraine) is significantly higher than those of other countries—ranging from \$110 for Georgia and Armenia to \$120-\$125 for the Baltic states. It is of particular importance to note that the TMR will seemingly receive a lower energy price than the rest of Moldova. As Marakutsa explained in June 2005, "Transnistria does not deserve Moldova's fate of receiving the fuel for the world price... In the gas question, our delegation achieved mutual understanding with the Russian side."³²⁶ This has led to the concern that the price of gas is simply being used as leverage in relation to other political issues.

The TMR has seemingly negotiated a separate peace with Russia concerning its own \$1 billion energy debt in which the TMR repaid part of the debt by transferring its shares in Moldova-Gas to Gazprom.³²⁷ At the end of

³²⁵ *Vasily Tarlev: Moldova will Repay Gas Debt to Russia*, Infotag (Oct. 28, 2005).

³²⁶ *Russia Promises Help to Overcome Budget Deficit—Marakutsa*, Infotag (Tiraspol, June 30, 2005).

³²⁷ "Part of the debt will have to be repaid in kind with industrial assets, which is what we have been negotiating," said Aleksander Ryazanov of Gazprom. *Gazprom Wants Transdnier's Stake in Moldova-Gas Through Debt Reduction Scheme*, RFE/RL (Oct. 4, 2005). According to Radio Free Europe:

November, 2005, the TMR transferred the shares to Gazprom.³²⁸ It is unclear how Gazprom currently views the state of the Transnistrian debt.

Increasing tariff barriers and prohibiting imports from Moldova

Russia is Moldova's largest trade partner, accounting for 35.2 % of all of Moldova's exports.³²⁹ As such, it is able to exert significant leverage on Moldovan policy based on adjustments to its trade policy.

In April 2005 Russia banned the importation of Moldovan meat. Russia explained that this was due to concerns that Moldova was involved in re-exporting meat to Russia that had not been domestically produced.

In May 2005 Russia banned the importation of Moldovan fruits and vegetables.³³⁰ Russia stated that Moldovan fruits and vegetables did not meet Russian standards.

As of December 2, 2005, Moldova claims that they have complied with all Russian requests concerning meats, fruits, and vegetables, but there has been no response from Russian authorities. The Russian press agency ITAR-TASS reports that, due to the Russian ban, Moldovan farms have lost between 40 and 80 percent of their income.³³¹

In addition to these bans on agricultural products, in September 2005 Russia's Federal Customs Service stopped releasing documentary excise stamps to producers of Moldovan spirits and wines, thus jeopardizing their access to the Russian market.³³² In mid-October 2005, the Bardar Co., described by one Russian news source as "a major Moldovan cognac plant," needed to close because it no longer had any Russian excise stamps which are needed to export to Russia.³³³ According to Moldpres, the delay seems to have only affected Moldova.³³⁴

Moldova-Gas was created in 1999 with capital of 1.33 billion lei (\$100 million at the current exchange rate), in which 50 percent plus one share belonged to Gazprom, 35.33 percent of shares were controlled by the Moldovan government, 13.44 percent of shares belonged to Tiraspol, and the remainder was split among more than 1,700 private holders.

Id.

³²⁸ *Gazprom Has No Commercial-Economic Reasons to Double Gas Prices for Moldova*, Moldova.org, citing to Reporter .MDF (Dec. 1, 2005).

³²⁹ *Moldova seeks to Lift Russian Import Ban on Fruits, Vegetables*, RFE/RL (Aug. 15, 2005).

³³⁰ Id.

³³¹ *Moldovan Exporters Reportedly Suffering from Russian Ban*, Moldova.org (Dec. 2, 2005).

³³² *Russia Stops Releasing Excise Stamps for Moldovan Wines*, Basa-Press (Sept. 26, 2005)

³³³ *Cognac Distillery closes for Lack of Excise Stamps*, Kommersant.com (Oct. 20, 2005).

³³⁴ Id.

Assistance to the TMR

As mentioned above, Russian economic assistance to the TMR has included below-market energy subsidization even when the rest of Moldova does not have such terms of trade. However, beyond sweetheart energy deals, Russia has been integral in the construction of a Transnistrian economy separate and apart from the Moldovan economy. In 1991, the Soviet Agroprombank established the first separate Transnistrian bank; that bank operated as the region's central bank until early 1992.³³⁵ This was a key step in allowing the Smirnov regime an economic policy that would diverge from that of the rest of Moldova.³³⁶ The Transnistrian economy, such as it is, is completely reliant on Russian munificence.

Private Economic Interests

Besides direct economic assistance by Russia, the fortunes of Russian economic elites have become intertwined with a successful secession of the TMR. The TMR's economy is highly reliant on Russia. "Just over 50% of [the TMR's] officially registered exports are direct towards two key markets—Russia and Russian companies registered in North Cyprus."³³⁷ To pick just one example, the ECHR found credible evidence that "from 1993 onwards Transnistrian arms firms began to specialize in the production of high-tech weapons, using funds and orders from various Russian companies."³³⁸

More generally, though, the risk of the TMR's privatizations—which were largely bought by Russian and Ukrainian companies—being unwound or otherwise jeopardized leads to a substantial interest on the part of some of Russia's business elite. This is redoubled with the substantial interest that Gazprom now has in the proper transfer of shares in Moldova-Gas from the TMR to Gazprom as a valid means of paying off debt.

Or consider as another example the story of the Metalurgical Metallurgical Plant (MMZ) in Ribnita. The Ribnita plant was built in 1984 using German technology and is widely considered to still be the most advanced steel works in the former Soviet Union.³³⁹ The Ribnita plant also generates between 40% and 66% of the TMR's tax revenues.³⁴⁰

³³⁵ ICG 2004, *supra* note 178, at 3.

³³⁶ In addition to this, Transnistrian banks opened accounts in Odessa, Ukraine, to begin constructing a separate Transnistrian economy. *Id.*, at 3.

³³⁷ Herd, *supra* note 10, at 5. Cyprus, it should be noted is a favorite "offshore" location for front companies.

³³⁸ Case of Ilascu, *supra* note 12, at para. 150.

³³⁹ King, *supra* note 145, at 538.

³⁴⁰ LYNCH, *supra* note 34, at 66 (stating that the steelworks provide 40% to 50% of the TMR's tax revenue); Herd, *supra* note 10, at 5 (citing a level of two-thirds of the TMR's tax revenue).

The TMR sold the Ribnita plant, despite the protests of the government of Moldova, to the Russian company Itera.³⁴¹ Then, in April 2004, Itera sold 75% of the plant to the Hares Group, an Austrian company, which purchased another 15% from other co-owners.³⁴² Some have argued that the Hares Group is a "political buffer" which purchases assets in former Soviet republics and then re-sells them to the actual intended owners.³⁴³ In the summer of 2004, Hares allegedly sold 30 percent of the MMZ shares to Alisher Usmanov, one of the "metal tycoons" of Russia, who then announced a plan to consolidate MMZ with five other enterprises from Russia, Ukraine and Kazakhstan making the new enterprise the fourth largest ore mining and processing company in the world. Such high economic stakes may well play a part in driving Russia's political agenda, regardless of the requirements of international law.

c. Leadership ties

There is ample circumstantial evidence that the Russian government is closely tied with Igor Smirnov and his associates. The current "minister of justice" of the TMR, Victor Balala was actually on the staff of the Duma until 1996 or 1997. He is believed to have been one of the planners of the "privatization" of assets in Transnistria. The chief of internal security of the Smirov regime is Vladimir Antufeyev, a former Russian general who had headed the OMON unit in Latvia in 1991 and is wanted by Interpol for the murder of Latvian journalists.³⁴⁴ He "is believed to be under the control of and in permanent consultation with Russian Federal Security Service (FSB) personnel and is perceived to be the right hand of the Smirnov clan."³⁴⁵

Most of the TMR's leadership seem to be Russian nationals. Asked whether he is a Russian citizen, Litskai said that he has two citizenships --

³⁴¹ Case of Ilascu, *supra* note 12, at para. 160.

³⁴² *MMZ May Become Part of Mighty Eurasian Mining and Metallurgical Company*, Infotag (June 15, 2005)

³⁴³ *Id.*

³⁴⁴ Herd, *supra* note 10, at 4. A New York Times reported has this exchange with Marakutsa:

Some also say that the region is a hotbed of smuggling and a potential haven for terrorists. "I can assure you," Mr. Marakutsa said emphatically, "that neither terrorists nor smugglers will find a place on our territory." They also say that the feared director of internal security, Maj. Gen. Vadim Shevtsov, is actually Vladimir Antufeyev, a former Soviet shock trooper wanted by Interpol for his role in an attack on the Interior Ministry of Latvia in 1991 in which five people died.

Mr. Marakutsa frowned. "There's probably some bit of truth in that," he said.

Wines, *supra* note 39.

³⁴⁵ Herd, *supra* note 10, at 4-5.

Transnistrian and Russian. Although much the TMR's leadership came to Moldova from other parts of the USSR prior to Russia existing as an independent state, they have been recently been granted Russian citizenship. Smirnov was granted Russian nationality in 1997 and TMR Vice president Alexander Caraman received Russian nationality in 1999. Marakusta was granted Russian nationality in 1997.³⁴⁶ In speaking with the TMR's leadership after the official meeting, we were unable to find a single senior representative who had not emigrated to Moldova from Russia or Ukraine.³⁴⁷

d. Diplomatic stance and unequal bargaining power

The various activities described above—the economic pressure, the military assistance to the TMR, the energy politics—need to be understood in light of the constant Russian rhetoric in favor of the TMR and critical of Moldova.

Although support for the TMR has come most consistently from the Duma, that is not the only source of support. During the early 1990's, then Russian Vice President Aleksandr Rutskoi was a vocal supporter of an active Russian foreign policy in aid to the Transnistrians.³⁴⁸ In April 1992 Rutskoi visited Chisinau and Tiraspol and said that the Dniestr republic “has existed, exists, and will continue to exist.”³⁴⁹ Rutskoi's hard-line was offset by Minister of Foreign Affairs Andrei Kozyrev, who sought a more conciliatory policy and attempted to downplay Rutskoi's rhetoric. Despite Rutskoi's calls to recognize the TMR, it was Moldova that was recognized by the Russian government at this juncture. However, after the Battle of Bender of June 1992, Yeltsin seemed to shift his support toward Rutskoi.³⁵⁰ Nonetheless, the ECHR noted that, in one television appearance, President Yeltsin stated that “Russia has lent, is lending and will continue to lend its economy and political support to the Transdnestrian region.”³⁵¹

In September 2004, a Russian delegation led by Sergey Baburin, deputy chairperson of the Duma, said that “one genuine reality must be accepted:

³⁴⁶ Case of Ilascu, *supra* note 12, at paras. 147-49.

³⁴⁷ More generally, Litskai explained that the TMR allowed dual citizenship as of 1995. He explained that in order to be able to travel abroad, some 90 percent of the population in Transnistria have other citizenship in addition to Transnistrian. According to Tiraspol official estimates, 80,000 people in the TMR have Russian passports; 20,000 are Ukrainian citizens; 100,000 are Moldovan citizens, and several thousand people have passports from other CIS countries. Maksymiuk, *supra* note 42.

³⁴⁸ Kolsto, et al. *supra* note 9, at 993.

³⁴⁹ *Id.*

³⁵⁰ *Id.*, at 994.

³⁵¹ Case of Ilascu, *supra* note 12, at para. 138.

Moldova is today made of two states—the Moldovan Transdnistrian Republic and the Republic of Moldova, while the Transdnistrians have fully demonstrated their right to choose their fate alone.”³⁵²

Observers have noted that Russia increased pressure prior to Moldovan elections in 2005, possibly in part because recent elections in Abkhazia and Ukraine caused a fear of loss of influence. Of particular importance was whether Voronin would support the Kozak Plan that Russia had proposed as a method of settling the Transnistrian conflict. During this period, one sees the most aggressive energy politics as well as the banning of various Moldovan exports. Graeme Herd wrote:

As no party comes to power in Moldova without Russian financial and campaign support, the fact that Serafim Urichean, the mayor of Chisinau visited Moscow in early 2004—albeit for “hospital treatment”—was newsworthy. Voronin was facing an implicit choice: Moscow would back or threaten to back an opposition candidate and party in the spring 2005 parliamentary elections unless Voronin ceased his refusal to support the logic of the Kozak Memorandum.³⁵³

This occurred with a simultaneous warming towards the separatists. In October 2005—in the midst of Moldova’s concerns over rising energy costs, the Russian press reported on a trip by a Russian delegation to Tiraspol and Chisinau:

On the next day after the cold reception in Chisinau, Yuri Zubakov [the Deputy Secretary of Russia’s Security Council] took the Russian delegation to Pridnestrovie capital - Tiraspol... the two sides immediately signed an agreement "About the perspectives of cooperation between Russian and Pridnestrovie business communities."

Tiraspol was full of joy. The head of the Pridnestrovie Foreign Ministry Valery Litskai told [Russian press outlet] Kommersant that Russia had to switch long time ago from diplomatic pirouettes to the pragmatic policy. "That had to start five years ago. Why is there Russian-Moldavian commission and no Russian-Pridnestrovie commission? Now, everything will be different," he said. According to the minister, there were discussions with Russian experts about the gas supply to Pridnestrovie, cooperation in the area of energy resources, transportation, industry and banking.³⁵⁴

³⁵² Herd, *supra* note 10, at 5 (citation omitted).

³⁵³ *Id.*, at 8.

³⁵⁴ Soloviev, *supra* note 324.

Russia understandably wants the states near its border to be non-threatening. However, using trade embargoes, garrisoned military units, and energy prices to thwart the resolution of a separatist crisis in another state is at odds with the norms of non-intervention contained in the U.N. Charter, the Helsinki Final Act, and the Friendly Relations Declaration, to name only three relevant texts.

Besides obstructing an internal settlement of the conflict, Russia has also attempted to hold at bay third party states seeking to resolve the crisis. Russia's EU Ambassador Vladimir Chizhov was reported as welcoming EU and US involvement in settling the Transnistrian conflict, he "stressed the limits to expanded territorial discussions, especially with the Baltic states: 'Border agreements are not a Russia-EU issue. They are bilateral matters between Russia and its neighbors.'"³⁵⁵ He also noted that "You may claim that Moldova is an immediate neighbor of the EU, but so is Iraq in a certain manner after the opening of negotiations with Turkey."³⁵⁶ One should note that Moldova is not an immediate neighbor of Russia, but Russian Ambassador Ryabov said that Russia would not let Transnistria's interests be infringed by the December 2005 Moldova-Ukrainian agreement.³⁵⁷

While a key concern for Russia may be to maintain primary influence in the former Soviet space, it needs to keep in mind that there are legal limits to what influence is allowed. As the ECHR concluded in the *Ilascu* decision:

In the light of all these circumstances the Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdnestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdnestria, which is part of the territory of the Republic of Moldova.

The Court next notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime (see paragraphs 111 to 161 above), thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova.³⁵⁸

³⁵⁵ Ferguson, *supra* note 302.

³⁵⁶ Id. Similarly, Gleb Pavlovsky, an advisor to Russian President Putin, explained "Russia is currently revising its policy in the post-Soviet space and the mechanisms of its implementation." He stated that "any country [that would] promote the doctrine of Russia's rollback will certainly create a conflict in relations with this country." Herd, *supra* note 10, at 14.

³⁵⁷ *Russian Ambassador Against Dictate and Extremities in Border Regulations*, Infotag (Chisinau, Feb. 6, 2006).

³⁵⁸ Case of *Ilascu*, *supra* note 12, at para. 382.

Influence as a matter of fact may lead to responsibility as a matter of law, especially when one finds that the state overreached its acceptable bounds and used undue influence. Regardless as to whether one is convinced that Russia's actions and statements give rise to such a claim of state responsibility under international law, these actions are properly understood as part of a larger pattern of behavior that fosters the Transnistrian conflict. Contrast this with Turkey's involvement in resolving the situation in Gagauzia.

So why is Russia acting in this manner? We have no definitive answer. Some have argued that there are psychological reasons—that Russia wants to hold back the tide of Western influence and revolutions. Perhaps the domestic political cost would be too high for whoever “lost” the TMR to the West. Perhaps, as some have argued, one should think of the TMR as a “Giant Offshore” used by businesses in the region because it is unregulated and untaxed. In a similar vein, *The Economist* has called Transnistria “a big, ugly smuggling racket with a piece of land attached.”³⁵⁹

These and/or the other reasons listed above may explain Russia's stance towards the Transnistrian crisis. However none of these political explanations confers the legal right to intervene in the domestic affairs of another state.

2. Ukraine

Due to its common border with Moldova—and particularly Transnistria—as well as the significant ethnic Ukrainian population in Transnistria and throughout Moldova, Ukraine has had a special interest in the resolution of this frozen conflict. In part to its own internal disputes, Ukraine's official stance was critical of Transnistrian separatism from the beginning.³⁶⁰ Moreover, Since 1991, Ukraine has advocated the complete withdrawal of Russian troops from Transnistria.³⁶¹

Nonetheless, although Ukraine has acted in many ways as a counterbalance to Russian influence in Transnistria, its attentions have often been viewed by the Moldovans with a mixture of hope and suspicion. Despite early calls by Ukrainian leadership for a Russian troop withdrawal, there have also been attempts by Ukraine to build a relationship with the TMR's leadership. During the 1990's, for example, Smirnov had several visits to Ukraine in which he met with the President and the Minister of Foreign Affairs.³⁶² Some reports claim that the son-in-law of Kuchman, the former president of Ukraine, allegedly owns one of

³⁵⁹ *THE ECONOMIST*, Jan. 29, 2005.

³⁶⁰ ICG 2004, *supra* note 178, at 10.

³⁶¹ *Id.*

³⁶² Bowers, *et al.*, *supra* note 85.

the steel companies based in Transnistria. And now, there are reports that some close to Yushchenko are alleged to have business interests in Transnistria.³⁶³

But, given that the Transnistrian economy seems to be reliant on illegal trafficking of goods,³⁶⁴ and that such trafficking needs the open border with Ukraine in order to move the goods to Odessa or other Black Sea ports, Ukraine's policies concerning the separatist situation have great impact. Some have argued, perhaps wishfully, that if Ukraine closed its Transnistrian border, the Smirnov regime would be forced to negotiate a settlement.

Such a result is not so definite. Litskai quipped in his meeting with the Mission that even if Moldova and Ukraine economically blockaded Transnistria, Russia would save them with an airlift of food and supplies and that such an operation could be viable for a very long time. The TMR's leadership and Russia are deploying the blockade rhetoric once again with the advent of the new Moldova-Ukraine border regime—which cannot reasonably be considered a blockade—as of March 3, 2006. Images of the Berlin Airlift notwithstanding, it is unlikely that better border patrols alone would solve the situation, especially if the whole customs system is venal, as some have argued. Ukrainian Minister of Foreign Affairs Boris Tarasyuk has said that "the previous authorities in Ukraine actually established a chain of smuggling."³⁶⁵ However, he said, there is some hope because, regarding planned anti-smuggling projects in Ukraine, "[i]t was impossible to imagine such things before [Viktor] Yushchenko was elected president. The former leadership of Ukraine had served as a cover for smugglers. Today, legal business could celebrate and smugglers should despair."³⁶⁶ While a

³⁶³ See, e.g., Lynch, *Yushchenko Undercutting?*, *supra* note 84 (noting allegations that Yushchenko associate Poroshenko has business interests in Transnistria.)

³⁶⁴ Consider that in 1998, during a brief period of joint customs control that had been encouraged by the OSCE, Transnistria imported 6,000 times as many cigarettes as Moldova. King, *supra* note 145, at 547. Oazu Nantoi, who was the president's senior advisor on Transnistria, resigned and attempted to publicize the issue via television broadcasts. The head of Moldovan National Television, supposedly on orders from government officials, ordered the broadcasts to stop.

³⁶⁵ Stephen Castle, *Over Tea and Biscuits, EU Plots to Bring Order to Moldova's Frontier*, THE INDEPENDENT, Oct. 15, 2005.

³⁶⁶ Vladimir Socor, *Ukraine Must Limit Smuggling for EU-Moldova Mission to Work*, Eurasia Daily Monitor, Jamestown Foundation (Oct. 18, 2005); *citing to* UNIAN (Oct. 7, 2005). Socor himself tends to have a critical view of Ukrainian policy:

The peace plan's real author, former National Security and Defense Council secretary Petro Poroshenko, in effect farmed out Ukraine's customs service to a group of his long-time associates from the grey-business world in Vynnytsya, an oblast adjacent to Transnistria and known as a conduit for smuggling. Poroshenko's close associate from Vynnytsya, Volodymyr Skomarovsky, top chief of Ukrainian customs until September 2005, advocated publicly and imposed in practice a policy whereby Transnistria's exports via Ukraine are legal, unless the cargos contain drugs, illicit arms, or trafficked humans. Through this definition, Ukraine legalized the Tiraspol leadership's lucrative exports, despite the fact that they do not carry customs seals, stamps, or certificates from any recognized authorities. This issue has been discussed at length in the Ukrainian press this

certain amount of Tarasyuk's rhetoric is merely a new regime contrasting itself to the previous rulers, the disposition of the border is undoubtedly a central component to any solution as border controls make separatism more economically difficult.

The European Union is now lending its weight to resolving the border situation. "Under an initiative known as the Neighbourhood Policy, the EU will send 65 staff to help monitor Moldovan and Ukrainian border guards at 38 crossing points."³⁶⁷ The EU's Border Assistance Mission began on December 1st, 2005.³⁶⁸ Besides "back office" staff and advisers, there are five teams each composed of nine to fifteen customs officers seconded from EU member-countries.³⁶⁹ The Border Assistance Mission is monitoring the entire length of the Moldovan—Ukrainian border, including the 400 kilometer section between Transnistria and Ukraine. According to the "Martini mandate"—a paraphrase of an old advertisement for the drink—the EU border guards can go "any time, any place, anywhere" to monitor the situation.³⁷⁰

Although preliminary results seem promising, whether and to what extent the Border Assistance Mission makes a long-term difference remains to be seen.

Beyond the open border question, Ukraine under the leadership of Victor Yuschenko has sought a comprehensive solution in a proposal that has been called

year, corrupt interests were exposed, and the president could not have been unaware of the adverse implications for Ukraine's international image.

For their part, Moldova (in the first place) and the EU (less consistently) took the position that all cargos out of Transnistria that do not carry legal customs seals, stamps, or certificates and are unregistered in Moldova constitute contraband by definition. Moldova wanted the producer and exporter firms in Transnistria to register with Moldova's authorities and pass through Moldovan customs—or joint Moldovan-Ukrainian customs—in order to qualify as legal exports.

Responding to Moldovan and EU requests, the government of Yulia Tymoshenko issued three decisions and ordinances in May 2005 in accordance with the proper legal definition of contraband. With this, Tymoshenko sided with the Moldovan government against her rival Poroshenko and his Vynnytsya group interests. However, the implementation of those decrees was postponed until July, at which point Yushchenko officially suspended their validity indefinitely. Yushchenko took this decision during a meeting in Kyiv with Transnistria leader Igor Smirnov, as part of some reciprocal understandings that remain unclear. The meeting itself was amply covered by media from Kyiv and Tiraspol, but the decisions reached were not reported, and official Kyiv left Chisinau largely in the dark. The Tymoshenko decrees remain frozen.

Id.

³⁶⁷ Castle, *supra* note 365.

³⁶⁸ Vladimir Socor, *EU Launches Unprecedented Mission on Ukraine-Moldova Border*, Eurasia Daily Monitor, Jamestown Foundation (Oct. 13, 2005).

³⁶⁹ See "Structure" at the EU Border Assistance Mission website, <http://www.eubam.org>.

³⁷⁰ Castle, *supra* note 365.

“the Yuschenko Plan.” At its heart, it tries to satisfy Transnistrian demands for self-rule, Moldovan requirements that their state not be carved-up, and Russian desire to maintain its Near-Abroad as a sort of buffer zone where it has control.³⁷¹ Moldovans are concerned that the Yuschenko Plan would make eventual secession too easy and pre-secession relations too difficult. As some see it, the Ukrainian plan “would allow Transnistrian officials to have input into, and perhaps veto power over, international agreements signed by Moldova.”³⁷² Whether and how the Plan evolves in continuing discussions among Ukraine, Moldova, the TMR, Russia, and other interested parties remains to be seen.

While the Yuschenko Plan was greeted with optimism, events since then have not borne out the Plan’s promise as of this writing. Russia and Ukraine became embroiled in a crisis over energy sales from Gazprom to Ukraine. Ukraine has argued that Gazprom was acting under instructions from the Russian government. On the Transnistrian question, Ukraine has at times taken a stance that is markedly closer to Russia’s. First, after criticism from the TMR and Russia, Ukraine backed away from the border agreement it had made with Moldova. (Although it did subsequently enact a revised border regime, under Russian and TMR criticism.) Ukraine and Russia also had a fact-finding mission to Transnistria concerning alleged arms production. They found that there was no evidence of any weapons being manufactured in Transnistria. While the Mission has been skeptical of some of the more fantastic allegations of military production in the TMR, there seems to be a reasonable claim that at least some level of small arms manufacturing, as well as the manufacturing of component parts for larger weapons systems, still occurs in Transnistria. In light of this, the credibility or at least the rigor of the Russian-Ukrainian fact-finding mission must be considered.

The current and future role of the Ukraine can be summarized as follows: (a) stricter border controls are a necessary, though not conclusive, step in resolving the Transnistrian crisis, however Ukraine now seems reluctant to enact border controls; (b) Ukraine has made what may be a good faith effort at designing a solution to the crisis, however the proposal is still fluid and the final version of the Yuschenko Plan needs to be seen before its legal implications—if any—can be assessed; and (c) now that Ukraine has become a more active participant in the Transnistrian crisis its actions will need to be monitored, as have those of Russia and Moldova, by the various stakeholders.

Conclusion: Peril and Promise

Secessions are more a problem of politics than law. If an entity secedes and the parent state accepts the secession, there is little role for legal argument. If

³⁷¹ For example, Graeme Herd reports that Konstantin Zatulin, a member of the Duma, has said “At least we are a superpower on the territory of the former Soviet Union. I mean the CIS and the Baltic states. We are a superpower in relation to Moldova, Ukraine, and Georgia.” Herd, *supra* note 10, at 14.

³⁷² Lynch, *Yuschenko Undercutting?*, *supra* note 84

an entity secedes and such a secession is largely accepted by the international community then, even if the parent state objects, such an entity will likely enter into the community of states as a new member.

If, however, an entity attempts to secede and the result is a military victory for the secessionists (by denying the parent state the ability to reconquer the territory, at least for the moment) but a political victory for the parent state (no other country recognizes the secession), then one has a hard case both for politics and for law. Here, where politics is most prevalent and power is most naked, the role of law is (perhaps paradoxically) most important. It is where political rhetoric becomes overheated that it especially makes sense for stakeholders to return to the norms of the international system and to first principles.

Based on the principles of international law examined in this report, we conclude the following:

Concerning the Status of the TMR. Attempted secessions are largely viewed as domestic affairs that need to be resolved by the state itself. There is no right to secede as a general matter. At most, secessions may be accepted in cases where a people have been oppressed and there is no other option for the protection of their human rights. In light of these rules, the TMR has not made a legally sufficient case that it has a right to external self-determination or secession.

Consequently, the effective control of the TMR of the Transnistrian part of Moldova is that of a *de facto* regime and may be viewed as analogous to control by an occupying power. The TMR is thus limited as to what it may legally do with the territory it administers.

Concerning the Conversion of Property by the TMR. The law of occupation recognizes that the occupying power may, as a matter of fact, control the economic resources within a territory but, as a matter of law, the rightful owners are the previous owners. The final disposition of the property is not decided by the current effective control by the occupier and as such, the occupier has the legal duty not to destroy the economic value of the property. Any economic activities undertaken jointly with the separatists or insurgents by another party are at the peril of that party. There is no comfort that such activities will be sanctioned after the final resolution of the separatist conflict and they may, in fact, be “unwound.”

In light of the rules governing *de facto* regimes and also the law of occupation, the TMR’s privatization program can leave investors with no confidence that these transactions would be enforced if the TMR is reintegrated into Moldova.

Concerning the Responsibilities of Third-Party States. Interventions by third parties are not favored and are assessed in relation to the norms of non-intervention set out in numerous global and regional treaties and legal documents. Sovereignty requires that a state’s wishes concerning affairs within its own territory be respected up to the point that some other core interest of the international system is implicated. Thus, for example, the garrisoning of troops

on foreign soil is not allowed if the host state requests that the troops leave. Russia's activities concerning the Transnistrian situation, particularly the intervention of the 14th Army on behalf of the separatists, the ongoing military assistance to the TMR, the economic support of the TMR, and effectively bargaining on behalf of the TMR using energy process and other levers of power against Moldova, leads to credible claims of state responsibility on the part of Russia for the continuing separatist crisis and its proximate results.

Similarly, in light of the experience with Russia, Ukraine's increased participation in the conflict should be monitored.

This is a time of peril and promise in the Transnistrian crisis. The peril of the situation is that, given recent events, attitudes will harden and that there will be no soft landing or "buy-out option" in which Smirnov will simply be given enough money to go away.³⁷³ The ever-present promise of the situation is that a "negotiated reintegration process [for Transnistria] might also then serve as a template for the reintegration of South Ossetia and Abkhazia into a sovereign Georgia."³⁷⁴ As always, the role of law in international politics is to assist in the peaceful settlement of disputes. The first step in any such settlement is an honest accounting of the strengths and weaknesses of the position of each side. That is what this report has attempted to do.

³⁷³ Herd, *supra* note 10, at 10.

³⁷⁴ *Id.*, at 3.

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