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The European Union's Engagement with the 'de-facto States' in the Eastern Partnership

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About the Author

Stefania Kolarz is a legal practitioner and a PhD candidate at the Chair of International and European Law, Faculty of Law, Administration and Economics, at the University of Wrocław (Poland). She holds an MA in EU International Relations and Diplomacy Studies from the College of Europe in Bruges (2019-2020), a Master of Law in International and European Business Law from Paris Dauphine University (2015) and a Master of Law from the University of Wrocław (2015). Her research interests include *de facto* states and legal aspects of the EU's external relations, in particular with the Eastern Partnership countries. This paper is based on her Master's thesis at the College of Europe (Hannah Arendt Promotion), which was awarded the 'ENP award for the best thesis on the European Neighbourhood Policy'.

Editorial Team:

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Dijver 11 | BE-8000 Bruges, Belgium | Tel. +32 (0)50 477 251 | Fax +32 (0)50 477 250 |
E-mail ird.info@coleurope.eu | www.coleurope.eu/ird

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Abstract

Through its enlargements and the launching of the Eastern Partnership the European Union (EU) approached Russia's so-called near abroad. The shared neighbourhood is spotted with '*de facto* states' such as Abkhazia, South Ossetia, Nagorno-Karabakh, Transnistria, Donetsk and Luhansk, which proclaimed independence from their 'mother states': Georgia, Azerbaijan, Moldova and Ukraine respectively. In the absence of international recognition, however, these self-proclaimed republics depend on the support of their patrons: Russia and, in the case of Nagorno-Karabakh, Armenia. This translates into particular legal implications for those regions: while they are formally perceived to remain integral parts of their mother states, the latter do not exercise an effective control there. Since the EU is tightening its bonds with the Eastern Partnership countries, the question arises how it engages with these *de facto* states. The EU's interaction with the 'unrecognised states' in the Eastern Partnership is shaped by both international and EU law. While Brussels respects the international legal framework limiting its engagement (e.g. the obligation to respect the territorial integrity and sovereignty of the mother states or the lack of competence to grant recognition or establish diplomatic relations), it has found pragmatic ways to interact with the *de facto* states. The Union addresses those self-proclaimed republics by shaping the recognition practices of its member states, by enabling the EU Delegations and Special Representatives to have contacts with the *de facto* authorities, by highlighting its adherence to the principles of international law in its political statements and jurisprudence, and by pursuing a Non-recognition and Engagement Policy.

Introduction: *de facto* states in international relations and EU external action

The conflicts in Moldova and the South Caucasus date back to the dissolution of the Soviet Union which brought about a proclamation of independence by the titular *de facto* states:¹ Transnistria, Nagorno-Karabakh, Abkhazia and South Ossetia from their respective 'mother states' – Moldova, Azerbaijan and Georgia.² While none of the former gained worldwide recognition, their functioning has been guaranteed by the 'patron states' (Russia, and, in case of Nagorno-Karabakh, Armenia), which are internationally recognised states supporting the self-proclaimed republics, most often sharing their ethnicity and acting as proxies assisting them to overcome issues linked to non-recognition.³ As King notes, "[i]n this limbo between war and peace, [*de facto* states] have spent the better part of a decade building real institutions that function, in some cases, about as well as those of the legitimate countries of which these republics are still, supposedly, constituent parts. All have the basic structures of governance and the symbols of sovereignty. All have military forces and poor but working economies. All have held elections for political offices".⁴ Although these unrecognised republics are perceived by the international community as an integral part of their mother states, the latter do not exercise effective control over them.⁵

It is noteworthy that from a political perspective, *de facto* states constitute for the Kremlin a safeguard to prevent the North Atlantic Treaty Organisation and the EU from approaching closer to Russia's near abroad.⁶

¹ While it is the most common to use the term '*de facto* states', this term is subject to a lively debate and may be used interchangeably with 'unrecognised states (republics)', 'separatist republics', 'self-proclaimed republics' etc.

² H. Blakkisrud & P. Kolstø, "Dynamics of *de facto* Statehood: The South Caucasian *de facto* States between Secession and Sovereignty", *Southeast European and Black Sea Studies*, vol. 12, no. 2, 2012, p. 282.

³ N. Caspersen, "Playing the Recognition Game: External Actors and *De Facto* States", *The International Spectator*, vol. 44, no. 4, 2009, pp. 52-53.

⁴ C. King, "Eurasia's Non-state States", *East European Constitutional Review*, vol. 10, no. 4, 2001, p. 99.

⁵ S. Kolarz, "Problem of Protection of Immovable Property Situated within the Territories of *De Facto* States", in B. Heiderhoff & I. Queirolo (eds.), *Old and New Problems in Private Law*, Canterano, Arcane, 2020, p. 118.

⁶ There exist some doubts as to using the notion of *de facto* state with regard to Donetsk and Luhansk due to their relatively short existence and ongoing fights, as well as uncertainty as to their internal sovereignty and actual degree of popular support of their inhabitants – legitimacy (S. Relitz, 2019). Therefore, some scholars (J. O'Loughlin, V. Kolossov, G. Toal, 2014) suggested to refer to them as 'proto *de facto* states' or '*de facto* states in making'.

Due to the EU's successive enlargements and the strengthening cooperation with its Eastern partners, the EU has increasingly become interested in a settlement of the conflicts over *de facto* states. As the Commission noted,

if the ENP [European Neighbourhood Policy] cannot contribute to addressing the conflicts in the region, it will have failed in one of its key purposes. Such conflicts can threaten the Union's own security, whether through the risk of escalation or of an exodus of refugees, or by interrupting energy supplies or cutting trade and transport links, or through the spread of terrorism and organised crime including trafficking in human beings, drugs and arms. [...] The ENP can never substitute for the regional or multilateral efforts underway to address these issues. But the EU must be prepared to play a more active role here.⁷

The main objective of this paper is to provide an introduction to the debate on *de facto* states from a legal and an EU perspective. It addresses the question how the EU engages with the *de facto* states in the Eastern Partnership. The paper argues that the EU's relations with the *de facto* states are shaped by two co-existing and mutually non-exclusive sets of norms: international law and EU law. The two play, however, different roles. While international law states some basic principles regarding the legal status of *de facto* states and generally limits the possibilities of interactions between the EU and the self-proclaimed republics, EU law fills this broad approach with some substance. This substance is defined on a case-by-case basis by the EU's jurisprudence, agreements and practice which, in turn, extends the scope of potential interactions between Brussels and the separatist republics. International law, apart from setting the principle of territorial integrity, does not provide a catalogue of its subjects, nor settle the issue of the role of recognition. As international law does not grant the EU the capacity to recognise a newly-proclaimed entity as a state nor engage with it diplomatically, Brussels needs to find other ways to interact with *de facto* states, in conformity with international law. This interaction comprises a variety of legal and political instruments such as shaping the recognition practices of its member states, enabling the EU Delegations and Special Representatives to have contact with the *de facto* authorities, highlighting the EU's adherence to the principles of international law

⁷ European Commission, *Communication from the Commission to the Council and the European Parliament on Strengthening the European Neighbourhood Policy*, COM(2006) 726, Brussels, 04.12.2006, p. 10.

in its political statements and jurisprudence, and pursuing a Non-recognition and Engagement Policy (NREP).

The paper adopts a formal-dogmatic method which consists of ascertaining and interpreting the content of the relevant international law and EU law, as well as the jurisprudence of the Court of Justice of the European Union (CJEU). Mindful, however, of the shortcomings of this approach (the majority of sources is not dedicated to the issue of *de facto* statehood), the research is complemented by an analysis of EU documents regarding the self-proclaimed republics, including EU statements, speeches, declarations, press releases, reports, etc. since the early 1990s as well as the findings of political science scholars. In addition to this, a legal comparative method is applied.

The paper is structured as follows: the next section focuses on the international legal framework with a brief overview of some lacunas of the international legal system that allowed *de facto* states to emerge, before discussing the competence of the EU in the field of recognition and establishment of formal relations with *de facto* states and the EU political statements in this regard. The subsequent section is then devoted to the EU framework, analysing the relevant CJEU jurisprudence, the agreements concluded with the Eastern partners and the NREP.

The international legal framework shaping the EU's relations with *de facto* states

International law has at least three main implications which shapes the relations between the EU and *de facto* states. First, its deficiencies allow for the emergence of those 'unrecognised states'. Second, the EU has to operate within the framework of international law limiting its competence to recognise an entity or enter in diplomatic relations with it. Last but not least, international norms, such as the obligation to respect the territorial integrity, apply to all international actors, including non-state entities, and therefore narrows down the scope of the EU's discretion in shaping its policies towards the mother-, patron- and *de facto* states.

The emergence of de facto states

Although the notion of statehood is one of the key terms of international law, there is no universally accepted legal definition thereof, neither at the international nor at the

European level. The most common is to refer to Article 1 of the Montevideo Convention of 1933 stipulates that “[t]he state as a person of international law should possess the following qualifications: (a) a permanent population; (b) identified territory; (c) government; and (d) capacity to enter into relations with the other states”.⁸ Obviously, such a wording leaves some leeway for interpretation and, in consequence, allows *de facto* states to emerge.

Moreover, as a consequence of their sovereignty, states are the only primary subjects of international law; all other subjects are of a derivative character and the decision to recognise the legal personality of a new entity is left entirely to states.⁹ Contrary to national law, however, international law does not contain a list of its subjects nor criteria to become a subject, again leaving a margin for discussion on a case-by-case basis and taking decisions based on political, rather than legal, considerations.¹⁰

Finally, despite the exclusion of recognition from the criteria of statehood in the Montevideo Convention, the declaratory, constitutive or mixed role of recognition remains a subject of lively debate among scholars. According to declaratory theory, a state becomes a subject of international law at the moment of its emergence on the international level, while recognition is just a political confirmation of that fact.¹¹ By contrast, the constitutive theory claims that a state becomes a subject of international law only upon its recognition by the international community.¹² Regardless of the theory adopted, practice demonstrates that the lack of recognition disables an entity to effectively act on the international level.¹³ Therefore, *de facto* states struggle for worldwide recognition to increase their security (regulation of the legal status will render any acts of coercion by the mother state unfounded and illegal), stabilise their

⁸ International Conference of American States, *Montevideo Convention on the Rights and Duties of States*, signed at Montevideo on 26 December 1933.

⁹ J. Barcik & T. Srogosz, *Prawo międzynarodowe publiczne*, Warsaw, C.H. Beck, 2014, 2nd ed., p. 144; R. Kwiecień, *Podmiotowość prawnomiędzynarodowa państwa*, in: ed. B. Mielnik, A. Wnukiewicz – Kozłowska, *Podmiotowość w prawie międzynarodowym*, Wrocław, Wydawnictwo Uniwersytetu Wrocławskiego, 2013, p. 38.

¹⁰ P. Bogacki, “Zagadnienie podmiotowości prawnej w stosunkach międzynarodowych”, *Roczniki Nauk Prawnych*, vol. VII, 1997, p. 214.

¹¹ L. Antonowicz, *Rzecz o państwach i prawie międzynarodowym*, Lublin, Monografie Wydziału Administracji WSEI, 2012, p. 95.

¹² L. Antonowicz, *Państwa i terytoria. Studium prawnomiędzynarodowe*, Warsaw, PWN, 1988, p. 96.

¹³ A. Murphy & V. Stancescu, “State formation and recognition in international law”, *Juridical Tribune*, vol. 7, no. 1, 2017, p. 7.

economies (by accessing foreign markets) and effectively enjoy other international rights and privileges.¹⁴

So far, Abkhazia and South Ossetia have been recognised by Russia, Syria, Nauru, Venezuela and Nicaragua (temporarily by Tuvalu, and Abkhazia also by Vanuatu), and the other separatist republics by none.¹⁵ Legally, this dynamic is explained by Lynch who, while referring to the Montevideo Convention, explains that: “[t]he *de facto* states fulfil the first three of these criteria, and claim to be able to pursue the fourth. However, the empirical qualifications of the *de facto* state cannot make it legal or legitimate in international society”.¹⁶ Their non-recognition is justified by the obligation to respect the principles of international law (e.g. sovereignty and territorial integrity) and, as some scholars argue, an entity that has emerged in violation thereof shall not be (called) a state.¹⁷

The EU's competence to recognise states and to establish diplomatic relations

From the perspective of recognition, the relations between the EU and *de facto* states are shaped by two elements of the international legal framework. The EU, being itself a derivative subject of international law, does (at least formally) not have a competence to recognise an entity as a state. Nevertheless, Brussels is bound not to act in a way that could seem to recognise movements violating international law.

Although no international legal norm exists that requires international actors to recognise new entities, the international community is increasingly prone to agree on

¹⁴ S. von Steinsdorff, “Incomplete state building – incomplete democracy? How to interpret internal political development in the post-Soviet *de facto* states. Conclusion”, *Communist and Post-Communist Studies*, vol. 45, nos. 1-2, 2012, p. 205; G. Wilson, “Secession and Intervention in the Former Soviet Space: The Crimean Incident and Russian Interference in Its ‘Near Abroad’”, *Liverpool Law Review*, vol. 37, 2016, p. 169.

¹⁵ D. Ó Beacháin, G. Comai & A. Tsurtsunia-Zurabashvili, “The secret lives of unrecognised states: Internal dynamics, external relations, and counterrecognition strategies”, *Small Wars & Insurgencies*, vol. 27, no. 3, 2016, p. 452; Radio Free Europe, South Ossetia Recognizes 'Luhansk People's Republic', published online 19.06.2014, retrieved 02.04.2020, <https://www.rferl.org/a/south-ossetia-recognizes-luhansk-peoples-republic/25427651.html>.

¹⁶ D. Lynch, “Separatist states and post-Soviet conflicts”, *International Affairs*, vol. 78, no. 4, 2002, p. 835.

¹⁷ L. Antonowicz, *państwa w prawie międzynarodowym* [The Notion of Statehood in Public International Law], Warsaw, PWN, 1974, p. 134; L. Broers, “Mirrors of the World: The Claims to Legitimacy and International Recognition of *De Facto* States in the South Caucasus”, *Brown Journal of World Affairs*, vol. 20, no. 11, p. 145.

the existence of an obligation not to recognise entities arising from the violation of international law.¹⁸

The legal framework for granting or refusing recognition is specified by national laws. EU membership does not affect this. The EU has no competence, neither on the grounds of international law nor within its own legal framework, to recognise an entity as a state. Nevertheless, the practice reveals that it would be wrong to assume that Brussels does not play any role in this respect. First, the emergence of regional organisations in general induced a tendency to coordinate recognition acts by their members and also set substantive benchmarks for granting or withholding recognition.¹⁹ Second, the EU gathers influential states such as France and Germany (and until recently the United Kingdom), plays the role of a “normative power” and sets standards that are followed by the other international actors.²⁰

It seems, however, that it is easier to justify and observe the EU exercising non-recognition (than recognition) because a situation arising out of a violation of law can be condemned by any subject of international law. This is illustrated by the European Council Conclusions calling states not to recognise the proclamation of independence of Abkhazia and South Ossetia during the Russo-Georgian war in 2008²¹ or a joint statement on Crimea by the President of the European Council and the President of the European Commission – the two bodies entrusted to externally represent the Union as such (and not its Member States) on the basis of Articles 15(6) and 17(1) TEU.²² Moreover, the EU condemns any unjustified recognition by third states, as in the case of the recognition of the aforementioned separatist republics by Russia.²³

¹⁸ G. Wilson, *op. cit.*, p. 164.

¹⁹ E. Newman & G. Visoka, “The European Union’s practice of state recognition: Between norms and interests”, *Review of International Studies*, vol. 44, no. 4, 2018, p. 6.

²⁰ I. Manners, “Normative Power Europe: A Contradiction in Terms?”, *Journal of Common Market Studies*, vol. 40, no. 2, 2002, pp. 235-258.

²¹ Council of the EU, *Presidency Conclusions*, Brussels, 06.10.2008, p. 2.

²² European Council, Joint statement on Crimea by President of the European Council Herman Van Rompuy and President of the European Commission José Manuel Barroso, EUCO 58/14, Brussels, 16.03.201; EU, Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, pp. 13–390.

²³ European Commission, Speech of the Commissioner for External Relations and European Neighbourhood Policy, *EU/Russia: a challenging partnership, but one of the most important of our times*, Strasbourg 21.10.2008.

In the 1990s, the EU made three non-legally binding attempts to coordinate the recognition practices of its member states: the so-called 'Carrington formula', the Council's declaration on the guidelines on the recognition of new states in Eastern Europe and in the Soviet Union, and the report of the so-called 'Badinter Committee'.²⁴ The EU thus became the author of the 'conditional recognition' doctrine which suggests increased chances for international recognition for entities that respect democracy, the rule of law and the rights of minorities,²⁵ but it has not elaborated any binding regulatory framework, let alone the competence to recognise new states. Therefore, the EU has to rely on its member states to build a consensus on a case-by-case basis.²⁶ If this happens, the Union issues a joint statement (guidelines, communication or other non-binding instrument) on behalf of its members who subsequently proceed with the recognition on the basis of their respective national procedures.²⁷ However, as the examples of Kosovo and Palestine demonstrate, this is not always the case.

Although the Council confirmed that "Member States will decide, in accordance with national practice and international law, on their relations with Kosovo",²⁸ the EU has nevertheless implicitly suggested its support for the entity's independence by signing the Stabilisation and Association Agreement with Pristina in 2015. This is not a mixed agreement to be ratified by all member states, therefore pushing some hesitating members to engage without recognition.²⁹ Similarly, the Euro-Mediterranean Interim Association Agreement with the Palestine Liberation Organisation was signed in 1997.³⁰

²⁴ S. Blay, "Self-Determination: A Reassessment in the Post-Communist Era", *Denver Journal of International Law and Policy*, vol. 22, no 2-3, 1994, pp. 275-315, p. 311; EPC Declaration on the Recognition of New States in Eastern Europe and the Soviet Union of 16 December 1991, as reproduced in R. Caplan, *Europe and the recognition of new states in Yugoslavia*, 2005, pp. 187-188; A. Pellet, "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples", *European Journal of International Law*, vol. 3, no. 1, 1992, p. 178.

²⁵ S. von Steinsdorff, *op. cit.*, p. 205.

²⁶ E. Newman & G. Visoka, *op. cit.*, pp. 8-9.

²⁷ *Ibid.*, pp. 14, 12.

²⁸ Council of the EU, Press release "2851st Council meeting. General Affairs and External Relations", Brussels, 18.02.2008, p. 2.

²⁹ D. Wydra, "Between Normative Visions and Pragmatic Possibilities: The European Politics of State Recognition", *Geopolitics*, vol. 25, no. 2, 2020, p. 335.

³⁰ Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestine Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, OJ L 187, 16.7.1997, pp. 3-135.

It may therefore be concluded that the EU actively shapes the practice of recognition of its member states despite the lack of a formally conferred competence to do so.

A comparable dynamic may be observed on the level of direct engagement with *de facto* states. While the EU cannot formally establish diplomatic relations with unrecognised states, it nevertheless interacts directly with them. This is illustrated by the practice of the EU Delegations to mother states and the EU Special Representatives (EUSR). The EU Delegation to Moldova maintains formal and informal contacts with Transnistria.³¹ Apart from representing the EU in the '5+2' peace negotiation format³² since 2005, it constitutes a channel through which Brussels finances and facilitates confidence-building measures (CBM).³³ Moreover, the EU Delegation was entrusted with the negotiation of the extension of the application of the EU-Moldova Deep and Comprehensive Free Trade Area (DCFTA) to the separatist republic.³⁴ Importantly, its contacts with the *de facto* authorities have not been limited to trade; despite not being explicitly mandated to cooperate with the Transnistrian leadership, the Delegation visits the region on a weekly basis to run CBM projects.³⁵ Similarly, while the main tasks of the EU Delegation to Georgia comprise the implementation of the Association Agreement and DCFTA, it has also been the biggest funder of CBM, development and security projects in Abkhazia and, until 2008-2010, in South Ossetia.³⁶ On the contrary, there is hardly any evidence of contacts of the EU Delegations in Baku and Kiev with the separatist republics.

Leaving some leeway to engage with *de facto* states is even more visible in the mandates of the EU Special Representatives shaped by the decision on the appointment. While the mandates of the EUSR to Moldova included "developing and

³¹ V. Axyonova & A. Gawrich, "Regional Organizations and Secessionist Entities: Analysing Practices of the EU and the OSCE in Post-Soviet Protracted Conflict Areas", *Ethnopolitics*, vol. 17, no. 4, 2018, p. 417.

³² The '5+2' format includes: Transnistria, Moldova, Russia, Ukraine and the OSCE, and two observers: the EU and the US.

³³ S. Relitz, "The stabilisation dilemma: conceptualising international responses to secession and *de facto* states", *East European Politics*, vol. 35, no. 3, 2019, p. 15.

³⁴ M. Dembińska & F. Mérand, "The role of international brokers in frozen conflicts: the case of Transnistria", *Asia Europe Journal*, vol. 17, no. 1, 2019, p. 23.

³⁵ V. Axyonova & A. Gawrich, *op. cit.*, p. 416.

³⁶ S. Relitz, *op. cit.*, p. 15; EU, 2011 Annual Action Programme for Georgia, Support to conflict settlement Action Fiche, p. 1, retrieved 16.04.2020, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enpi_2011_c2011_4966_annual_action_programme_for_georgia_conflictsettlement.pdf.

maintaining close *contacts with all relevant actors*”,³⁷ the current mandate of the EUSR for the South Caucasus encompasses “develop[ing] contacts with governments, parliaments, *other key political actors*, the judiciary and civil society in the region” and “intensify[ing] the Union’s dialogue with the *main actors* concerned regarding the region”.³⁸ This wording suggests that the EU allowed its Representatives to have contacts with the *de facto* authorities, yet in practice, this varies from case to case. The EUSR has a limited access to Nagorno-Karabakh, but he maintains contacts with its ‘authorities’.³⁹ While he can enter South Ossetia only for the purpose of preparing the Geneva International Discussions (GID) meetings four times a year and has hardly any contact with its leadership or the civil society organisations, the access to Abkhazia is more open.⁴⁰

This state-of-art may be explained by the findings of Axyonova and Gawrich who underline that the EU is more prone to accept an extension of actions beyond the mandate if the risk of conflict re-escalation is low (Transnistria).⁴¹ It tends to act according to the mandate when such a risk is higher (Nagorno-Karabakh) and goes beyond it only for the sake of the prevention of a conflict re-escalation (South Ossetia).⁴² As far as the physical access of members of the EU Delegations to *de facto* states is concerned, there is also a legal explanation. On the basis of Article 5(6) of the ‘EEAS Decision’, the High Representative is responsible to enter in arrangements with the host states (Moldova, Georgia, Azerbaijan, Ukraine) to ensure the Delegation staff enjoys “privileges and immunities equivalent to those referred to in the Vienna Convention on Diplomatic Relations”.⁴³ According to the latter, “[t]he person of a

³⁷ Council of the EU, *Council Joint Action 2005/265/CFSP of 23 March 2005 appointing a Special Representative of the European Union for Moldova*, OJ L 81, 30.3.2005, pp. 50–52, Article 3, emphasis added; EU, *Council Joint Action 2007/107/CFSP of 15 February 2007 appointing the European Union Special Representative for the Republic of Moldova*, OJ L 46, 16.2.2007, pp. 59–62, Article 3, emphasis added.

³⁸ Council of the EU, *Council Decision (CFSP) 2018/907 of 25 June 2018 extending the mandate of the European Union Special Representative for the South Caucasus and the crisis in Georgia*, ST/8849/2018/INIT, OJ L 161, 26.6.2018, p. 27–31, Article 3(a, g); EU, *Council Decision (CFSP) 2020/254 of 25 February 2020 amending Decision (CFSP) 2018/907 extending the mandate of the European Union Special Representative for the South Caucasus and the crisis in Georgia*, ST/5958/2020/INIT, OJ L 54I, 26.2.2020, pp. 11–12.

³⁹ European Parliament, parliamentary questions, written response by Vice-President of the Commission, retrieved 16.04.2020, https://www.europarl.europa.eu/doceo/document/E-8-2018-000464-ASW_EN.html.

⁴⁰ V. Axyonova & A. Gawrich, *op. cit.*, p. 418.

⁴¹ *Ibid.*, p. 423.

⁴² *Ibid.*

⁴³ Council of the EU, *Council Decision of 26 July 2010 establishing the organisation and functioning of the European External Action Service*, OJ L 201, 3.8.2010, pp. 30–40, Article 5(6).

diplomatic agent shall be inviolable. [...] The receiving State shall [...] take all appropriate steps to prevent any attack on his person, freedom or dignity.”⁴⁴ As the mother states cannot ensure the protection of the EU representatives on separatist territories, the more fragile the situation, the less they are willing to assume the responsibility related to allowing them entering this areas. Politically, this argument may also be valid in the case of the EUSRs.

Despite these attempts to intensify its presence in *de facto* states, the EU highlights its commitment to the principles of international law, as is illustrated by its statements.

Principles of international law reflected in EU statements

Regarding Abkhazia and South Ossetia, the EU underlines its “firm support for Georgia's sovereignty and territorial integrity within its internationally recognised borders”⁴⁵ and commits to a “peaceful resolution of [the] conflict”, from time to time adding “in line with OSCE [Organisation for Security and Cooperation in Europe] principles and commitments and the fundamental norms of international law”.⁴⁶ Nevertheless, it also highlights a commitment to an “engagement with the breakaway regions of Abkhazia and South Ossetia, in support of longer-term conflict resolution”.⁴⁷

The discourse on Nagorno-Karabakh is different compared to the Georgian separatist republics. First, the EU calls on Armenia and Azerbaijan to refrain from the use of force and resume the talks, underlining that the maintenance of the *status quo* is not an option.⁴⁸ Second, the commitment to the preservation of the Azerbaijani territorial integrity is not as firm as in the case of Georgia. For instance, the EU calls on Yerevan and Baku “to continue their efforts to find a peaceful settlement based on *mutual compromise*”⁴⁹ or “confirms its support for [...] a stable political agreement concerning

⁴⁴ Vienna Convention on Diplomatic Relations Done at Vienna on 18 April 1961, Article 29.

⁴⁵ E.g. EEAS, *Local EU Statement on the 11 years anniversary of the conflict between Russia and Georgia*, Tbilisi, 07.08.2019.

⁴⁶ E.g. EEAS, *EU Statement on the situation in Georgia delivered at the OSCE Permanent Council meeting in Vienna, 5 September 2019*, Vienna.

⁴⁷ E.g. Delegation of the European Union to Georgia, *Georgia and the EU*, retrieved 05.04.2020, https://eeas.europa.eu/delegations/georgia/49070/georgia-and-eu_en.

⁴⁸ E.g. EEAS, *Statement by the Spokesperson on a helicopter incident in the context of the Nagorno-Karabakh conflict*, Brussels, 12.11.2014.

⁴⁹ E.g. European Council, *Göteborg Statement*, Göteborg, 14.06.2001, emphasis added.

Nagorno Karabakh, which should be acceptable to *both Armenia and Azerbaijan*".⁵⁰ It "supports a peaceful resolution [...] on the basis of the principles of non-use of force, territorial integrity and the self-determination of peoples"⁵¹ and the OSCE's Madrid principles (according to which a referendum regarding the status of Nagorno-Karabakh shall be held).⁵² Third, as a latecomer, the EU leaves the floor to the OSCE, supporting the efforts of the Minsk Group and confirming its readiness to play a complementary role, especially in the field of confidence-building.⁵³

As far as Transnistria is concerned, the EU supports peaceful dispute settlement and negotiations in the '5+2' format⁵⁴, underlining the respect for "the sovereignty and territorial integrity of the Republic of Moldova with a special status for Transnistria".⁵⁵ Similarly to the South Caucasus conflicts, the EU reiterates its willingness to contribute to the CBM,⁵⁶ and sees its role as facilitator of the peaceful conflict settlement⁵⁷ "in close consultation with OSCE".⁵⁸

Overall, this demonstrates that the EU's general approach towards *de facto* states is consistent with international law and/or the principles of conflict settlement elaborated during peace processes, insisting on non-recognition but, also non-isolation (e.g. CBM). International law, however, does not provide any guidelines as to

⁵⁰ E.g. EU, *Declaration by the Presidency on behalf of the European Union on forthcoming "Presidential elections" in Nagorno Karabakh*, Brussels, 02.08.2002, emphasis added.

⁵¹ E.g. European Commission, *Statement by President Barroso following his meeting with Tigran Sargsyan, Prime Minister of the Republic of Armenia*, Brussels, 15.03.2011; European Council, *Statement by President Herman Van Rompuy after his meeting with President of Azerbaijan, Ilham Aliyev*, Brussels, 22.06.2011.

⁵² E.g. European Council, *Remarks by Herman Van Rompuy, President of the European Council, following the meeting with Serzh Sargsyan*, Brussels, 06.03.2012.

⁵³ E.g. European Commission, *Statement by President Barroso following his meeting with President Aliyev of Azerbaijan*, Brussels, 21.06.2013.

⁵⁴ E.g. Council of the EU, Press release "2896th Council meeting General Affairs and External Relations General Affairs Luxembourg, 13 October 2008", published online 13.10.2008, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/PRES_08_287.

⁵⁵ E.g. European Commission, *Statement by High Representative/Vice President Federica Mogherini and Commissioner Johannes Hahn on the appointment of Prime Minister Chiril Gaburici and the formation of the government in the Republic of Moldova*, Brussels, 18.02.2015.

⁵⁶ E.g. Council of the EU, Press release "2896th Council meeting General Affairs and External Relations. General Affairs", published online 13.10.2008, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/PRES_08_287

⁵⁷ E.g. Council of the EU, *European Union - Ukraine Summit the Hague, 8 July 2004 - Joint press release*, The Hague, 08.07.2014.

⁵⁸ Council of the EU, Press release "2590th Council Meeting General Affairs and External Relations. General Affairs", Luxembourg, 14.06.2004.

how to implement such a non-recognition combined with non-isolation. Therefore, the answer shall be sought on the basis of EU law and practice.

The EU framework for dealing with *de facto* states

The normative framework for the EU's engagement with *de facto* states is contained in the CJEU jurisprudence and, more directly, in the Union's agreements with mother states. It is further supplemented by its practice.

De facto states in the jurisprudence of the Court of Justice

Until today, there was no CJEU judgment referring directly to the legal status of Donbas, Transnistria, Abkhazia, South Ossetia or Nagorno-Karabakh. Nevertheless, two cases seem to be of particular relevance: T-512/12 (*Front Polisario v. Council*) and C-420/07 (*Apostolides*). While the former refers to the Western Sahara and the latter to the Turkish Republic of Northern Cyprus (TRNC), they both demonstrate how the CJEU approaches the status of entities aspiring for independence in the application of EU law and the interpretation of the EU's international agreements.

In the *Front Polisario* case, the CJEU qualified the applicant, the national liberation movement Front Polisario, as a legal person of private law in order to meet the criteria of admissibility set out in Article 263 TFEU. Since it was impossible for the Front to satisfy the requirement of providing the Court with an extract from the register of companies, the CJEU eventually recalled the autonomous character of the term 'legal person' under EU law and stated that "in certain specific cases, an entity which does not have a legal personality under the law of a Member State or of a non-member State may nevertheless be regarded as a 'legal person' within the meaning of Article 263 [...], in particular, where by their acts or actions, the European Union and its institutions treat the entity in question as being a distinct person, which may have rights specific to it, or be subject to obligations or restrictions".⁵⁹ It set a further requirement of having "constituting documents and an internal structure giving it the independence necessary to act as a responsible body in legal matters".⁶⁰

⁵⁹ CJEU, case T-512/12 *Front Polisario v. Council*, judgement of 10.12.2015, ECLI:EU:T:2015:953, paras. 48, 52.

⁶⁰ *Ibid.*, paras. 53-54.

This reasoning raises the question whether *de facto* states can successfully act before the CJEU. On the one hand, the requirements of internal documentation and structure seem to be satisfied. On the other hand, the action could be unsuccessful since none of the EU institutions or bodies seems to treat *de facto* authorities, apart from the Transnistrian leadership (a direct addressee of multiple EU statements and sanctions⁶¹), as a 'distinct person'. In addition to this, it is unclear to what extent the CJEU attaches importance to the perception of such separatist authorities as a representative of a given population. In this respect, it could be argued that the differences between *de facto* states and the United Nations (UN) non-self-governing territories shall be taken into account; contrary to oftentimes blacklisted authorities of *de facto* states, Front Polisario is internationally recognised as a national liberation movement.⁶² While the latter enjoy the right to self-determination under international law, granting a right to secession to the former remains a subject to discussion.⁶³

Although the T-512/12 (*Front Polisario v. Council*) decision was set aside by the Court's new judgement C-104/16 as the result of an appeal by the Council, the mere approach of equating the entity struggling for its independence to a legal person under national law was not contested. Moreover, the CJEU highlighted that "where a treaty is intended to apply not only to the territory of a State but also beyond that territory, that treaty expressly provides for it, whether it is a territory 'under jurisdiction' of that State [...] or in any territory 'for whose international relations [that State] is responsible'".⁶⁴ This is also vital for the analysis of the legal status of *de facto* states under agreements the EU concluded with their respective patron states. Even assuming the exercise of effective jurisdiction by the patron states over the separatist territories, the agreement shall not be interpreted as covering also those self-proclaimed republics, unless there is an explicit contractual stipulation to the contrary.

⁶¹ E.g. Council Decision 2012/170/CFSP of 23 March 2012 amending Decision 2010/573/CFSP concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova (OJ L 87, 24.3.2012, p. 92); Council Decision 2012/527/CFSP of 27 September 2012 amending Decision 2010/573/CFSP concerning restrictive measures against the leadership of the Transnistrian region of the Republic of Moldova (OJ L 263, 28.9.2012, p. 44).

⁶² S. Secrieru, "The Transnistrian conflict – new opportunities and old obstacles for trust building (2009-2010)", *Southeast European and Black Sea Studies*, vol. 11, no. 3, 2011, pp. 248-249.

⁶³ G. Wilson, *op. cit.*, pp. 168-169.

⁶⁴ CJEU, case C-104/16 *Front Polisario c. Council*, judgement of 21.12.2016, ECLI:EU:C:2016:973, para. 96.

Similarly, the preliminary ruling in the *Apostolides* case seems to underline a priority of legal over actual status of *de facto* states. The CJEU decision originated from the inquiry about the possible recognition of the judgement in circumstances where the applicability of the *acquis communautaire*, including Regulation No 44/2001 on the jurisdiction and the recognition and enforcement of judgements in civil and commercial matters that would serve as legal basis, has been suspended in the TRNC as the Cypriot government does not exercise effective control there.⁶⁵ The Court underlined that Regulation No 44/2001 “merely designates the Member State whose courts have jurisdiction *ratione materiae*, but does not allocate jurisdiction within the Member State concerned”⁶⁶ and that “[t]he fact that the land is situated in the northern area may possibly have an effect on the domestic jurisdiction of the Cypriot courts, but cannot have any effect for the purposes of that regulation”.⁶⁷ It could therefore be concluded that the Court treats *de facto* states as integral parts of their respective mother states.⁶⁸ Taking this argument one step further, it could be argued that, should the Court refuse to apply the Regulation, it would not only violate EU law, but also suggest the existence of the TRNC as a separate state. As Advocate General Kokott explained, the Regulation would not be applicable only if the situation concerned the direct enforcement in the TRNC (instead of the Republic of Cyprus) of a judgement of a member state or an enforcement in a member state of a judgement rendered by a court of the TRNC.⁶⁹ Importantly, she underlined that the suspension of *acquis* shall “be limited to what is absolutely necessary”, since this solution shall “promote the growing together of the two parts of the country”.⁷⁰

The lesson learned for *de facto* states from this case is that apart from treating the mother state as the only entity bound by EU law and the *de facto* state as its administrative unit, the potential non-application of EU law to the separatist territories shall be limited to the greatest possible extent. The EU does not wish to jeopardise the peace process between the mother state and its separatist territory through its own closer integration with the mother state.

⁶⁵ CJEU, case C-420/07, paras. 30-31.

⁶⁶ *Ibid.*, para. 48.

⁶⁷ *Ibid.*, para. 51.

⁶⁸ S. Kolarz, „Problem Członkostwa Tureckiej Republiki Cypru Północnego w Unii Europejskiej”, in: ed. J. Helios, W. Jedlecka, A. Kwieciński, „Prawo wobec wyzwań współczesności: wybrane problemy teoretycznoprawne i dogmatycznoprawne”, Wrocław, 2019, p. 119.

⁶⁹ CJEU, Opinion of Advocate General Kokott, case C-420/07, 18.12.2008, ECLI:EU:C:2008:749, para. 31.

⁷⁰ *Ibid.*, paras. 35, 38, 41-42.

It could be argued, however, that this is the case of Cyprus which, as EU member state, has much stronger bonds with the Union than the Eastern partners. Nevertheless, even before the Cypriot accession to the EU, the CJEU was advocating for its territorial integrity e.g. in the *Anastasiou* case concerning the non-recognition of TRNC import certificates under the Association Agreement between the European Economic Community and the Republic of Cyprus.⁷¹ Importantly, also in this case the Court's reasoning was based on an interpretation of the EU-Cyprus agreement as applicable to the whole island, rather than on the duty of non-recognition.⁷² Therefore, it is worth exploring whether the territorial scope of application of the EU agreements with the Eastern partners is in line with the aforementioned jurisprudence.

The issue of de facto states in EU agreements with mother states

As far as the EU's contractual approach towards *de facto* states is concerned, two types of acts shall be taken into consideration: Association Agreements including DCFTAs, as well as readmission agreements, both concluded between the Union and particular partners. Other agreements having more limited implications for *de facto* states (e.g. visa liberalisation arrangements which focus on personal instead of territorial application) will not be analysed. Moreover, in line with the reasoning in the C-104/16 judgement no reference will be made to the arrangements with patron states, Armenia and Russia, since these agreements apply only to their internationally recognised territories.⁷³

The EU-Georgia Association Agreement of 2014 applies, according to its Article 429, to the territory of Georgia.⁷⁴ It contains, however, a clarification that "[t]he application of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, in relation to Georgia's regions of Abkhazia and Tskhinvali region/South Ossetia over which the

⁷¹ E. Kontorovich, "Economic Dealings with Occupied Territories", *Columbia Journal of Transnational Law*, vol. 53, no. 584, 2014-2015, p. 622.

⁷² *Ibid.*

⁷³ Comprehensive and enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Armenia, of the other part, OJ L 23, 26.1.2018, p. 4-466, Article 393; Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part; original text: OJ L 327, 28.11.1997, p. 3-69, Article 110.

⁷⁴ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.8.2014, pp. 4-743, Article 429(1).

Government of Georgia does not exercise effective control, shall commence once Georgia ensures the full implementation and enforcement of this Agreement, or of Title IV (Trade and Trade-related Matters) thereof, respectively, on its entire territory".⁷⁵ So far, however, such an extension has not been made. The EU's Association Agreement with Moldova provides in its Article 462 the same solution regarding its territorial scope, but since 1 January 2016 the DCFTA applies also to Transnistria.⁷⁶

The other difference between the two agreements is that in the Association Agreement with Georgia the parties limit their statements to a reiteration of the need for reconciliation,⁷⁷ while the Association Agreement with Moldova additionally emphasises reintegration.⁷⁸ Importantly, both agreements underline the "commitment to peaceful conflict resolution in full respect of the sovereignty and territorial integrity of Georgia [Moldova] within its internationally recognised borders", but the Georgian one additionally refers to non-recognition and engagement with the breakaway republics.⁷⁹

Paradoxically, on the level of implementation, it is rather Moldova that illustrates the mother state's more cooperative approach. For instance, Transnistrian companies already benefit from the EU pre-DCFTA preferential system,⁸⁰ its leadership was invited as an observer to the Association Agreement negotiations⁸¹ and the agreement was published also in Russian, which is not the official language in Moldova, but most spoken in Transnistria.⁸² Although a comparable level of engagement could be

⁷⁵ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, OJ L 261, 30.8.2014, pp. 4–743, Article 429(2).

⁷⁶ European Commission, *Answer given by Ms Malmström on behalf of the Commission to the European Parliament question E-001168/2016*, retrieved 03.04.2020, https://www.europarl.europa.eu/doceo/document/E-8-2016-001168-ASW_EN.html; EU, *Remarks by Johannes Hahn on behalf of the HR/VP at the EP Plenary*, retrieved 03.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_16_121.

⁷⁷ E.g. Association Agreement with Georgia, Article 9.

⁷⁸ Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, OJ L 260, 30.8.2014, pp. 4–738, Preamble.

⁷⁹ Association Agreement with Moldova, Article 8; Association Agreement with Georgia, Article 9.

⁸⁰ V. Baar & B. Baarová, "De facto states and their socio-economic structures in the post-Soviet space after the annexation of Crimea", *Studia z Geografii Politycznej i Historycznej*, vol. 6, 2017, pp. 278-279.

⁸¹ M. Dembińska & F. Mérand, *op. cit.*, p. 23.

⁸² European Commission, *EU-Moldova: relations developing at full speed*, Brussels, 2014, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_54.

expected from Georgia, the more inclusive approach dates from 2018 only when the Georgian government presented its 'A Step to a Better Future' initiative which mentions the possibility for Abkhazia to benefit from the DCFTA on the basis of a status-neutral registration of their entrepreneurs in Georgia.⁸³

The Association Agreement with Ukraine, containing a DCFTA as well, fully entered into force on 1 September 2017.⁸⁴ It does not refer to the ongoing conflicts in Ukraine.⁸⁵ The same remains valid for the Partnership and Cooperation Agreement of 1996 concluded between Brussels and Baku which applies to the territory of Azerbaijan without providing any exceptions.⁸⁶ While the agreement does not even mention the name of the separatist region, the only reference to its particular situation is made in the preamble which invokes "support of the independence, sovereignty and territorial integrity of the Republic of Azerbaijan".⁸⁷

It may thus be concluded that all the above-mentioned agreements follow one of the two patterns: either the territory of *de facto* state is excluded from the scope of application of the agreement, or the latter does not make any difference between governmentally controlled and separatist regions. An explanation for the parallel existence of those apparently incoherent approaches, apart from purely political considerations, may be sought in the timing of the negotiations and the entry into force of the respective agreements. In the case of Moldova and Georgia the time between the proclamation of independence by Transnistria, Abkhazia and South Ossetia and the negotiation of the agreement was much longer than in the case of Azerbaijan and Ukraine, rendering an adjustment of the territorial scope of application of the Association Agreements more justified.

⁸³ P. Gaprindashvili *et al.*, *One step closer – Georgia, EU-integration, and the settlement of the frozen conflicts?*, GRASS – Georgia's Reforms Associates Reformanda, Tbilisi, 2019, p. 17.

⁸⁴ EU, *EU relations with Ukraine*, retrieved 01.04.2020, <https://www.consilium.europa.eu/en/policies/eastern-partnership/ukraine>.

⁸⁵ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ L 161, 29.5.2014, p. 3–2137, Articles 9 and 483.

⁸⁶ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, OJ L 246, 17.9.1999, pp. 3–51, Article 101.

⁸⁷ Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and the Republic of Azerbaijan, of the other part, OJ L 246, 17.9.1999, preamble.

What the two solutions have in common, however, is that both create legal uncertainty. On the one hand, Moldova (in respect to non-trade-related issues) and Georgia risk that the non-implementation of the reforms and the EU standards in their separatist regions result in a further moving away of those *de facto* states, thus jeopardising the reintegration perspectives.⁸⁸ On the other hand, Azerbaijan and Ukraine (and Moldova with respect to trade-related issues), take the responsibility for the implementation of their contractual obligations in the areas that are actually beyond their effective control. Interestingly, the latter is also valid for the readmission agreements.

The readmission agreements between the EU and Georgia, Moldova, Azerbaijan and Ukraine apply to their respective territories with no exception regarding *de facto* states.⁸⁹ Importantly, each of them contains a provision binding the respective partner not only to readmit its own citizens, but also third-country nationals who illegally entered the EU from its territory.⁹⁰ Although there are currently no flights between the separatist territories and the EU, the situation may change. For instance, while the only airport in Nagorno-Karabakh does not have an International Air Transport Association (IATA) code to operate international flights, the Abkhazian airport managed to overcome this issue by using the already existing codes of Sukhumi airport from the Soviet era and intends to reopen.⁹¹ Also Transnistria plans to transform its operating military airport for passenger transport.⁹² Those developments shall thus be closely monitored. Although the risk may be mitigated by a refusal of the EU27 to establish connections with *de facto* states, a consensus of the member states can never be taken for granted. Moreover, such a potential 'boycott' could also be challenged

⁸⁸ D. Tolksdorf, "Russia, the USA and the EU and the conflicts in the wider Black Sea region: the potential for multilateral solutions in the wake of the Ukraine conflict", *Global Affairs*, vol. 1, no. 4-5, 2015, pp. 421-430.

⁸⁹ Agreement between the European Union and Georgia on the readmission of persons residing without authorisation, OJ L 52, 25.2.2011, pp. 47-65, Article 21; Agreement between the European Union and the Republic of Azerbaijan on the readmission of persons residing without authorisation, OJ L 128, 30.4.2014, pp. 17-42, Article 22; Agreement between the European Community and the Republic of Moldova on the readmission of persons residing without authorisation, OJ L 334, 19.12.2007, pp. 149-167, Article 21; Agreement between the European Community and Ukraine on the readmission of persons, OJ L 332, 18.12.2007, pp. 48-65, Article 18.

⁹⁰ E.g. Article 3(1)(b) Readmission Agreement with Moldova.

⁹¹ J. Kucera, "Abkhazia announces plans to reopen airport", *Eurasianet*, published online 30.07.2019, retrieved 10.04.2020, <https://eurasianet.org/abkhazia-announces-plans-to-reopen-airport>.

⁹² C. Vlas, "Tiraspol wants its airport to be reopened", *Moldova.org*, published online 28.12.2017, retrieved 10.04.2020, <https://www.moldova.org/en/tiraspol-wants-airport-reopened>.

from the perspective of the goal of increasing people-to-people relations promoted by the EU with respect to all areas of the Eastern Partnership.

The overview of the two types of agreements thus leaves the impression that the EU does not pay enough attention to the practical issues arising from the application or non-application of the contractual arrangements with the mother states to the *de facto* states. Neither does the EU encourage the mother states to act more proactively towards a conflict settlement by using conditionality. Yet, the EU addresses the issue of *de facto* states with a pragmatic policy.

Non-recognition and Engagement Policy: the EU's pragmatic approach

An opposition to the secession of the *de facto* states and their non-recognition does not mean that international actors, including the EU, do not maintain any contacts at all.⁹³ Although the degree of cooperation with particular separatist republics varies, none of them is completely isolated.⁹⁴ Brussels uses the NREP, implying an interaction with *de facto* states "in a way that does not formally acknowledge their existence as an independent state".⁹⁵ The concept was launched by the EUSR for the South Caucasus, Peter Semneby, who in 2009 prepared a non-paper designing "the vision of interaction with breakaway territories without compromising Georgia's territorial integrity within the post-2008 August war context".⁹⁶ This de-isolation and confidence-building activity is crucial to conflict settlement and a precondition for a durable peace,⁹⁷ helping to close the gap between the mother states pursuing EU-oriented reforms and the *de facto* states which have not implemented them in parallel.⁹⁸

It should be noted, however, that even if allowed, the engagement relies on the consent of the mother state; the latter may for instance insist on limiting the engagement to the elements necessary for the future reintegration, on being a proxy

⁹³ S. Relitz, *op. cit.*, p. 2.

⁹⁴ N. Caspersen, "Recognition, Status Quo or Reintegration: Engagement with *de facto* States", *Ethnopolitics*, vol. 17, no. 4, 2018, pp. 373-389, p. 376.

⁹⁵ E. Berg & K. Vits, "Quest for Survival and Recognition: Insights into the Foreign Policy Endeavours of the Post-Soviet *de facto* States", *Ethnopolitics*, vol. 17, no. 4, 2018, p. 393.

⁹⁶ J. Ker-Lindsay & E. Berg, "Introduction: A Conceptual Framework for Engagement with *de facto* States", *Ethnopolitics*, vol. 17, no. 4, 2018, p. 337.

⁹⁷ N. Caspersen, "Recognition...", *op. cit.*, p. 373; EEAS, *Statement by the spokesperson of HR Catherine Ashton on the adoption of the Georgian Action Plan for Engagement for Abkhazia and South Ossetia*, Brussels 08.07.2010.

⁹⁸ D. Tolksdorf, *op. cit.*

in contacts between the unrecognised entity and the third party, or on subjecting any action to its prior approval.⁹⁹ In this respect, the mother states vary significantly from a very cooperative Moldova to a more hesitant Georgia and an even more reluctant Azerbaijan.¹⁰⁰ For instance, on the basis of the 2008 Law on Occupied Territories, Tbilisi requires any actor willing to engage with Abkhazia or South Ossetia to obtain a prior written authorisation from the Georgian authorities (except for urgent humanitarian assistance which just needs to be notified to the government).¹⁰¹

Moreover, on the implementation level, an action may be subject to further demands from the mother states. This was, for instance, the case for the EU educational exchange programmes and scholarships for schools of Nagorno-Karabakh and South Ossetia, where Baku and Tbilisi asked for the introduction of an eligibility criterion consisting of the possession of an Azerbaijani or Georgian passport respectively.¹⁰² Although both could reasonably require their citizens to have suitable documents, this has jeopardised the initiative since most often inhabitants of *de facto* states had renounced those citizenships and, apart from the unrecognised one, they usually use passports of their patron states.¹⁰³ The approach of Tbilisi, however, tends to liberalise; in 2018 it adopted a set of laws 'A Step to a Better Future' sketching some perspectives for extending Georgia's EU integration benefits to the *de facto* states.¹⁰⁴

Importantly, for reasons of effectiveness rather than legal concerns, the EU's engagement shall also be accepted by the respective partners in the *de facto* state. Particular EU projects thus often provide for their 'consultation and consent'.¹⁰⁵ For instance, while any action in Transnistria shall be coordinated with the Moldovan

⁹⁹ N. Caspersen, "Recognition...", *op. cit.*, p. 381.

¹⁰⁰ U. Jakša, "EU Policy Options towards Post-Soviet *De Facto* States", *PISM Policy Paper*, no. 6 (159), 2017, p. 7.

¹⁰¹ Georgia, Law of Georgia on Occupied Territories, 23.10.2008, Article 6.

¹⁰² D. Ó Beacháin, G. Comai & A. Tsurtsunia-Zurabashvili, *op. cit.*, p. 444.

¹⁰³ P. Jolicoeur, "L'Union européenne et l'OTAN face à l'implication de la Russie dans les conflits gelés. Deux voies divergentes", *Études internationales*, vol. 40, no. 4, 2009, p. 551.

¹⁰⁴ European Commission, *Joint Staff Working Document: Association Implementation Report on Georgia*, Brussels, 2019, p. 5. https://eeas.europa.eu/sites/eeas/files/2019_association_implementation_report_georgia.pdf

¹⁰⁵ EU, *2007 Annual Action Programme for Georgia, Economic Rehabilitation Action Fiche*, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enpi_2007_c2007_5372_annual_action_programme_for_georgia_economic_rehabilitation.pdf, retrieved 16.04.2020, p. 22.

Ministry of Reintegration,¹⁰⁶ the EU shall then consult with the Transnistrian leadership, which is generally open for such a cooperation.¹⁰⁷ South Ossetia, in turn, has for years been refusing any form of international engagement.¹⁰⁸ Therefore, projects initially addressed to both Georgian *de facto* states are rather implemented in Abkhazia only.¹⁰⁹ The EU underlines, however, that it is “important to continue to search for all creative ways to continue to engage in South Ossetia”.¹¹⁰

Importantly, the EU thus does not passively wait for the acceptance of its policies underlining the necessity of ‘creative’ and ‘pragmatic’ engagement with *de facto* states.¹¹¹ In this context one could also ask whether the EU has the competence to engage without recognition? Needless to say, at no point the Treaties refer to this policy. Therefore, the competence depends on how the particular actions will be framed, e.g. as trade, development or humanitarian aid. The legal qualification concentrates therefore on the object and not the subject of EU action. Moreover, since the NREP is shaped on a case-by-case basis, the exact borderline between non-recognition and actions amounting to recognition remains undefined. Scholars agree, however, that the establishment of full diplomatic relations shall be avoided. This puts the EU on the safe side, since not being a state, it cannot formally establish diplomatic relations.¹¹²

There are no particular mechanisms nor procedures for the NREP. Nevertheless, the analysis thereof allows to draw some conclusions on patterns of Brussels’ engagement. First, the NREP has been shaped by the Commission and the High Representative and is managed mostly by the EU Delegations.¹¹³ Although it was suggested that the EUSR

¹⁰⁶ EU, *2007 Annual Action Programme for Moldova, Support to Civil Society in Transnistria Action Fiche*, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enpi_2007_c2007_6294_annual_action_programme_for_moldova_civilsocietytransnistria.pdf, retrieved 16.04.2020, p. 21.

¹⁰⁷ EU, *2007 Annual Action Programme for Moldova, Confidence-building Measures Action Fiche*, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enpi_2007_c2007_6294_annual_action_programme_for_moldova_confidencebuildingmeasures.pdf, retrieved 16.04.2020, p. 3.

¹⁰⁸ European Commission, *Evaluation of the European Union's co-operation with Georgia (2007-2013)*, vol. 1, 2015, p. 43.

¹⁰⁹ E. Berg & K. Vits, *op. cit.*, p. 400.

¹¹⁰ European Commission, *Evaluation ...*, p. xix.

¹¹¹ E.g. European Commission, *Joint statement following the meeting between the European Commission and the Government of Georgia*, Brussels, 21.05.2014.

¹¹² J. Ker-Lindsay, “Engagement without recognition: the limits of diplomatic interaction with contested states”, *International Affairs*, vol. 91, no. 2, 2015, p. 285.

¹¹³ E. Newman & G. Visoka, *op. cit.*, p. 28; V. Axyonova & A. Gawrich, *op. cit.*, p. 418.

for the South Caucasus could play a more prominent role, Brussels delegates the implementation tasks to local civil society organisations, while the EUSR or the EU Head of Delegation intervene only in the most complex situations.¹¹⁴

Second, as far as the *de facto* counterparts are concerned, the EU emphasises its engagement with local civil society organisations, therefore circumventing as much as possible the issue of dealing directly with *de facto* authorities.¹¹⁵ Should interaction with the latter prove necessary, it is preferably informal.¹¹⁶

Third, this engagement has no Treaty or (apart from the case of the Georgian *de facto* states) contractual basis. It is realised mostly via status-neutral projects, funded from various EU external assistance instruments.¹¹⁷ For example, the programmes implemented in Abkhazia encompass: assistance for the return of internally displaced persons (IDPs), small agricultural projects, social and economic strengthening of local communities, demining or improvement of infrastructure, healthcare and education.¹¹⁸

In addition to this, it is also worth mentioning how the EU defines the territorial scope of those grants and other projects. Apart from programmes explicitly excluding the territories of *de facto* states, e.g. the Eastern Partnership framework Integrated Border Management Flagship Initiative,¹¹⁹ different patterns can be identified:

- 1) addressing the programme to the territory of the mother state and limiting its immediate application to the territories under its effective control, with a possible subsequent extension to *de facto* states, e.g. SAFE programme;¹²⁰

¹¹⁴ T. Frear, "The foreign policy options of a small unrecognised state: the case of Abkhazia", *Caucasus Survey*, vol. 1, no. 2, 2014, p. 91; European Union, *Evaluation ... op. cit.*, p. 45.

¹¹⁵ G. Kyris, "The European Union in Northern Cyprus: Conceptualising the Avoidance of Contested States", *Geopolitics*, vol. 25, no. 2, 2018, p. 356.

¹¹⁶ *Ibid.*, p. 9.

¹¹⁷ European Commission, *Evaluation ... op. cit.*, p. 45.

¹¹⁸ EU, *2011 Annual Action Programme for Georgia, Support to Conflict Settlement Action Fiche*, *op. cit.*, pp. 3-4; EU, *2007 Annual Action Programme for Georgia, Economic Rehabilitation Action Fiche*, *op. cit.*, p. 19; P. Gaprindashvili *et al.*, *op. cit.*, pp. 9-10.

¹¹⁹ European Commission, Annex 2 of the Commission Implementing Decision on the ENI East Regional Action Programme 2018, retrieved 04.04.2020, p. 1, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/c_2018_3253_f1_annex_en_v2_p1_971039.pdf.

¹²⁰ EU4 Safety, Accountability and Fight against Crime in Georgia; European Commission, Annex 1 of the Commission Implementing Decision on the Annual Action Programme 2018 in favour of Georgia, retrieved 04.04.2020, p. 4, <https://ec.europa.eu/neighbourhood->

- 2) addressing the programme to the entire territory of the mother state from the outset. In this group, several (mutually non-exclusive) patterns can be identified:
 - a) Moldova's 'joint programmes' to enhance cooperation between the mother- and *de facto* state, e.g. EU Support to Confidence Building Measures;¹²¹
 - b) programmes with special mention of an inclusion of the area of *de facto* state, e.g. the Civil Society Facility for Moldova;¹²²
 - c) programmes mentioning actions for the benefit of *de facto* state as separate objectives, e.g. the ENPI Annual Action Programme 2007 for Moldova;¹²³
 - d) programmes with particular adjustments regarding the *de facto* state, e.g. refraining from public procurement procedure or granting a separate budget for the region, Skills Development and Matching for Labour Market Needs of 2017, where an amount of 3 750 000 euro is allocated "for specific actions in Georgia's breakaway region of Abkhazia"¹²⁴, or ENPARD III with a special grant "Expansion of rural development measures in Abkhazia";¹²⁵

enlargement/sites/near/files/eni_2018_041443_eu4security_accountability_and_fight_against_crime.pdf.

¹²¹ European Commission, Commission Implementing Decision of 5.8.2013 on the Annual Action Programme 2013 in favour of the Republic of Moldova to be financed from the general budget of the European Union, Brussels, 2013, p. 18; EU, Annex 2 of the Commission Implementing Decision on the Annual Action Programme 2018 in favour of the Republic of Moldova, retrieved 04.04.2020, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/annex_2_clean_cbm_md_final.pdf; European Commission, Annex 2 of the Commission Implementing Decision on the Annual Action Programme 2018 in favour of the Republic of Moldova, Action Fiche for Confidence Building Measures, retrieved 04.04.2020, p. 1, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enpi_2013_c2013_5199_annual_action_programme_for_moldova_confidence_building_measures.pdf.

¹²² European Commission, Annex 3 of the Commission Implementing Decision on the Annual Action Programme 2015 in favour of the Republic of Moldova Action Document for the Civil Society Facility (Moldova), retrieved 04.04.2020, p. 1, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eni_2015_c2015_7150_annual_action_programme_for_moldova_civilsociety.pdf.

¹²³ European Neighbourhood and Partnership Instrument. European Commission, Commission Decision on the ENPI Annual Action Programme 2007 in favour of the Republic of Moldova, retrieved 04.04.2020, p. 2, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/enpi_2007_c2007_6294_annual_action_programme_for_moldova.pdf.

¹²⁴ European Commission, *Annex 2 to Commission Implementing Decision on the Annual Action Programme 2017 for the Republic of Georgia to be financed from the general budget of the European Union*, retrieved 04.04.2020, p. 1, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/eni_2017_040319_skills_development_and_matching_labour_market_needs.pdf.

¹²⁵ European Neighbourhood Programme for Agriculture and Rural Development. European Commission, *Annex 1 of the Commission Implementing Decision on the Annual Action Programme 2016 in favour of Georgia*, retrieved 04.04.2020, pp. 14, 19-20, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/c_2016_7556_annex1_enpard_iii.pdf.

- 3) addressing the programme to selected regions within the mother state's territory, including *de facto* states, particularly often applied in Abkhazia, e.g. a lifelong learning skills entrepreneurial learning and entrepreneurship programme started in 2019;¹²⁶
- 4) conflict-related humanitarian assistance programmes, which through their "impartiality, neutrality and non-discrimination" (Article 214(2) TEU) constitute a particularly interesting illustration of the NREP as they may be addressed directly to the populations of *de facto* states, e.g. the 1998 rehabilitation projects in Abkhazia and South Ossetia;¹²⁷ or a 2006 programme for elderly and destitute Abkhazians.¹²⁸ They are also rare examples of the EU's engagement in Nagorno-Karabakh and Donbas.¹²⁹

Last but not least, apart from the contribution to long-term peaceful conflict resolution, the NREP is designed to limit the *de facto* states' dependency on their patrons,¹³⁰ namely "to reduce Russia's strategic leverage over these regions and have a stake in the de-escalation of tensions springing from international isolation".¹³¹ For historical and geopolitical reasons, the EU's involvement in the respective peace processes varies from case to case.¹³² "The EU rather than seeking to join these mostly discredited

¹²⁶ European Commission, Press release "High-level meeting continues to bring Georgia and the European Union closer together", published online 21.11.2018, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_18_6493.

¹²⁷ European Commission, Speech of the Member of the European Commission "The European Union and Georgia: Promoting regional Co-operation in the South Caucasus", Tbilisi, 1998.

¹²⁸ European Commission, Press release "Commission adopts five new humanitarian aid decisions worth more than EUR 5.6 million", published online 20.12.2002, retrieved 05.04.2020 https://ec.europa.eu/commission/presscorner/detail/en/IP_02_1942; European Commission DG ECHO, *Humanitarian Aid Decision 23 02 01*, Brussels, 2006; European Commission, Press release "Humanitarian aid: Commission allocates €2 million for the most vulnerable people in Abkhazia, Georgia", published online 05.12.2007, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_07_1861.

¹²⁹ European Commission, Press release "ECU 3 Million in Humanitarian aid for Displaced People in Azerbaijan", published 30.09.1993, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_93_825; European Commission, Press release "Humanitarian aid for Displaced People in Azerbaijan", published 17.12.1993, retrieved 05.04.2020 https://ec.europa.eu/commission/presscorner/detail/en/IP_93_1166; European Commission, Press release "Humanitarian aid for People in Armenia", published 20.12.1994, retrieved 05.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/IP_94_1247.

¹³⁰ EU, *Facts and Figures about EU-Georgia Relations*, retrieved 04.04.2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_11_535, p. 2; A. Cooley & L. A. Mitchell, "Engagement without Recognition: A New Strategy toward Abkhazia and Eurasia's Unrecognized States", *The Washington Quarterly*, vol. 33, no 4, 2010, p. 71.

¹³¹ E. Newman & G. Visoka, *op. cit.*, p. 21.

¹³² The EU co-chairs GID regarding Abkhazia and South Ossetia along with the OSCE and the UN and has an observer status in 5+2 Transnistria negotiations. While in the OSCE Minsk Group dealing with the Nagorno-Karabakh conflict it remains absent, its presence is ensured by one

and deadlocked formats, has been building new frameworks of cooperation in which it could bring an added value to the conflict resolution process".¹³³ For instance, while the EU Border Assistance Mission (EUBAM) civilian mission was not designed to have contact with the separatist republic and has no access to Transnistria, it has gradually assumed the tasks of contacting its leadership within the framework of sectoral cooperation, workshops organised for both Moldovan and *de facto* authorities and some consultations with the private sector via the Transnistrian Chamber of Commerce and Industry.¹³⁴ The EU Monitoring Mission (EUMM)¹³⁵ to Georgia, apart from this monitoring task, has helped to run the Incident Prevention and Response Mechanism (IPRM) and a Hotline between the conflicting parties.¹³⁶ While the latter was designed as a subsidiary mechanism enabling parties to have contact on a daily basis, it has replaced the suspended IPRM.¹³⁷ Moreover, the EUMM has recently started minor CBM projects.¹³⁸

This suggests that the EU is generally open to allow its missions to cooperate with the respective *de facto* states even though such an engagement is not always explicitly mentioned in the documents constituting the legal basis for its actions. Moreover, Brussels proves flexible in adapting to the conditions on the ground and local needs; when one of its instruments proves ineffective, its role is taken over by another one. For instance, some tasks of the EUSR to South Ossetia were taken over by the EUMM Hotline.¹³⁹

of the co-chairs: France – the only Member State directly involved in this peace process. The case of Donbas represent comparable characteristics – the informal Normandy Format includes France, Germany, Ukraine and Russia without explicitly allowing Brussels join the negotiation table.

¹³³ N. Popescu, "The EU and Transnistria", *UNISCI Discussion Papers*, no. 10, 2006, p. 5.

¹³⁴ V. Axyonova & A. Gawrich, *op. cit.*, p. 417.

¹³⁵ The EU CSDP civilian mission to Georgia deployed in 2008 to reduce tensions and potential of conflict escalation by patrolling areas adjacent the so-called Administrative Boundary Lines (ABL) between Abkhazia and South Ossetia and the areas controlled by Georgian authorities (EU, *Facts and Figures about EU-Georgia Relations*, p. 2.)

¹³⁶ EEAS, *Trust building measures by the EU Monitoring Mission Georgia: a success story*, published online 07.10.2019, retrieved 06.04.2020, https://eeas.europa.eu/headquarters/headquarters-homepage/68448/trust-building-measures-eu-monitoring-mission-georgia-success-story_en.

¹³⁷ P. Gaprindashvili *et al.*, *op. cit.*, p. 9; EEAS, *Trust building measures...*

¹³⁸ S. Relitz, *op. cit.*, p. 15.

¹³⁹ I. Merheim-Eyre, "Exploring the European Union's rationalities of governing: the case of cross-border mobility in the eastern partnership", *East European Politics*, vol. 33, no. 3, 2017, p. 382; Axyonova & A. Gawrich, *op. cit.*, pp. 418-419.

Conclusions: the EU's legal pragmatism

This paper examined how the EU engages with *de facto* states. The Union's interaction with those 'unrecognised states' is shaped by both international and EU law. While the international law seems to limit its engagement (e.g. by the obligation to respect the territorial integrity and sovereignty of the mother states or the lack of competence of the EU to grant recognition or establish diplomatic relations), the Union has established pragmatic ways to interact with the *de facto* states via shaping the recognition practices of its member states, the activity of its Delegations and Special Representatives and the NREP, highlighting its adherence to the principles of international law in its political statements, jurisprudence and agreements.

Within this arguably tight margins, the EU nevertheless manages to interact with the *de facto* states in a way that does not violate international law. The analysis of its statements, jurisprudence, agreements and practice allows to draw some conclusions as to the content of the normative framework guiding the EU's relations with those unrecognised republics. First, although the EU itself is not a state and therefore not entitled to grant recognition, it often exercises non-recognition allowed by international law. In the absence of a consensus on recognition between its members states, the EU can only try to convince them to follow its political decisions.

Second, as non-state actors, neither the EU nor the *de facto* states can establish diplomatic relations with each other. However, the mandates of the EU Delegations and Special Representatives allow for contact with the authorities of the separatist republics when appropriate. The latter are therefore qualified as 'relevant actors', but by no means is their legal status equated with the one enjoyed by their respective mother states.

Third, the Union underlines its adherence to the principles of international law (such as the peaceful settlement of international disputes, respect for sovereignty and territorial integrity) by issuing statements and declarations referring to *de facto* states and highlighting its support for the rules established in the peace processes regarding particular conflicts. While it supports non-recognition, it also advocates for non-isolation.

Fourth, this alignment to international standards can also be seen in the jurisprudence of the CJEU which underlines that the agreements concluded between the EU and patron states do not cover the separatist territories. The latter are within the scope of the agreements with mother states and any suspension of their application due to a lack of effective control over the self-proclaimed republics shall be narrowed down as much as possible, in order not to jeopardise a future reintegration.

Fifth, Brussels pursues a Non-recognition and Engagement Policy that aims at closing the gaps between the mother states aligning to EU standards and their respective separatist regions, as well as at building confidence between the two. This is implemented mostly via status-neutral projects and by the intermediary of non-governmental actors on both sides, paying due consideration to the consent of the mother states and the subsequent acceptance of the *de facto* states.

In sum, it can be concluded that the EU, while acting in line with international norms and standards, managed to fill this imprecise framework with content in many respects much broader than it could be expected. Moreover, the status of non-state actors on the international level places the Union on a safe side – despite interacting with the self-proclaimed republics, it cannot be accused of an implicit recognition since under international law it is not capable to do so. Nevertheless, one shall not forget that despite the EU's effective use of the legal instruments, the actual level of engagement depends also on the particularities of the political situation of the *de facto* states. Therefore, the interactions of the EU with Transnistria are much more intense than with South Ossetia, Nagorno-Karabakh or Donbas, while Abkhazia may be situated in between these two groups.

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