**Non-Recognised Entities under International and EU Law**

***International law and non-recognized entities: towards a frozen future?***

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## Introduction

The non-recognized entities of interest to this collection, and this chapter in particular, must be entities which in principle are capable of being, and consider themselves to be, entitled to statehood. As such, as a minimum, they must meet the well-known criteria for Statehood contained in the 1933 *Montevideo Convention on the Rights and Duties of States*[1]: permanent population; defined territory; government; and capacity to enter into relations with other States. The last will come into play if only, of course, they were recognized. But they are not.

A great deal has been written about recognition for the purposes of international law, including debates as to the "constitutive" and "declaratory" theories. In his chapter in the 2014 collection on *Self-Determination and Secession*, which I examine in more detail below, Stefan Oeter provided, in his section on "Traditional Doctrines of Recognition"[2], voluminous foot notes setting out a large part of the current scholarship. I do not propose to repeat these, especially as my focus must be on non-recognition. He referred in particular to the work of Stefan Talmon[3] and Jure Vidmar[4] - as well as many others. In his view,

> Most treatises of international law still describe the 'declaratory theory' on recognition as the dominant doctrine governing state practice. As main characteristics of the 'declaratory theory' the writings of public international law usually describe that:
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> - sovereign statehood, ie the quality of being an independent and sovereign state, constitutes a mere fact which may be assessed in an empirical fashion;
> - the underlying judgment of whether a political entity is a sovereign state constitutes a mere act of cognition oriented at criteria of effectiveness of state authority, and not a genuinely normative judgment;

[1] United Nations Treaty Series https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20165/v165.pdf
[2] Stefan Oeter "The Role of Recognition and Non-Recognition with Regard to Secession", Chapter 4 in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds.) *Self-Determination and Secession in International Law* (Oxford University Press, Oxford, 2014), 45-67, at 48-52.
[3] Stefan Talmon, *Recognition of Governments in International Law* (Oxford, Clarendon, 1998).
[4] Jure Vidmar, "Explaining the Legal Effects of Recognition", 61(2) *International and Comparative Law Quarterly* (2012), 361-387; "Territorial Integrity and the Law of Statehood" 44(4) *George Washington International Law Review* (2012), 700-770.

- statehood in essence requires exclusive sovereignty over a distinct territory and people exercised by an effective structure of authority;
- a state worthy of recognition must be independent of foreign states and may not be subjected to a hierarchical relationship of authority exercised by another state."[5]

All the entities reviewed in this collection have failed to pass the test. But as I show below, matters are rather more complicated for the purpose of my present chapter.

Among the questions I pose in this chapter are the following. What are the consequences of non-recognition for these entities? What will happen if they attempt to secede? That is, if they are part of an existing state. Or if the question of secession even arises. In several cases, in my opinion, it does not. In essence, this is the collision between the desire for and right to self-determination, and the opposition of the state in which the entity in question finds itself. If it ever found itself in any other state. It is evident that there is considerable complexity. In identifying the issues or answering the questions.

In any event, the four post-Soviet entities which are the center of attention for this collection – Transnistria, Nagorno-Karabakh (Artsakh), Abzhazia and South Ossetia - have survived in more or less their present form since 1991, or even before the collapse of the USSR (or perhaps 1993 in the case of Nagorno-Karabakh, when it was recognized by Azerbaijan as a party to negotiations). Could they continue indefinitely in the form in which they have now existed for nearly three decades? Do they face a frozen future? Is that necessarily a bad thing?

After preliminary remarks as to the case studies in this volume, I turn, secondly, to a very useful 2011 political science examination of the issues of non-recognition, and the various different names under which it has been studied. Third, I consider a 2014 collection on self-determination and secession to which I contributed, and the particular approaches taken by the respective authors. Fourth, I return in more detail to the case studies in this collection. Each of the three collections I consider has in common with each other a central place for the four post-Soviet unrecognized entities mentioned above.

Fifth, before concluding, I consider again the route to the 'gold standard' for recognition, which is admission to and membership of the United Nations, and the role of the

[5] Stefan Oeter "The Role of Recognition and Non-Recognition with Regard to Secession", Chapter 4 in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds.) Self-Determination and Secession in International Law (Oxford University Press, Oxford, 2014), 45-67, at 48-49.

Unrepresented Nations and Peoples Organization (UNPO) in campaigning for the peoples which do not yet have their own states.

My conclusion is, of course, tentative, but in my view it is entirely possible that the four post-Soviet entities, in particular, which have already survived three decades of existence – and people do not live too badly in Tiraspol or Sukhumi – may be able to continue if not indefinitely, then for more decades to come, even if they remain non-recognized and without admission to or membership of the United Nations.

**The case studies in this volume**

The following chapters are listed in the "Preliminary table of contents" (as of 26 May 2020) for this collection, with a focus on Catalonia[6]; Scotland and Catalonia[7]; Abkhazia and South Ossetia[8]; the Donetsk/Lugansk "Peoples Republics" (DNR and LNR)[9]; Nagorno-Karabakh (or as it now calls itself, the Republic of Artsakh[10]); Transnistria (I prefer, for reasons given below, PMR)[11]; subjects of the Russian Federation[12]; and annexed Crimea[13].

Of these 11 case studies (bearing in mind that the Russian Federation has 85 subjects, 21 of which are "ethnic" republics, named after their "titular people", with special constitutional dispensations as to language, and up until recently their own presidents), the following preliminary observations may be made. Each case is strikingly different from each other, especially in terms of the prospect of achieving recognition from any significant number of states, or unambiguous statehood in terms of being admitted to the United Nations. As I show in more detail below, in at least one case statehood is a near certainty. All the others are very different. The greatest similarity is shown by the four post-Soviet entities – they were all located in the Soviet Union, and issues have arisen since its collapse.

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[6] Chapter 4, Pau Bossacomba Busquets "Catalonia under international and EU Law"
[7] Chapter 5, Aiste Mickonyte "EU citizenship in light of secessionist movements in Europe: Cases of Scotland, Catalonia and beyond"
[8] Chapter 6, Benedikt Harzl "Passportizastsiya revisited: extraterritorial naturalization in the case of Abkhazia and South Ossetia"; and Chapter 8, Gaga Gabrichidze "Legal systems of Abkhazia and South Ossetia and their status under international and European Law"
[9] Chapter 7, Roman Petrov "Legal systems of Donetsk/Lugansk Peoples Republics and their status under international and European Law"
[10] Ministry of Foreign Affairs, Republic of Artsakh http://www.nkr.am/en/
[11] Chapter 10, Lucia Leontiev "Legal system of Transnistria and its status under international and European Law"
[12] Chapter 11, Paul Kalinichenko "Russian Constitution and legal status of subjects of the federation"
[13] Chapter 12, Stefan Lorenzmeier "Investment disputes in the annexed Crimea from perspective of international law"

In a few of these cases an argument can be made that the entity contains a "people" (as nowhere defined in the UN Charter or the relevant international instruments) with the right to self-determination. They are: Catalonia (the Catalonian people), Abkhazia (the Abkhaz people), South Ossetia (the Ossetian people – South Ossetia has a kin-state in the neighboring Republic of North Ossetia – Alania[14], a subject of the Russian Federation), and, for example, the (Volga) Tatar people in the Russian Federation. There is no DNR or LNR people, and no such claim is made by any interested party. The population of Artsakh or Nagorno-Karabakh is Armenian, with a kin-state very close by. The population of Transnistria (the PMR) is predominantly ethnic Russian and Ukrainian, and there is no "Transnistrian people", nor is such a claim made. Following its illegal annexation of Crimea, Russia claimed that the "Crimean people" had exercised a right of self-determination. This claim is hotly disputed, not least by me. The great majority of inhabitants of Crimea are and have been since Russia's first annexation in 1783, ethnic Russian. The indigenous people, with the undoubted right to self-determination, is the unfortunate Crimean Tatar people, who suffered genocide at the hands of Stalin in 1944.[15]

In any event, all of them are located, as a matter of international law, within existing States: Spain, the UK, Georgia, Ukraine, Azerbaijan, Moldova, and the Russian Federation.

**How these entities may be described – a political science approach**

Of course, the description of such entities is open to debate. In 2011 a collection entitled *Unrecognised States in the International System*[16] was published by a group of distinguished political scientists. In their Introduction, Nina Caspersen (York) and Gareth Stansfield (Director of the Centre for Ethno-Political Studies, Exeter) noted that "unrecognised states" are "territories that have achieved de facto independence often, though not always, through warfare, but have failed to gain international recognition as independent states."[17] They pointed out that these entities have also been described in the political science literature as

[14] Its official web-site is at http://alania.gov.ru/.
[15] See Bill Bowring "Who Are the "Crimean People" or "People of Crimea"? The Fate of the Crimean Tatars, Russia's Legal Justification for Annexation, and Pandora's Box" in Sergey Sayapin and Evhen Tsybulenko (eds.) *The Use of Force against Ukraine and International Law" Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (T M C Asser / Springer 2018), 21-40.
[16] Nina Caspersen and Gareth Stansfield (eds) *Unrecognised States in the International System* (London, Routledge, 2011).
[17] Nina Caspersen and Gareth Stansfield, "Introduction", in Nina Caspersen and Gareth Stansfield (eds.) *Unrecognised States in the International System* (London, Routledge, 2011), 1-8, at 1-2.

"de facto states"[18], "separatist states"[19], "almost-states"[20], "contested states"[21], and "unrecognized quasi-states"[22]. They added that unrecognized states such as Nagorno-Karabakh and South Ossetia "control (most of) the territory they lay claim to and have managed to build at least some state institutions; they have, in other words, achieved a level of 'stateness' underpinned by a degree of de facto domestic sovereignty."[23]

They identified three criteria for the purpose of their collection.

First, the entities concerned must have achieved de facto independence and must have managed to maintain this for at least two years. Second, they have not gained international recognition, or even if they have been recognized by some states, they are still not "full members of the international system of sovereign states". Third, they have demonstrated an aspiration for full, *de jure*, independence.[24]

This collection contains rather good maps[25] of many examples of territories which have expressed such an aspiration, often with bloody and catastrophic results: Abkhazia (Georgia), Anjouan (Comoros), Biafra (Nigeria), Bougainville (Papua New Guinea), Chechnya (Russia), East Timor (Indonesia), Eritrea (Ethiopia), Gagauzia (Moldova), Katanga (Congo), Kosovo (Serbia), Kurdistan Region (Iraq), Montenegro (Federal Republic of Yugoslavia), Nagorno Karabakh (Azerbaijan), Northern Cyprus (Cyprus), Republika Srpska (Bosnia), Republika Srpska Krajina (Croatia), Puntland and Somaliland (Somalia), South Ossetia (Georgia), Taiwan (China), Proposed Tamil Eelan (Sri Lanka), and Transnistria (Moldova). These are described as "unrecognised states since World War II".

As noted below, East Timor (Timor-Leste), Eritrea, and Montenegro are now full members of the United Nations. The entities which meet their criteria are Abkhazia, Kosovo, Kurdistan-Iraq, Nagorno Karabakh, Northern Cyprus, Somaliland, South Ossetia, Taiwan and Transnistria.

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[18] Scott M Pegg *International Society and the De Facto State* (Brookfield, Ashgate, 1998).
[19] Dov Lynch, *Engaging Eurasia's Separatist States: Unresolved Conflicts and De facto states,* (Washington DC, US Institute of Peace Press, 2004).
[20] Bartosz H. Stanislawski (ed.) "The Forum: Para-States, Quasi-States and Black Spots: Not States, But Not "Ungoverned Territories" Either", 10(2) *International Studies Review* (2008), 366-96.
[21] Deon Geldenhuys, *Contested States in World Politics*, (London, Palgrave Macmillan, 2009).
[22] Pål Kolstø, "The Sustainability and Future of Unrecognized Quasi-States" 43(6) *Journal of Peace Research*, 723-40.
[23] Nina Caspersen and Gareth Stansfield, "Introduction", in Nina Caspersen and Gareth Stansfield (eds.) *Unrecognised States in the International System* (London, Routledge, 2011), 1-8, at 3.
[24] Ibid, at 3-4.
[25] "Appendix: maps of unrecognized states", in Nina Caspersen and Gareth Stansfield (eds.) *Unrecognised States in the International System* (London, Routledge, 2011), 207-226.

In her chapter Nina Caspersen[26] argues (giving examples) that "The aspiration for international recognition remains a defining characteristic of unrecognised states and a central part of the narrative employed by the political elites", and that "to further this goal they attempt to dissociate themselves from images of lawlessness, violence and ethno-national radicalism, and instead convey an image of democratic, effective entities…"[27] She asks why the title of her chapter suggests that they are *imitating* democratic statehood? "Why can't they create the 'real deal'?[28] She points first to the need for an external patron, and second to the tension between the need for strong defense ensuring popular legitimacy, and the need to present themselves as democratic and inclusive. In spite of these tensions, she recognizes that "… these entities have shown themselves capable of surviving for several decades."

> "Their statehood may be under strain, but if no palatable alternatives are put on the table and if the entity receives enough external support to sustain itself, then they can have considerable staying power… These entities may therefore not be permanent, but they are not completely transient either."[29]

This was written in 2010, based on research between 2007 and 2010. So another decade has passed, and the four entities with which, in my view we are primarily concerned, are still there, and not doing too badly even if non-recognized.

**An international law approach - self-determination and secession**

In 2014 I published a chapter on Transnistria as one of the case studies in the collection *Self-Determination and Secession in International Law*[30]. The other case studies were South Ossetia, Abkhazia and Nagorno-Karabakh, with comparative studies of Kosovo, Western Sahara, and Eritrea – and a postscript on Crimea. This collection started with a project entitled "After Kosovo: Legal issues of Autonomy and Secession in the CIS", and a conference under this title took place in Munich in February 2012. There were initially the four post-Soviet case studies, and these remain the four case studies of the collection as published, with the comparative studies.

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[26] Nina Caspersen "States without sovereignty: Imitating democratic statehood" in Nina Caspersen and Gareth Stansfield (eds.) *Unrecognised States in the International System* (London, Routledge, 2011), 73-89.
[27] Ibid at 78.
[28] Ibid at 81
[29] Ibid at 88
[30] Bill Bowring, "Transnistria", in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds.) *Self-Determination and Secession in International Law* (Oxford University Press, Oxford, 2014), 157-174.

I note again that this collection and that referred to above have in common case studies on the four post-Soviet non-recognized entities.

However, I wonder, looking back, whether there was in some sense a category error. Kosovo was most certainly a case of (attempted) secession from Serbia. The Advisory Opinion of the International Court of Justice of 22 July 2010[31] which followed the Kosovan Declaration of Independence of 17 February 2008 and the UN General Assembly's Request of 8 October 2008, as is well known, left open most legal questions of self-determination and secession. The Court concluded merely that the adoption of the declaration of independence had not violated any applicable rule of international law.

Kosovo's Declaration of Independence may not have been unlawful, but it has not been particularly successful. As of 27 July 2019, the Republic of Kosovo had received 115 diplomatic recognitions as an independent state, of which 15 had been withdrawn between 2017 and 2019[32]. Serbia's diplomatic objective is to reduce the number of UN member states recognizing Kosovo below 50%.

As of 17 August 2019, more than 10 years after the Declaration, 100 out of 193 (52%) UN member states, and 23 out of 28 (82%) EU member states recognize Kosovo. The five EU states which have not done so are Spain, Slovakia, Cyprus, Romania, and Greece – all of them not too far distant from Kosovo. The government of Serbia does not, unsurprisingly, recognize Kosovo. Ironically, UN Security Council Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting, on 10 June 1999, is still in force, and provides that "the region Kosovo and Metohija is a province of Serbia". That is still the legal position.

In 2013, Serbia began to normalize relations with the government of Kosovo in accordance with the Brussels Agreement[33], as a precondition for entry by Serbia into the EU, but the process stalled in November 2018 after Kosovo imposed a 100 percent tax on importing Serbian goods.[34]

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[31] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010* [2010] I(CJ Rep 403, at https://www.icj-cij.org/en/case/141

[32] "Togo 15th country to revoke recognition of Kosovo" 26 August 2019 at http://www.tanjug.rs/full-view_en.aspx?izb=502660

[33] Aleksandar Vasovic and Justyna Pawlak "EU brokers historic Kosovo deal, door opens to Serbia accession" 19 April 2013 at https://www.reuters.com/article/us-serbia-kosovo-eu/eu-brokers-historic-kosovo-deal-door-opens-to-serbia-accession-idUSBRE93I0IB20130419 .

[34] "Serbia's FM: Berlin Summit isn't format for Belgrade – Pristina talks" 30 April 2019 at http://rs.n1info.com/English/NEWS/a480148/Berlin-summit-not-good-format-for-Belgrade-Pristina-talks-FM-says.html .

However, it can be argued that the four post-Soviet entities never seceded from any state, with the possible exception of Nagorno-Karabakh[35], where the Nagorno-Karabakh Autonomous Oblast with an ethnic Armenian majority had been established within the borders of the Azerbaijan Soviet Socialist Republic on 7 July 1923, with a narrow strip of territory separating it from the Armenian SSR.

All these entities had a distinct ethnic and linguistic identity and varying degrees of autonomy in the USSR, and in the cases of Transnistria, Abkhazia and South Ossetia, the entities in question simply refused to become part of the newly independent states, which had formed part of Union Republics. These became independent states with the collapse of the USSR in 1991.

Thus, on 27 August 1991 the Moldovan Parliament adopted a Declaration of Independence in respect of a territory including Transnistria. But ethnic Russians and Ukrainians, the majority of the population of Transnistria, had been organizing a movement of resistance to incorporation into a new Republic of Moldova, Romanian speaking, which, they feared, might well seek to become part of Romania.[36] Did Transnistria ever secede from Moldova?

Abkhazia is linguistically distinct from Georgia, became a Soviet Socialist Republic, the Abkhazian SSR, on 4 March 1921, a significant status, but was merged with Georgia and downgraded to an Autonomous Republic in 1931. With the collapse of the USSR in December 1991, and the emergence of Georgia as an independent state, the Abkhaz simply refused to become part of the new Georgia, and on 23 July 1992 declared an independent state. A bloody war in 1992-3, and large-scale ethnic cleansing of Georgians by the Abkhaz, ended in defeat for Georgia. Did Abkhazia ever secede from Georgia?

Ossetians are to be found in North Ossetia - Alania, a Republic which is a subject of the Russian Federation, and in South Ossetia, in which the Ossetian population are ethnically and linguistically the same as North Ossetia, which is separated from North Ossetia by the Caucasus mountains, and is linked by a road tunnel[37]. In April 1922 the South Ossetian Autonomous Oblast was created as part of the Georgian SSR, which was formed in 1921 and subsequently incorporated in the Soviet Union in 1922. The South Ossetian Popular Front

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[35] See Heiko Krüger "Nagorno-Karabakh", in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds.) *Self-Determination and Secession in International Law* (Oxford University Press, Oxford, 2014), 214-232, at 215-16

[36] See Bill Bowring, "Transnistria", in ibid., 157-174, at 161-2.

[37] The Roki Tunnel is a mountain tunnel of the Transkam road through the Greater Caucasus Mountains, north of the village Upper Roka. It is the only road joining North Ossetia–Alania in the Russian Federation into South Ossetia.

(Ademon Nykhas) was created in 1988. On 10 November 1989, the South Ossetian regional council asked the Georgian Supreme Council to upgrade the region to the status of an "autonomous republic", a request which was refused by Georgia.

After intense fighting, on 24 June 1992, Georgia and the South Ossetian government signed the Sochi ceasefire agreement, brokered by Russia. The agreement included obligations to avoid the use of force, and Georgia pledged not to impose sanctions against South Ossetia. A Joint Control Commission for Georgian–Ossetian Conflict Resolution of Ossetians, Russians and Georgians was established, with Russian, Georgian and South Ossetian peacekeepers.

South Ossetia declared independence on 29 May 1992. In 1993 it approved a Constitution identifying itself as a republic. It elected a president in 1996. A new Constitution was adopted by referendum on 8 April 2001.[38] This situation continued until the Georgia-Russian War - the "five day war" – of 2008.[39] As a result of the war, and "ethnic cleansing" of Georgians who previously comprised one third of its population, the population of South Ossetia is now about 50,000, with less than 10% Georgians.[40]

The following UN member states recognize South Ossetia: Russia, Nicaragua, Venezuela, Nauru, and Syria[41] (in 2018). South Ossetian is also recognized by Abkhazia, Transnistria, Artsakh – and the partially recognized Sahrawi Arab Democratic Republic.[42]

It is highly debatable whether South Ossetia "seceded" from Georgia in any meaningful sense.[43]

**The case studies in this collection – an overview**

In this section I introduce some more salient factors in consideration of the case studies in the present collection.

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[38] Text, in Russian, at https://web.archive.org/web/20081006092114/http://cominf.org/2004/10/15/1127818105.html

[39] In my view, Georgia started it – see Bill Bowring "Georgia, Russia and the Crisis of the Council of Europe: Inter-State Applications, Individual Complaints, and the Future of the Strasbourg Model of Human Rights Litigation" in James Green and Christopher Waters (eds.) *Conflict in the Caucasus: Implications for International Legal Order* (Palgrave Macmillan, 2010), 114-135. The Russia army could have taken Tbilisi without difficulty, but returned home. Mikheil Saakashvili remained in power for several more years. It seems clear that since his demise, Russia now enjoys considerably more influence in Georgia.

[40] https://dfwatch.net/south-ossetia-hit-population-crisis-birth-rate-drops-20-five-years-49986

[41] http://syriatimes.sy/index.php/news/local/37419-syria-south-ossetia-sign-agreement-on-establishing-diplomatic-ties

[42] Giorgi Lomsadze "Semi-Recognized Western Sahara to Recognize South Ossetia" 29 September 2010 at https://eurasianet.org/semi-recognized-western-sahara-to-recognize-south-ossetia

[43] But see arguments to the contrary in Christopher Waters, "South Ossetia", in Christian Walter, Antje von Ungern-Sternberg and Kavus Abushov (eds.) *Self-Determination and Secession in International Law* (Oxford University Press, Oxford, 2014), 175-190.

*Catalonia (and Scotland as a comparator)*

Catalonia is not a non-recognised state or entity. It will not be seceding from Spain any time soon.

In the Spanish Constitution of 1978[44], Catalonia, along with the Basque Country and Galicia, was defined, indirectly, as a "nationality" (*nacionalidad*). [45] The constitution also gave Catalonia the right to autonomy[46], which resulted in the Statute of Autonomy of Catalonia of 1979. On 18 June 2006 a new Statute of Autonomy was approved by referendum, which defined Catalonia as a "nation" in its Preamble, while retaining in Article 1 the term "nationality" as in the Spanish Constitution of 1978.[47] After four years deliberation, on 28 June 2010 the Spanish Constitutional Court reviewed the constitutionality of the new Statute, and held that the term "nation" in the Preamble had no legal standing.[48]

On 27 October 2017 following a non-violent referendum held on 1 October, the Catalan Parliament in Barcelona (in the absence of the opposition) declared independence from Spain, and the Spanish Parliament in response immediately approved direct rule.[49] The Catalan President is in exile, and on 14 November 2019 members of the Catalan government and civil society were sentenced to long terms of imprisonment for Sedition and other crimes[50]. Support from the EU and its member states has been notable by its absence. The Catalan population is divided perhaps equally between those in favour of and those opposed to independence.

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[44] English translation at: http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf .

[4545] Section 2 of the Constitution is as follows:
The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognises and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.
(*La Constitución se fundamenta en la indisoluble unidad de la Nación española, patria común e indivisible de todos los españoles, y reconoce y garantiza el derecho a la autonomía de las nacionalidades y regiones que la integran y la solidaridad entre todas ellas*. At https://www.lamoncloa.gob.es/espana/leyfundamental/Paginas/index.aspx ).

[46] Chapter 3, Sections 142-158.

[47] At: https://www.parlament.cat/document/cataleg/150259.pdf .

[48] "El TC rebaja las aspiraciones de Catalunya en lengua, justicia y tributos catalanes", at https://www.lavanguardia.com/politica/20100628/53954106148/el-tc-rebaja-las-aspiraciones-de-catalunya-en-lengua-justicia-y-tributos-catalanes.html In Spanish.

[49] BBC "Catalans declare independence as Madrid imposes direct rule", at https://www.bbc.co.uk/news/world-europe-41780116 , and Jose Antich "Six months since Catalonia's Declaration of Independence" https://www.elnacional.cat/en/editorial/jose-antich-six-months-declaration-independence_263091_102.html .

[50] S Burgen "Catalans protest at 'harsh' sentencing of independence leaders" *The Guardian* 14 November 2019, at https://www.theguardian.com/world/2019/oct/14/catalans-protest-at-harsh-sentencing-of-independence-leaders-in-spain.

Scotland, on the other hand, not only has devolved government since 1997 and almost complete domestic autonomy, in the context of having kept its own law and other attributes of separate identity since the Act of Union of the Kingdom of Scotland with the Kingdom of England in 1706, but has an unopposed right to independence if that is desired by a majority of its population. Scotland is therefore quite different from the other case studies, and the issue of non-recognition does not arise. However, the Scottish National Party takes a keen interest in events in Catalonia; and the Catalan independence movement looks to Scotland as an inspiring precedent.

*Abkhazia and South Ossetia*

These are non-recognized states or entities, under all criteria so far mentioned.

Abkhazia and South Ossetia, which were constituent parts of Georgia as it emerged from the USSR, but with very different histories and ethnic and linguistic composition, have, since the 2008 war between Russia and Georgia, been recognized as independent states only by Russia, Venezuela, Nicaragua, Nauru and Syria. Further recognition is highly unlikely, and admission to the UN practically inconceivable. As to Abkhazia, Farhad Mirzayev concluded that "… in the conflict between the right to self-determination and the principle of territorial integrity, the former is limited in favour of the latter." [51] As to South Ossetia, Christopher Waters came to a similar conclusion. [52]

*DNR and LNR*

These are not in my view non-recognized states or entities.

The Donetsk (DNR) and Luhansk (LNR) "Peoples Republics" are not even recognized by Russia, which maintains that they remain part of the territory of Ukraine, but should receive special status within Ukraine. The DNR is "recognized" by the LNR and South Ossetia. The LNR is "recognized" by the DNR and South Ossetia. Indeed, on 2 October 2019 it was reported that Ukraine's president, Volodymyr Zelenskyy, had announced plans to implement the so-called Steinmeier formula of 2015 granting special status to these territories - if local elections there are conducted by the Ukrainian authorities under the Ukrainian constitution, and if the Organisation for Security and Cooperation in Europe (OSCE) declares that the elections are held according to international standards and without any pressure from

[51] F Mirzayev, "Abkhazia", in C Walter, A von Ungern-Sternberg and K Abushov (eds.) *Self-Determination and Secession in International Law* (Oxford University Press, Oxford, 2014), 191-213, at 212.
[52] C Waters, "South Ossetia", in ibid., 175-190.

Russia.[53] And on 14 October 2019 Gwendolyn Sasse reported that "Most people in separatist-held areas of Donbas prefer reintegration with Ukraine", based on surveys carried out by her in 2016 and 2019.[54] These entities are most certainly un-recognized and there appears to be no self-determination claim or issue.

*Nagorno-Karabakh or Artsakh*

This is a non-recognised state or entity for the purpose of this chapter.

Heiko Krüger wrote that there are two reasons why the Nagorno-Karabakh Republic or Republic of Artsakh has not yet achieved statehood under the Montevideo criteria, although it has a defined territory and permanent population.[55] First, its administration cannot be considered an effective government as it is not able to maintain itself without Armenia's assistance. In 2005 the Parliamentary Assembly of the Council of Europe characterized the situation as a de facto annexation by Armenia.[56] Second, "… international law … does not accept a status which rests upon an illegal armed intervention by a third state."

This Republic still belongs in international law to the Republic of Azerbaijan, despite its recognition by Azerbaijan for the purpose of negotiation in 1993.[57] However, I repeat that it has now been in existence for three decades, and seems likely to persist.

*Transnistria or PMR*

This is a non-recognized state or entity for the purpose of this chapter.

As noted above, I have written about Transnistria, officially the Pridnestrovian Moldavian Republic[58] (PMR).[59] The PMR's Constitution states in Article 1 that "The Pridnestrovian Moldavian Republic is a sovereign, independent, democratic, legal state."[60] However, as of 2011, only Abkhazia, the Republic of Artsakh, and South Ossetia recognize its independence. Russia has never recognized it as a state, and has always maintained that it should have a special status within Moldova, of which it is still a part.[61]

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[53] https://emerging-europe.com/news/zelensky-confirms-steinmeier-formula-ukraine-settlement/
[54] https://theconversation.com/most-people-in-separatist-held-areas-of-donbas-prefer-reintegration-with-ukraine-new-survey-124849
[55] Heiko Krüger "Nagorno-Karabakh", in ibid., 214-232, at 227-8.
[56] PACE Resolution 1416 (2005); and see Antonello Tancredi "Secession and the Use of Force" in ibid., 68-94, at 93 – "… and illegal occupation by Armenia of a region which is still internationally regarded as part of Armenia."
[57] H Krüger "Nagorno-Karabakh", in ibid., 214-232, at 227-8, and at 230
[58] http://en.president.gospmr.org/
[59] Bill Bowring, "Transnistria", in ibid., 157-174.
[60] http://en.president.gospmr.org/pravovye-akty/konstitutsiya-pmr/
[61] Ibid, at 173

Nevertheless, in its 2004 judgment in *Ilaşcu* [62] the Strasbourg Court held that:

> 392. All of the above proves that the 'MRT'[63], set up in 1991–92 with the support of the Russian Federation, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.

The finding that the PMR "remains under the effective authority, or at the very least under the decisive influence" of Russia for the purpose of responsibility for its violations of human rights is highly unusual. The usual finding, necessary for attribution of responsibility, is "effective overall control", for example in its judgments in relation to British military activities in Iraq.[64] Here, the Court uses the phrase "at the very least". One has the sense that the Court is uncomfortable with the position it has taken.

The Court held Russia responsible in 2011 in *Ivanţoc and Others v. Moldova and Russia*[65], in 2012 in *Catan and others v Moldova and Russia*[66], and in 2016 in *Mozer v. Moldova and Russia*[67], now with the usual phrase "effective control", and subsequently. This *Ilascu* ruling, with its attribution of responsibility to Russia, was subjected to strong criticism in the dissenting judgment of the Russian judge, Anatoly Kovler, with which I agree, and to similar criticism in a blog and journal article after *Catan*.[68] Nevertheless, in *Mozer* the Court held

> 110. The Court therefore maintains its findings in *Ilaşcu and Others*, *Ivanţoc and Others* and *Catan and Others* (all cited above), to the effect that the "MRT" is only able to continue to exist, and to resist Moldovan and international efforts to resolve the conflict and bring democracy and the rule of law to the region, because of Russia's military, economic and political support. In these circumstances, the "MRT's" high level of dependency on Russian support provides a strong indication

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[62] *Ilaşcu and Others v Moldova and Russia* Application no. 48787/99, judgment of 8 July 2004.
[63] Moldavian Republic of Transdniestria
[64] Marko Milanovic "European Court Decides Al-Skeini and Al-Jedda" 7 July 2011. *EJIL:Talk!* At https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/.
[65] Application no. 23687/05, judgment of 15 November 2011.
[66] Application nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012
[67] Application no. 11138/10, judgment (GC) of 23 February 2016
[68] Marko Milanovic, "Grand Chamber judgment in *Catan and Others*' (2012) *EJIL Talk!*, 21 October at http://www.ejiltalk.org/grand-chamber-judgment-in-catan-and-others/ ; and Bill Bowring "Geopolitics and the right to education, and why 'no person' is in fact a child" 26(2) *Child and Family Law Quarterly* (2014) 196-215.

> that Russia continues to exercise effective control and a decisive influence over the "MRT" authorities (see *Catan and Others*, cited above, § 122).

In July 2012 the deputy head of the Russian Foreign Ministry announced in Tiraspol – the first time that such a declaration was made by Russia in the PMR - that the conflict must be settled by way of including the PMR within Moldova with the rights of a special district, and German Chancellor Angela Merkel supported this position when she visited Chisinau the following month.[69] It should be noted that the 134,535 strong Turkic language Gagauz people of southern Moldova now have their own "national-territorial autonomous unit" with constitutional status within Moldova, with three official languages, Moldovan (which is in reality Romanian), Gagauz and Russian[70].

*The Russian regions, especially the ethnic (national) Republics*

This again is somewhat *sui generis*. The period between 1990 and March 1992 has been described as the "parade of sovereignties" in the USSR and then Russia[71]. The abortive *coup d'état* of 18 August 1991 swiftly led to the demise of the USSR. The Minsk Agreement of 8 December 1991[72], and the Alma-Ata Declaration of 21 December 1991[73] laid the USSR to rest. During this period an extraordinary process began. From July to November 1990 the majority of the 'ethnic' autonomous republics attempted to throw off their autonomous status, and to take on sovereign statehood. They did this by way of a series of declarations.[74] In fact, 23 of the subjects of the Soviet Russian Federation declared state sovereignty even before the collapse of the USSR in December 1991.

These territories – two of them located in Georgia, soon to become an independent state – wanted to be recognized as fully fledged members of the USSR, and to enter into treaty relations with the RSFSR (predecessor of the Russian Federation). And some of the autonomous *okrugs* unilaterally decided to become autonomous republics. Such decisions were taken in 1990 by the legislatures of the Chukotka and Yamalo-Nenets autonomous

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[69] Ibid, at 167.
[70] http://www.gagauzia.md/index.php?l=en .
[71] See Bill Bowring "The Russian Constitutional System: Complexity and Asymmetry", in Marc Weller and Katherine Nobbs (eds.) *Asymmetric Autonomy and the Settlement of Ethnic Conflicts* (University of Pennsylvania Press, 2010) 48-74.
[72] *Rossiisskaya Gazeta* 10 December 1991.
[73] *Rossiisskaya Gazeta* 24 December 1991.
[74] *Deklaratsii o suverenitete soyuznikh i avtonomnikh respubl;ikh*, Moscow 1991.

*okrugs*. Chukotka successfully left the Magadan *oblast* to become a subject of the RF, according to the Judgment of the Constitutional Court of the RF of 11 May 1993.[75]

The real threat of the transformation of Russia into a confederation provided the direct impetus for a draft Federative Treaty. On 31 March 1992 the RSFSR and most of the subjects signed the Federative Treaty, setting out the division of powers. The Treaty was incorporated into the 1978 Constitution of the RSFSR, with effect from 10 December 1992. In the view of Irina Umnova, writing in 1998, Russia turned from a unitary state into a half-federation or quasi-federal state.[76] She also considered that for the regions other than the ethnic republics, the Treaty "won" a status of autonomy similar to the regions of unitary decentralized states, such as Italy and Spain (both since the 1980s). One of the most important guarantees of autonomy was the principle, to be found in Articles 84 of the Treaty and Article 84(9) of amended 1978 Constitution, that the territories of these formations could not be changed without their agreement.

It is notable that not all the subjects of the RSFSR agreed with the provisions of the Federative Treaty. Neither Tatarstan nor the Chechen-Ingush Republic signed the Treaty. On 21 March 1992 Tatarstan, despite the decision of the Russian Constitutional Court of 13 March 1992[77], held a referendum, confirming the status of Tatarstan as an independent republic, and subject of international law, with its own relations with the RF and other republics and also with foreign states on the basis of treaties and legal equality. Until a year ago it retained a special status within the RF.

The status of the Chechen-Ingush Republic was not at all clear; practically speaking, it escaped from the control of the Federal authorities[78]. The Republic of Bashkortostan also had a special relation to the Treaty. The process of 'republicanization' at this point began to transgress the limits of Russian legality. On 27 October 1993 Sverdlovsk *oblast* adopted a Constitution of the Urals Republic. This Republic was proclaimed unilaterally.[79] On 9 November 1993 President Yeltsin issued his Decree "On stopping the activities of the Sverdlovsk Oblast deputies", and declared that the actions of the Soviet in adopting its decisions of 1 July 1993 "On the status of Sverdlovsk Oblast within the RF" and of 27

[75] Vestnik of the Constitutional Court of the RF 1994 No.2-3, 53-59.
[76] Irina Umnova. *Konstitutsionni osnovy sovremennovo possiiskovo federalizma* (The constitutional foundations of contemporary Russian federalism). (Moscow, *Dyelo*, 1998), at 78.
[77] Vestnik of the Constitutional Court of the RF 1993 No.1 pp. 40-52.
[78] Irina Umnova. Ibid., at 72.
[79] *Yekaterinburgskii Vedomosti*, 30 October 1993.

October 1993 "On the Constitution of the Urals Republic" were null and void from the moment of their enactment[80] (see also Gerald Easter as to the attempt to create a new Urals Republic[81]).

*Crimea*

I have already mentioned above my own work on the Russian legal justifications for the 2014 annexation of Crimea, especially the contentions that the "Crimean people" exercised a right of (remedial) self-determination, enjoyed a very brief period of independence, before applying to join and being accepted into the Russian Federation.[82] It did not secede from any state, but was illegally annexed from Ukraine by Russia. There is not and has not been a "Crimean people", but as already pointed out, an indigenous people, the Crimean Tatars, who suffered genocide by the USSR in 1944, had a poor deal under Ukraine, and have been treated very badly indeed by Russia since the annexation.[83]

**The UN seal of approval, and the route to admission**

It may be argued that theories of recognition, and empirical studies as to the number of states recognizing or failing to recognize a particular entity have considerably less relevance in the post-WWII world. The "gold standard" test is now admission to and membership of the United Nations.

There are today a great many United Nations member states on the planet, 193 since South Sudan was admitted in 2011[84], following Montenegro in 2006[85], and Switzerland[86] and

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[80] Collection of the acts of the President and Government of the RF, 1993, No. 46,, Art. 4447.
[81] Gerald M Easter, "Redefining centre-regional relations in the Russian Federation: Sverdlovsk Oblast" 49(4) *Europe-Asia Studies* (1997), 617-635.
[82] Bill Bowring "Who Are the "Crimean People" or "People of Crimea"? The Fate of the Crimean Tatars, Russia's Legal Justification for Annexation, and Pandora's Box" in Sergey Sayapin and Evgen Tsybulenko (eds.) *The Use of Force against Ukraine and International Law" Jus Ad Bellum, Jus In Bello, Jus Post Bellum* (T M C Asser / Springer 2018), 21-40.
[83] I am one of a team representing the Majlis (representative body) of the Crimean Tatars in their complaint to the European Court of Human Rights, having been declared "extremist" and banned by the Russian authorities.
[84] The Republic of South Sudan formally seceded from Sudan on 9 July 2011 as a result of an internationally monitored referendum held in January 2011, and was admitted as a new Member State by the United Nations General Assembly on 14 July 2011. See https://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html.
[85] Montenegro held a 21 May 2006 referendum and declared itself independent from Serbia on 3 June 2006. In a letter dated 3 June 2006, the President of the Republic of Serbia informed the Secretary-General that the membership of Serbia and Montenegro was being continued by the Republic of Serbia, following Montenegro's declaration of independence. On 28 June 2006 it was accepted as a United Nations Member State by General Assembly resolution A/RES/60/264.
[86] On 10 September 2002, Switzerland became a full member of the United Nations, after a referendum supporting full membership won in a close vote six months earlier; Swiss voters had rejected membership by a 3-to-1 margin in 1986. The 2002 vote made Switzerland the first country to join based on a popular vote. https://www.theguardian.com/world/2002/mar/04/unitednations .

Timor-Leste[87] in 2002. As Jure Vidmar has pointed out with regard to secessionist entities, "… in the absence of U.N. membership, there exists no objective international indicator that would end the ambiguity and show that the entity is indeed a State." He also notes that practice shows that "… no state has been admitted to the U.N. against the competing claim to territorial integrity by its parent state."[88]

All these 193 U.N. member states meet the Montevideo criteria.

What about entities which have not yet been admitted to the United Nations? The Unrepresented Nations and Peoples Organization (UNPO) was conceived of in the late 1980s by exiled leaders of people living under communist oppression, Linnart Mäll of the Congress of Estonia, Erkin Alptekin of the Uyghur people, and Lodi Gyari of Tibet, together with Michael van Walt van Praag, the international law advisor of the 14th Dalai Lama. A key goal was to replicate the powerful message of nonviolence and interethnic tolerance in the face of oppression exhibited by the Tibetan people and championed by the 14th Dalai Lama and to provide a forum in which others are encouraged and supported to adopt similar approaches.

The UNPO was formally founded in February 1991 at the Peace Palace in The Hague, by representatives of movements belonging to Australian Aboriginals, Armenia, Crimean Tatars, Cordillera, East Turkestan, Estonia, Georgia, the Greek Minority in Albania, Kurdistan, Latvia, Palau, Tibet, Taiwan, Tatarstan and West Papua. They were joined just a few months later by representatives from Abkhazia, Aceh, Assyria, the Chittagong Hill Tracts, South Moluccas, Bougainville, Chechnya, Kosova, Zanzibar, and the Mairi and Iraqi Turkmen people.

Since then, UNPO's membership has grown steadily from its original founders, with membership from 43 peoples worldwide, comprising over 300 million people, lacking "true

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[87] In March 1999 Indonesian President BJ Habibe announced that if, in a "process of consultation", the East Timorese favoured independence over autonomy under Indonesia, he would grant it. On 30 August 1999 the UN oversaw an historic ballot, in which 78.5% of East Timorese rejected autonomy in favour of independence. On 20 September 1999 an Australian-led international peacekeeping force, Interfet, arrived to restore order. The UN ran a three-year administration in the lead-up to parliamentary and presidential elections. In May 2002 Gusmão was inducted as president of the newly named Timor-Leste. On 27 September 2002 the U.N. General Assembly voted unanimously to admit Timor-Leste. https://www.theguardian.com/world/2019/aug/30/east-timor-indonesias-invasion-and-the-long-road-to-independence; https://news.un.org/en/story/2002/09/46692-un-general-assembly-admits-timor-leste-191st-member .

[88] Jure Vidmar, "Territorial Integrity and the Law of Statehood", 44(4) *The George Washington International Law Review* (2012), 101-149, at 144; and see Dapo Akande "The Importance of Legal Criteria for Statehood: A Response to Jure Vidmar" *EJIL Talk!* 7 August 2013, at https://www.ejiltalk.org/the-importance-of-legal-criteria-for-statehood-a-response-to-jure-vidmar/ (arguing for the role of collective recognition in constituting statehood).

representation" in domestic or international forums. Many members have achieved their movement's goals and found a formal seat for their people at the national or international level and have, thus, left the organization, as their peoples are no longer considered to be "unrepresented".[89]

According to the UNPO Covenant, its members subscribe to the following:

- The equal right of all peoples to self-determination;
- Adherence to internationally-accepted human rights standards;
- Adherence to the principles of democratic pluralism and rejection of intolerance;
- Promotion of non-violence and the rejection of terrorism and violence as instruments of policy;
- Protection of the natural environment.

UNPO's General Secretary, appointed in 2018, is Ralph J. Bunche III (his grandfather was Ralph Johnson Bunche, 1904-1971, who received the 1950 Nobel Peace Prize for his late 1940s mediation in Israel, and was the first African American to be so honoured). Mr Bunche was for four years the OSCE's Chief of the Law and Justice Section in Pristina, Kosovo, followed by three years as Regional Director, Europe, for Fair Trials. He leads a very small team in Brussels.

Some former members have gained full independence and have been admitted to the UN, such as Armenia (1992), East Timor (Timor Leste, 2002), Estonia (1991), Georgia (1991), Latvia (1991), and Palau (1994)[90]. UNPO now has 43 members, including Abkhazia, Catalonia, and the Crimean Tatars. Of the national republic subjects of the Russian Federation, Bashkortostan was a member from 19986 to 1998, Buryatia from 1996 to 2010, Chechnya – Ichkeria from 1991 to 2010, Chuvashia from 1993 to 2018, Sakha-Yakutia from 1993 to 1998, Tatarstan from 1991 to 2008, Tuva from 1996 to 2010, and Udmurtia from 1993 to 2013. I strongly suspect that their termination of membership was not unconnected with the attitude of the Kremlin.

Writing in 2019, Fiona McConnell[91] explained

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[89] https://unpo.org/section/2 .

[90] Along with other Pacific Islands, Palau was made a part of the United States-governed Trust Territory of the Pacific Islands in 1947. Having voted against joining the Federated States of Micronesia in 1979, the islands gained full sovereignty in 1994 under a Compact of Free Association with the United States.

[91] Fiona McConnell "Comments for a Roundtable Discussion on "Transnational Activism: Impact of Populism on Minorities, Indigenous Peoples and Refugees", in Anna-Maria Biro (ed.) *Populism, Memory and Minority Rights Central Eastern European Issues in Global Perspective* (Brill/Nijhoff, 2019), 357-362, at 360-361; see also Fiona McConnell "Liminal geopolitics: the subjectivity and spatiality of diplomacy at the margins", 42(1) *Transactions of the Institute of British Geographers* (2017), 139-152 .

> At first glance, UNPO members appear to be unlikely bedfellows. Not only do they span all continents, they also cover a wide constitutional spectrum, with their political demands ranging from full recognition of statehood ( eg Iranian Kurdistan) and demands for the protection of cultural rights (Afrikaners)… Indeed, through membership on UNPO, we see the creation of a level playing field among actors of varying sizes, resources and political clout. Although nationalism underpins the politics of most of the member communities, within UNPO events this is tempered by a collective pan-community solidarity.[92]

It is possible to say that UNPO membership marks a trajectory from non-recognized status to – in a very few cases - admission to and membership of the United Nations.

**Conclusion**

The questions posed at the start of this collection therefore remain open. None of the case studies explored in the various chapters, except for Scotland, will achieve general recognition, let alone admission to the United Nations. For Scotland, a key question is future membership of the European Union.

This chapter has examined non-recognized entities and international law. International law signally fails to define "peoples" for the purpose of the right of peoples to self-determination. It may not be a coincidence that there is no legal instrument to my knowledge defining "non-recognized entities". It is for that reason that I have turned to the leading political science scholars in this field; and to a prominent recent collection of chapters on the issue. I am left, not with "ideal types", and indeed, there is a wide variety of case. But I come back to the four post-Soviet entities to which I have returned several times in the Chapter.

Even Kosovo, with backing from major Western powers, cannot achieve UN membership – and it is not one of the case studies. Catalonia will hopefully regain its autonomous status within unitary Spain and in my view and that of most observers and of many Catalonians, will never achieve independence. Given its disproportionate contribution of the Spanish economy, Catalonian secession would be a disaster for Spain. On the other hand, Scotland is highly likely to gain independence, peacefully, in the next decades, especially in the context of Brexit. Its contribution to the UK's economy is marginal, and indeed it is subsidized by England.

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[92] And see Vinay K Gidwani "Subaltern Cosmopolitanism as Politics" 38(1) *Antipode* (2006), 7-21.

The Russian Federation is unlikely to follow the example of the Soviet Union and disintegrate any time soon, though President Putin blames Vladimir Lenin's insistence on a federative structure both for the Soviet Union, with a right of secession, and for Russia itself, as the main cause of the collapse of the Soviet Union, and as posing to this day an existential threat to Russia. This is why the Russian legal justifications for the annexation of Crimea are potentially so dangerous for Russia's future, opening a Pandora's box, as I have argued.

And so far as Russia is concerned, Transnistria (PMR) will remain part of Moldova, but, along with Gagauzia, with special status, although this is not at all the outcome desired by the Tiraspol authorities. The DNR/LNR will remain legally part of Ukraine. It seems presently the case that neither Russia nor Ukraine want to take responsibility for necessary reconstruction or for dealing with the armed separatists who pose almost as much of a threat to Russia, by which they feel betrayed, as to Ukraine.

Armenia has won the ongoing war with Azerbaijan, militarily, but has lost in terms of its economy. Russia backed Armenia, but Azerbaijan, already linguistically close to Turkey, is likely in future to become overtly or not part of Turkey's eastward project. Artsakh, with its population of about 150,000, will continue its existence.

Thus, all four post Soviet entities are highly likely to continue in frozen limbo, and, it appears will not suffer too much as a result.