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FLICTS IONAL LAW

Frozen Conflicts in International Law

Challenging Legal Categories in the Post-Soviet Space

Livia Enzler

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sui generis, Zurich 2025

Dedicated to my dearest parents, my siblings, and always to William.

Who can say, around the dawn, exactly where night ends and day begins?

Brian Orend,
Jus Post Bellum: The Perspective of a Just-War Theorist

Acknowledgements

First and foremost, I would like to express my profound gratitude to my supervisor, Professor Oliver Diggelmann, for his invaluable guidance, inspiring discussions, and unwavering support throughout this journey. His mentorship extended beyond the dissertation itself, shaping my academic and professional growth also during my time as his research assistant at the Chair for International Law at the University of Zurich. I am also very thankful to Professor Urs Saxer for his willingness to support me as a second supervisor.

I would like to thank those who particularly supported me in the context of my research stays abroad: Professor Matthias Oesch, Professor Christoph Beat Graber, Professor Andreas Kley, Professor Lauri Mälksoo, Professor Allen Weiner, Professor Surabhi Ranganathan, and Professor Sandesh Sivakumaran. Thanks to them I was able to complete research stays at Stanford University and at the Lauterpacht Centre for International Law of the University of Cambridge. These experiences were not only crucial for the development of this thesis, but also deeply enriching on a personal level. I am grateful also for the generous research funding that I received from the University of Zurich (UZH Candoc Grant no. FK-23-010) and the financial support from the Swiss National Science Foundation (Grant no. 10BP-2_238910/1) for the open access book publication. A heartfelt thank you goes to Daniel Rüfli for his generous and attentive proofreading. I deeply appreciated his support and, moreover, our engaging discussions when working together at the Chair of International Law. I sincerely thank all friends and colleagues who have accompanied me since my first semester of studies or have later enriched my educational path through their companionship at the University. A very special thank you goes to my dear friend Anna Laura Elmer. Her constant support, thoughtful feedback, and tireless encouragement were indispensable. The regular exchange with her truly made the completion of this dissertation possible. Her precise and constructive comments at the final stage were especially invaluable. In her, I found not only a trusted colleague on this academic journey, but also a true friend.

I am deeply grateful to my parents for their unconditional support. The opportunities they have given me made it possible to enjoy such a rich and fulfilling education. Finally, I owe my heartfelt thanks to my fiancé, William. His presence, daily support, and openness to engaging with my work gave me strength and motivation throughout this entire process.

This dissertation was accepted by the Faculty of Law, University of Zurich, in April 2025. Literature and developments were taken into account until September 2024.

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List of Abbreviations

App	Application
Art	Article
ASIL	American Society of International Law
BBC	British Broadcasting Corporation
CARIM	Consortium for Applied Research on International Migration
CBMs	confidence-building measures
CIS	Commonwealth of Independent States
CSCE	Conference on Security and Cooperation in Europe (today OSCE)
CSS ETH	Centre for Security Studies, Eidgenössische Technische Hochschule Zürich
CTS	Consolidated Treaty Series
DCFTA	Deep and Comprehensive Free Trade Area
Doc	Document
Ed	Editor
Edn	Edition
Eds	Editors
EJIL	European Journal of International Law
EU	European Union
EUCO	European Council
EUMM	European Union Monitoring Mission
FARC	Revolutionary Armed Forces of Colombia
FDP	Freie Demokratische Partei
GDP	Gross Domestic Product
Ibid	Ibidem – in the same place
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDMC	Internal Displacement Monitoring Centre
IFSH	Institut für Friedensforschung und Sicherheitspolitik, University of Hamburg
IHL	International Humanitarian Law
IIFFMCG	Independent International Fact-Finding Mission on the Conflict in Georgia
ILA	International Law Association

ILC	International Law Commission
INCORE	International Conflict Research Institute
IOS	The Institute of East and Southeast European Studies
IRMCT	International Residual Mechanism for Criminal Tribunals
LNTS	League of Nations Treaty Series
MASSR	Moldovan Autonomous Soviet Socialist Republic
NATO	North Atlantic Treaty Organization
NGO	Nongovernmental organization
NKAO	Nagorno-Karabakh Autonomous Oblast
NPR	National Public Radio
NZZ	Neue Zürcher Zeitung
OIC	Organization of Islamic Cooperation
OSCE	Organization for Security and Cooperation in Europe
PACE	Parliamentary Assembly of the Council of Europe
Para	Paragraph
Paras	Paragraphs
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PKK	Kurdistan Workers' Party
PRCP	Peace Research Centre Prague
Res	Resolution
RULAC	Rule of Law in Armed Conflict
R2P	Responsibility to protect
SCR	Supreme Court Reports
SFSR	Soviet Federative Socialist Republic
SPD	Social Democratic Party of Germany
SSR	Soviet Socialist Republic
TAZ	Die Tageszeitung
TRNC	Turkish Republic of Northern Cyprus
UN	United Nations
UNGA	United Nations General Assembly
UNOMIG	United Nations Observer Mission in Georgia
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USSR	Union of Soviet Socialist Republics
Vol	Volume

Introduction

I. Introducing Frozen Conflicts

Frozen conflicts are typically understood as existing in a liminal state between war and peace. They are less violent than full-scale wars, but they involve unresolved issues and an underlying threat that together distinguish them from true peace: a no-war-no-peace situation. This phenomenon has probably been present since the advent of warfare. However, in recent decades, such conflicts have subtly but persistently challenged peace and stability in certain regions of the world. Accordingly, it is in recent decades that the term 'frozen conflict' has emerged and widely been used. For instance, the term has been used by *The Economist*, former US president Obama, in the coalition agreement of the German government, by the Parliamentary Assembly of the Council of Europe (PACE), OSCE officials, and UN Secretary Generals Annan and Guterres.[1]

Often, the term 'frozen conflict' is applied to disputes in the post-Soviet space: to the break-away regions of South Ossetia and Abkhazia in Georgia, Transnistria in Moldova, and Nagorno-Karabakh in Azerbaijan. These conflicts have been labelled frozen due to their relative stability over the last three decades compared to the full-scale wars these regions endured at the beginning of the 1990s. However, since this research project began in 2021, these frozen conflicts have experienced unexpected and drastic changes. The de facto state of Nagorno-Karabakh was conquered by Azerbaijan in 2023 and has officially ceased to exist, and the situations in South Ossetia, Abkhazia, and Transnistria are more uncertain than ever due to the war started by the Russian Federation (henceforth Russia) against Ukraine in 2022. The situation in Ukraine has also been labelled a frozen conflict since the 2010s, referring mainly to the region of Donbas and sometimes to Crimea. Since Russia's full-scale invasion in February 2022, however, the term 'frozen conflict' has mainly been used to describe

1 'The Hazards of a Long, Hard Freeze' [2004] *The Economist*; 'Background Press Briefing by Senior Administration Officials on Vice President Biden's Meetings with Foreign Leaders' (*The American Presidency Project*, 24 February 2014); 'Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit. Koalitionsvertrag 2021-2025 zwischen SPD, Bündnis 90/Die Grünen und FDP' 154; PACE, 'Ensuring a Just Peace in Ukraine and Lasting Security in Europe, Res 2516 (12 October 2023)' n 5; UNSC, 'Verbatim Records (29 February 2016) UN Doc S/PV.7635' 3; UNSC, 'Report of the Secretary-General on the Situation in Abkhazia, Georgia (28 September 2006) UN Doc S/2006/771' n 37; UNSC, 'Report of the Secretary-General on the Situation in Abyei (16 April 2019) UN Doc S/2019/319' n 63.

possible future scenarios.[2] The President of Ukraine, Zelenskyy, has repeatedly stated that he does not want Ukraine to enter another frozen conflict with Russia.[3]

The last years have demonstrated better than ever that a frozen conflict is not a permanent state but a highly dynamic one. These years have also shown that the topic merits particular and careful attention. Yet, in contrast to the term's wide use, conceptual approaches to frozen conflicts have been selective. And here lies the problem. The label seems to easily describe situations somewhere between war and peace, but when these are examined more closely, systematically characterizing the nature of these conflicts remains challenging. Many questions arise, for instance whether this term is a purely decorative metaphor or an academic term of art and whether this is a post-Soviet phenomenon or unlimited in time and space. Few academics have attempted to systematically conceptualize frozen conflicts, especially in international law. The present thesis aims to account for this disjuncture by retaining awareness of the material reality of frozen conflicts.

II. Problematization and Research Question

International law has shown little interest in the topic of frozen conflicts. Although the term has been applied by state officials, parliaments, international and regional organizations, and international legal writers and is somewhere 'at the edges of legal discourse',[4] conceptual approaches to frozen conflicts as a legal issue have been rare. When lawyers debate on situations labelled frozen conflicts, they typically focus on one specific legal aspect, such as the right to self-determination in the post-Soviet space,[5] the legality of extraterritorial mass naturalization in Russia's 'passportization' policy,[6] the acceptance of the *uti possidetis juris* principle by Russia in the post-Soviet

2 Frank Langfitt, 'Russia's War in Ukraine Could Become a "Frozen Conflict," Analysts Say' (*NPR-National Public Radio*, 10 May 2022); Daniel Sleat, Jacob Delorme and Jess Lythgow, 'Ukraine: Six Months on, No End in Sight' (*Tony Blair Institute for Global Change*, 24 August 2022).

3 E.g. in Zelenskyy's speech in August 2022, see 'After This Russian War against Ukraine, Neither Smoldering nor Frozen Conflict Should Remain — Address by President Volodymyr Zelenskyy' (*Official website of the President of Ukraine*).

4 Thomas D Grant, 'Frozen Conflicts and International Law' (2017) 50 Cornell International Law Journal 361, 413.

5 Johannes Socher, *Russia and the Right to Self-Determination in the Post-Soviet Space* (Oxford University Press 2021).

6 Anne Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction' (2010) 53 German Yearbook of International Law 623.

space,[7] the classification of specific conflicts as international or non-international armed conflicts,[8] remedying human rights violations that occur in the regions affected by frozen conflicts,[9] and financial investments in frozen conflict zones.[10] However, they do not deal with the overall phenomenon as a distinct legal research issue or examine the characteristics that constitute the frozen state of these conflicts. This neglect might be because 'frozen conflict' is not a precise legal term of art. The concept remains elusive and most likely has no direct legal implications. Accordingly, the term has not yet been employed in international treaties nor by international tribunals. Lawyers may therefore infer that it is merely a political phenomenon with no relevance to legal analysis. We think this conclusion falls short.

Indeed, the phenomenon of frozen conflicts is complex and challenges the binary logic of law, by which cases are either included in or excluded from a category entailing particular legal consequences. Frozen conflict is a concept that implies ambiguities. It blurs the boundaries of war and peace, international and non-international armed conflicts, *ius ad bellum* and *ius in bello*, states and nonstates, and law and politics. But the fact that it does not fit neatly into any of these categories does not diminish its relevance to legal thought. In fact, several other phenomena and material realities that initially did not fit into legal categorizations have eventually been included in legal discourse, for instance 'de facto state', 'asymmetric warfare', and 'responsibility to protect' (R2P). All of these concepts could be considered political because they do not neatly fit existing and undisputed legal categories. Yet, according to Koskenniemi, it is not the nature of the object in question that determines whether it is a political or legal issue, but the conceptual perspective from which we observe it.[11] Thus, should we ask whether frozen conflicts are invisible or whether international law is blind?

Instead of rigidly excluding frozen conflicts from legal thinking due to their ambiguity, a more interesting approach is to more closely examine the

7 Lauri Mälksoo, 'Post-Soviet Eurasia, Uti Possidetis and the Clash between Universal and Russian-Led Regional Understandings of International Law' (2021) 53 New York University Journal of International Law and Politics 787.

8 Philip Leach, 'South Ossetia (2008)' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012).

9 Nasia Hadjigeorgiou, 'Remedying Displacement in Frozen Conflicts: Lessons from the Case of Cyprus' (2016) 18 Cambridge Yearbook of European Legal Studies 152.

10 Tobias Ackermann and Sebastian Wuschka (eds), *Investments in Conflict Zones: The Role of International Investment Law in Armed Conflicts, Disputed Territories, and 'Frozen' Conflicts* (Brill Nijhoff 2021).

11 Martti Koskenniemi, 'Speaking the Language of International Law and Politics: Or, of Ducks, Rabbits, and Then Some' in Jeff Handmaker and Karin Arts (eds), *Mobilising International Law for 'Global Justice'* (Cambridge University Press 2018) 26.

relationship between international law and frozen conflicts and to reflect on the discipline's limitations when dealing with ambiguous phenomena. The research question of this thesis is therefore as follows: what relationship does international law have with frozen conflicts? Addressing this question allows a holistic approach that encompasses various levels of the complex relationship between the discipline and the concept of frozen conflicts. This approach obviates the need for a legal definition of 'frozen conflicts' or its promotion as a legal term of art. The levels of the relationship include, firstly, the term 'frozen conflict'; secondly, the actual situations that are referred to as frozen conflicts; and, finally, the conceptual and structural localization of the frozen conflict concept within the legal landscape.

The project presents several novel findings. First, it provides empirical findings on the use of the term 'frozen conflict', which has not previously been explored either by legal scholars or scholars from other disciplines. Second, it gains new insights into the conflicts in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh: the conflicts are examined holistically in a quest to identify legal circumstances that mark their deadlocked nature. An attempt to translate their frozenness into legal terms has not yet been pursued. The emphasis on the combination of legal characteristics with the specific historical context in which they emerged is another novel aspect. To remain with the metaphor, the thesis shows that a particular political climate is needed to freeze a conflict. Third, no work has yet examined more broadly the relationship between international law and frozen conflicts. Normally research projects on the topic of frozen conflicts wind up considering them not, or not primarily, a legal issue without further exploring the alleged mismatch between international law and frozen conflicts. The present thesis addresses this unexplored area. It takes frozen conflicts as an opportunity to observe how the inherently dichotomous logic of international law mechanisms limits their capacity to tackle ambiguities. Although research has examined the problems of rigid dichotomies in international law, no such observations have been made regarding the concept of frozen conflicts. The findings presented here show that the ambiguity of the concept merits particular attention from international law and contributes overall to greater legal sensibility to frozen conflicts and to the scrutiny of legal dichotomies.

III. Plan of the Book and Method

Examining the relationship of international law and frozen conflicts requires looking at several levels. Correspondingly, this book is divided into four parts. Each part includes distinct methodological elements. Following this introduction, Part I investigates the term 'frozen conflict'. Key questions include when the term emerged, who uses it, and which cases are most frequently referred to as frozen conflicts. Furthermore, it presents attempts to conceptualize and define the term in international law and other disciplines. Finally, it introduces other legal concepts that are connected to frozen conflicts. The core of this part consists of an empirical analysis of the term's usage. The method applied is thus primarily an empirical study of when the term 'frozen conflict' emerged. Moreover, the empirical study identifies the users of the term and the cases most frequently labelled frozen conflicts. These are South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh, which justifies the selection of these four cases for the subsequent case study and highlights the significance of their post-Soviet context.

Parts II and III present a case study that examines the conflicts in these four regions. Part II provides an overview that discusses the regions' history and recent developments. In Part III, an analysis of the cases follows that examines their common legal characteristics. The question in Part III concerns what the legal characteristics of frozenness are. The aim is to approach the conflicts through the term 'frozen' and to uncover the underlying legal dilemmas that contribute to their state being perceived as frozen. Some points need to be noted about the methodological approach of the case study that are relevant to the entire thesis. First, the situation in Nagorno-Karabakh changed drastically in 2023. References to the situation in Nagorno-Karabakh throughout the book refer to the period before 2023 unless otherwise noted. Second, the purpose of presenting the legal characteristics of frozen conflicts is to enable consideration of the phenomenon as a legal concept in a broader sense, similar to a legal idea or legal topic. The aim is not to formulate a legal definition of the concept of frozen conflict with clear boundaries. No set of legal characteristics will be outlined for defining a frozen conflict. In cognitive science, this approach is called the classic concept structure, in which 'inclusion into this concept is a dichotomous matter of being either in or out'.[12] Consequently, if one characteristic from this set is missing, the situation falls short

12 Christofer Berglund and Emil Aslan Souleimanov, 'What Is (Not) Asymmetric Conflict? From Conceptual Stretching to Conceptual Structuring' (2020) 13 Dynamics of Asymmetric Conflict 87, 89; See also Gary Goerz, *Social Science Concepts: A User's Guide* (Princeton University Press 2006) 6.

of the definitional requirements. Thinking of frozen conflicts as a dichotomous concept misses the essence of the phenomenon, which inherently blurs conceptual boundaries, particularly those in the realm of law. Therefore, this thesis follows the approach that cognitive science calls the 'family resemblance concept'.[13] Following this logic, no characteristic might be shared by all category members, but certain similarities connect them to one another: 'if one trait is missing, then the presence of some other substitutable attribute is enough for the situation to meet the definitional requirements.'[14] Qualifying a situation as a frozen conflict can thus be a question of continuous degree rather than rigid dichotomy. Accordingly, situations can also be 'better' or 'worse' members of the frozen conflicts category. Following this methodological approach is legitimate[15] because 'frozen conflict' is a descriptive legal concept, as opposed to a legal concept in the narrow sense of a legal term of art that entails concrete legal consequences.

Part IV situates the frozen conflict concept within the legal landscape. Special attention is paid to dichotomies in international law that are blurred by frozen conflicts. The concept can be placed somewhere between the dichotomies of war and peace and of law and politics. Analogies with other ambiguous concepts that are situated between dichotomies in international law will support this analysis. Finally, the strengths and weaknesses of frozen conflicts as a legal concept will be discussed. The approach in this part is primarily a comparative analysis of various legal concepts. The book concludes with a summary and outlook.

13 David Collier and James E Mahon, 'Conceptual "Stretching" Revisited: Adapting Categories in Comparative Analysis' (1993) 87 American Political Science Review 845; Eleanor Rosch, 'Cognitive Reference Points' (1975) 7 Cognitive Psychology 532, 544.

14 Collier and Mahon (n 13) 89.

15 Mark L Johnson, 'Mind, Metaphor, Law' (2007) 58 Mercer Law Review 845, 845 explaining how cognitive science can offer insights on legal concepts and legal reasoning.

Part I: Investigation of the Term

The initial focus of the research is to explore the term 'frozen conflicts' and to address several fundamental questions. The subsequent analysis requires understanding of the origin, use, and implications of the term. In particular, it is crucial to determine which situations are referred to as frozen conflicts. Moreover, this section examines conceptualizations and definitions that have been suggested by international lawyers and other scholars. Discussing tentative conceptualizations of frozen conflicts involves considering other legal concepts and examining their distinctions and overlaps with frozen conflicts. The aim is to present a comprehensive profile of the term 'frozen conflicts' that can provide a basis for further analysis.

I. Background of the Term

A. Origin

Defining the origins of specific terms and concepts can be both simple and complex. It can be simple when a term emerged following a specific and salient event, such as the 'war on terror', a phrase that can easily be attributed to US policy following the attacks of 9/11 in 2001. Conversely, it can be complex when a concept is not clearly attributable to a single event, when it remains fuzzy, and/or when it has not yet been fully conventionalized. Some think a phenomenon can certainly exist *avant la lettre*, whereas others assume that concepts always 'set free new realities'.[16] According to Skinner, changes in vocabulary correlate with changes in social perceptions and awareness.[17]

Identifying the first use and originator of the term 'frozen conflicts' is far from straightforward. Authors thus disagree on this question. Grant examined the etymology of 'frozen conflicts' and found 'one of the first' occurrences in

16 Reinhard Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford University Press 2002) 36.

17 Quentin Skinner, 'Language and Social Change' in James Tully (ed), *Meaning and Context: Quentin Skinner and His Critics* (Princeton University Press 1988).

1911 in the journal *The Academy and Literature*.[18] An article titled 'Hero as a Baby' pictures well-known individuals when they were little. One scene reads as follows: 'Napoleon weeping bitterly because he was compelled to go early to bed and to leave his leaden soldiers in a frozen conflict on the table'.[19] As the author does not further elaborate the scene, it is unclear whether this use of the term has a deeper meaning. The author trivially refers to toy soldiers that remain frozen, meaning in the exact same position, until the next day when little Napoleon will continue playing. The first use of the term to refer to a real conflict, rather than to leaden soldiers, according to Abline, occurred in 1998 in a OSCE report describing the situations in the Republic of Moldova (henceforth Moldova) and in Georgia.[20] In contrast, Grant points to the *Yearbook of Polish Foreign Policy* and suggests that the personal representative of the OSCE Chairman-in-Office called the conflict in Transnistria 'frozen' in 1994.[21]

However, leaving aside the fictional one of 1911 of Napoleon as a child, we found earlier examples of the term. In 1974, the North Yemenite conflict was described as 'remaining frozen'.[22] This conflict had begun in 1962 when the Republicans, led by the army, launched a coup d'état against the former dictator Muhammad al-Badr, leading to a civil war. By the late 1960s, the war had sunk into a stalemate with no clear end. The article published in 1974 explained that the conditions that had led to the conflict still existed and might lead to a new confrontation, especially because it was embedded in broader politics.[23] Furthermore, at the UNGA meeting on Antarctica in 1985, the Chilean representative emphasized the

> success of the Antarctic Treaty system — which has frozen conflicts over sovereignty, fostered uninterrupted cooperation between rival countries, and created the first zone of disarmament and peace, the first ecological preserve and the first scientific laboratory territory.[24]

18 Grant (n 4) 363.

19 Wilfried L Randell, 'Hero as a Baby' (1911) 2022 The Academy and Literature 142, 142.

20 Gaël Abline, 'La doctrine de l'étranger proche et les conflits gelés' (2013) 46 Revue Belge de Droit International 585, 587 note 5, citing the Permanent Council of the OSCE, CIO.GAL/75/98 of 2 November 1998.

21 Grant (n 4) 367, citing the Polish Institute of International Affairs, 76 Yearbook of Polish Foreign Policy (1994).

22 Jean Lagadec, 'La fin du conflit Yéménite' (1974) 24 Revue Française de Science Politique 344; see the wording in the abstract.

23 Ibid.

24 UNGA, 'Verbatim Record (25 November 1985) UN Doc A/C.1/40/PV.48' 36.

The metaphor also appeared in the *New York Times* in 1969, although in a slightly different variation. An article titled 'The Frozen War'[25] discussed the Cold War and whether the hostilities between the Soviet Union and the West had ended. The author considered the outbreak of a hot war between the two sides unlikely and suggested that the Cold War had become a frozen war: continuing 'in the thermal metaphor, one might say that the cold war is frozen over'.[26] These references show the term's appeal and its usage in various contexts. Yet, despite the lack of consensus on its introduction, there is broad consensus on when it gained momentum.

Apart from some trivial references, authors who engage with the term 'frozen conflict' seem to agree that it became popular in the 1990s.[27] The historical context was the aftermath of the collapse of the Soviet Union in 1991, the emergence of fifteen new states, and the disappearance of other entities.[28] The new states on the map were Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. Their territories were identified according to the *uti possidetis juris* principle, which transformed the former Republics' administrative boundaries into international ones. Secondary and tertiary entities within these Republics were not considered entitled to independence.[29] Nevertheless, some of these entities aimed, and still aim, for separation. Whereas some of the separation movements remained peaceful, for instance in the autonomous regions of Gagauzia in Moldova[30] and Ajaria in Georgia, others developed into wars, such as in Chechnya in Russia, which was especially severe.[31] Moreover, these new entities, whether independent states or regions aiming for independence, suddenly had the choice to adjust their positions vis à vis the Russian successor state and the West. Conflicts emerged in the regions of South Ossetia and Abkhazia in Georgia, Transnistria

25 André Fontaine, 'Topics: The Frozen War' *New York Times* (20 September 1969) 28.

26 Ibid 28.

27 See e.g. Abline (n 20) 587; Anton Bebler, *‹Frozen Conflicts› in Europe* (Verlag Barbara Budrich 2015) 10; Grant (n 4) 364; Michal Smetana and Jan Ludvík, 'Between War and Peace: A Dynamic Reconceptualization of "Frozen Conflicts"' (2019) 17 Asia Europe Journal 1, 1.

28 Bebler (n 27) 8.

29 Thomas D Grant and Stephen Schwebel, *International Law and the Post-Soviet Space I: Essays on Chechnya and the Baltic States*, vol 1 (Andreas Umland ed, Ibidem Press 2019) 35.

30 See, e.g., Claus Neukirch, 'Autonomy and Conflict Transformation: The Case of the Gagauz Territorial Autonomy in the Republic of Moldova' in Kinga Gal (ed), *Minority Governance in Europe* (Open Society Institute 2002).

31 See, e.g., Christoph Zürcher, *The Post-Soviet Wars: Rebellion, Ethnic Conflict, and Nationhood in the Caucasus* (New York University Press 2009).

in Moldova, and Nagorno-Karabakh in Azerbaijan. As in Chechnya, the aspiration for independence led to war, but unlike Chechnya, these regions are still de facto separated from the parent state — except for Nagorno-Karabakh, which was reintegrated into Azerbaijan in 2023. The situation between separatists aiming for independence, backed by a patron state, and the parent state to which they formally belong has been termed 'frozen conflict'. The term implies that the conflict remains unresolved and the situation is in limbo between war and peace.[32] The broad consensus among scholars of various disciplines is that the four conflicts in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh were the original or classic frozen conflicts and that the use of the term has expanded since then.[33] Interestingly, the term is the same in various languages: for example *conflit gelé* in French, *eingefrorener Konflikt* in German, заморожений конфлікт (zamorozhenyy konflikt) in Ukrainian, or замороженный конфликт (zamorozhennyy konflikt) in Russian. According to one Russian author, the Russian expression is a derivation of the English one, which reflects a critical attitude of the author to Russian policy.[34]

B. Conventionality of the Metaphor

The term 'frozen conflict' thus emerged in the specific historical context of the dissolution of the Soviet Union. Nevertheless, it has been conventionalized and applied to other conflicts, even to some that had actually existed and been frozen before. For example, the conflict between India and Pakistan over Kashmir has persisted for decades. The first of five wars took place more than 70 years ago following the withdrawal of the British Empire in 1947, and the situation has ever since been characterized by the recurrence of violence between terrorist groups and the military, large-scale political protests, and police repression.[35] In public and academic discourse, however, the Kashmir

32 Kamil Christoph Klosek and others, 'Frozen Conflicts in World Politics: A New Dataset' (2021) 58 Journal of Peace Research 849, 849.

33 Anton Bebler, *'Frozen Conflicts' in Europe* (Verlag Barbara Budrich 2015) 10; Christopher J Borgen, 'Imagining Sovereignty, Managing Secession: The Legal Geography of Eurasia's "Frozen Conflicts"' (2007) 9 Oregon Review of International Law 477, 478; Carolina Chavez-Fregoso and Nikola Živković, 'Western Sahara: A Frozen Conflict' (2012) 7 Journal of Regional Security 139, 140 note 2; Ondrej Ditrych, 'Georgia's Frosts: Ethnopolitical Conflict as Assemblage' (2019) 17 Asia Europe Journal 47, 48; Ibrahim Muradov, 'Finding a Theoretical Approach for Studying Post-Soviet "Frozen" Conflicts' (2017) 6 International Journal of Russian Studies 60, 61; Andrei A Kazantsev and others, 'Russia's Policy in the "Frozen Conflicts" of the Post-Soviet Space: From Ethno-Politics to Geopolitics' (2020) 8 Caucasus Survey 142, 142.

34 Andrei Devyatkov, 'Zamorozhennye Konflikty Kak Predmet Dialoga o Evropeiskoi Bezopasnosti (Frozen Conflicts as a Subject of Dialogue on European Security)' (2009) 4 (95) *Indeks Bezopasnosti (Security Index)* 177, 177.

35 Egbert Jahn, *World Political Challenges* (Springer International Publishing 2015) 205.

conflict has been called frozen only recently.[36] Another example of the term's expansion is the conflict between the Republic of Cyprus and Northern Cyprus. Again, the conflict existed before the collapse of the Soviet Union, since the Republic of Cyprus's independence from British rule in 1960 and the Turkish intervention in 1974, which led to a short war.[37] However, labelling it a frozen conflict has become frequent only in the last twenty years.[38] Moreover, the term has been used from the 2000s onwards in academic and public discourse to describe conflicts such as those in Kosovo,[39] Western Sahara,[40] Israel-Palestine (referring to the time before autumn 2023),[41] Bosnia and Herzegovina,[42] eastern Ukraine (referring to the time between 2014 and 2022),[43] Taiwan,[44] Catalonia,[45] North Korea–South Korea,[46] and probably more. Accordingly, the term's use has extended from the particular post-Soviet context to more universal applicability.

36 See e.g. Deepak Dobhal, 'Kashmir: The Frozen Conflict' (*Voice of America*, January 2017); Sumit Ganguly and others, 'India, Pakistan, and the Kashmir Dispute: Unpacking the Dynamics of a South Asian Frozen Conflict' (2019) 17 Asia Europe Journal 129; Jahn (n 35) 205 ff.; Aparna Ray, 'India, Pakistan: Working Towards Thawing the Siachen Conflict?' (*CSS ETH Zürich*, 4 July 2012).

37 Frank Hoffmeister, 'Cyprus', *Max Planck Encyclopedias of International Law* (Oxford University Press 2019) nn 20–23.

38 See e.g. Bebler (n 27); Antal Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' in Isabella Risini, Stefan Lorenzmeier and Sebastian Wuschka (eds), *Zeit und Internationales Recht*, vol 146 (Mohr Siebeck 2019); Borgen (n 33); Hadjigeorgiou (n 9).

39 Bebler (n 27) 151–186.

40 Chavez-Fregoso and Živković (n 33); Irene Fernández-Molina, 'Bottom-up Change in Frozen Conflicts: Transnational Struggles and Mechanisms of Recognition in Western Sahara' (2019) 45 Review of International Studies 407.

41 Paul Poast, 'Israel-Hamas War Is the Latest Frozen Conflict to Go Hot' (*World Politics Review*, 13 October 2023).

42 Valery Perry, 'At Cross Purposes? Democratization and Peace Implementation Strategies in Bosnia and Herzegovina's Frozen Conflict' (2009) 10 Human Rights Review 35; Valery Perry, 'Frozen, Stalled, Stuck, or Just Muddling through: The Post-Dayton Frozen Conflict in Bosnia and Herzegovina' (2019) 17 Asia Europe Journal 107.

43 Jan Ludvik and Vojtech Bahensky, 'The Russia-Ukraine Frozen Conflict: Evidence from an Expert Survey' (2024) 43 Comparative Strategy 104; 'Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit. Koalitionsvertrag 2021–2025 zwischen SPD, Bündnis 90/Die Grünen und FDP' (n 1) 154.

44 Peace Research Centre Prague, 'China v Taiwan' (*Frozen Conflicts Dataset*).

45 Vladimir Vernikov, 'Kataloniya—"zamorozhenniyy Konflikt" (Catalonia—'Frozen Conflict')' (2018) 18 Sovremennaya Evropa (Contemporary Europe) 129.

46 Virginie Grzelczyk, 'Threading on Thin Ice? Conflict Dynamics on the Korean Peninsula' (2019) 17 Asia Europe Journal 31.

The term's spread and popularity enables further observations on the metaphor it embodies. A metaphor connects a 'source domain' with a 'target domain'.[47] The two domains are interconnected by 'mapping', which is partial and non-absolute and allows features of the target domain to be highlighted.[48] Thus, the words 'frozen conflict' are the source domain, while the actual situation on the ground is the target domain. 'Frozen' maps onto unresolved, prolonged, enduring, low-intensity violence, without either war or peace. Metaphors are common in all idioms of the world and are used everywhere. They can contribute to making language more efficient,[49] 'fill lexical gaps and motivate semantic change',[50] and function as merely decorative elements.[51] They are also used in law, where they can serve both epistemic and poietic functions.[52] In any case, a metaphor needs time to become conventional because a new metaphor begins as nothing more than a comparison.[53] Only after having been employed frequently enough does a metaphor's base term become polysemous and complement its original, literal meaning.[54]

As noted above, the 'frozen conflicts' metaphor has been in use for some decades and has been applied frequently by various writers and speakers to describe a range of conflicts. Moreover, its meaning is highly intuitive, so the literal meaning of frozen has almost disappeared. People would not be surprised to learn that frozen conflicts are not actually frozen. One reason for this might be its semantic proximity to Cold War, a metaphor that has become highly conventional. The latter has lost some of its power because of its conventionality[55] and become a source domain when people speak of 'a cold war' instead of 'the Cold War'.[56] More broadly, the range of thermal metaphors

47 Paul H Thibodeau, Teenie Matlock and Stephen J Flusberg, 'The Role of Metaphor in Communication and Thought' (2019) 13 Language and Linguistics Compass e12327, 2.

48 Ibid.

49 Andrew Ortony, 'Why Metaphors Are Necessary and Not Just Nice' (1975) 25 Educational Theory 45.

50 Thibodeau, Matlock and Flusberg (n 47) 3.

51 Raymond W Gibbs, Jr and Herbert L Colston, *Interpreting Figurative Meaning* (Cambridge University Press 2012) 1.

52 Angela Condello, 'Metaphor as Analogy: Reproduction and Production of Legal Concepts' (2016) 43 Journal of Law and Society 8, 8, 22.

53 Brian F Bowdle and Dedre Gentner, 'The Career of Metaphor' (2005) 112 Psychological Review 193, 199.

54 Ibid 198–199.

55 Nathaniel Berman, 'Privileging Combat? Contemporary Conflict and the Legal Construction of War' (2004) 43 Columbia Journal of transnational Law 1, 36.

56 Michael P Marks, *Metaphors in International Relations Theory* (Palgrave Macmillan 2011) 119.

employed within the context of frozen conflicts is striking. Phrases such as 'threading on thin ice',[57] 'thawing a frozen conflict',[58] 'periods of thaw or freeze',[59] 'melting ice does not always freeze back in its previous shape',[60] 'the fighting cooled',[61] 'punctuated by periods of hot war',[62] 'Georgia's frost',[63] and 'Georgia's Secessionist De Facto States: From Frozen to Boiling',[64] all presuppose the conventionalization of the frozen conflict metaphor. However, the phrase is often put in quotation marks as 'frozen conflict' or 'frozen' conflict.[65] The term is also regularly complemented by 'so-called': 'the so-called "frozen" conflicts'.[66] This points to the term still being in a grey zone[67] and is evidence against its complete conventionalization. In contrast, Cold War does not usually appear in quotation marks, which implies that everyone is expected to understand it immediately. The frozen conflict metaphor evidently can be applied in various ways. Some consider it simply an 'enticing' metaphor,[68] a linguistic decoration or catchphrase, especially when appearing in newspaper headlines or book titles. However, others consider it an analytical concept. This work is interested in the latter approach. New phenomena continually emerge in the world, and both language and law constantly adapt by conceptualizing these changes, sometimes with metaphors.

57 Grzelczyk (n 46) 31.

58 Christian Borgen, 'Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova—a Report From the Association of the Bar of the City of New York' (St John's University 2006) 06-0045; Ray (n 36); Cory Welt, 'The Thawing of a Frozen Conflict: The Internal Security Dilemma and the 2004 Prelude to the Russo-Georgian War' (2010) 62 Europe-Asia Studies 63.

59 Perry, 'Frozen, Stalled, Stuck, or Just Muddling Through' (n 42) 110.

60 Grzelczyk (n 46) 33.

61 Borgen (n 58) 17.

62 James J Coyle, 'The Military Face of a Frozen Conflict' in James J Coyle (ed), *Russia's Interventions in Ethnic Conflicts* (Springer International Publishing 2021) 33.

63 Ditrych (n 33).

64 Stacy Closson, 'Georgia's Secessionist De Facto States: From Frozen to Boiling' (2008) 40 Russian Analytical Digest 2.

65 See e.g. Bebler (n 27); Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 173; Borgen (n 33); Pierre Jolicoeur and Aurélie Campana, 'Introduction : "Conflits gelés" de l'ex-URSS: Débats théoriques et politiques' (2009) 40 Études Internationales 501; Francesco Palermo, 'Irredentism', *Max Planck Encyclopedias of International Law* (Oxford University Press 2010) n 7; Smetana and Ludvík (n 27).

66 Philip M Breedlove, 'NATO'S Next Act: How to Handle Russia and Other Threats' (2016) 95 Foreign Affairs 96, 96.

67 Perry, 'Frozen, Stalled, Stuck, or Just Muddling Through' (n 42) 114.

68 Fernández-Molina (n 40) 407.

C. Problematic Implications

It is part of the nature of metaphors that they are not neutral but normally imply some judgment, as they highlight just one characteristic of the target domain. One author explains the use of metaphors, particularly in law, with a metaphor: they are either used as weapons 'where a given metaphor is mobilized in the legal/political stage' or as a battlefield 'where different groups fight over the control over the signification of a metaphor'.[69] With this in mind, the following four problematic aspects of the frozen conflict metaphor have been identified.

First, many criticize the adjective 'frozen' as misleading, because it suggests stability when in fact the situations referred to are very changeable and inherently risky.[70] They can turn into wars any time and can cause considerable casualties and destruction to a region.[71] The war in South Ossetia and Abkhazia in August 2008 showed how a 'frozen' situation can 'defrost' (разморозка[72], razmorozka) or 'thaw'[73] very quickly. Whereas Transnistria is considered the quietest frozen conflict, Nagorno-Karabakh has repeatedly experienced outbreaks of violence throughout the last decades, most recently in 2016, 2020, and 2023, causing many deaths and the displacement of hundreds of thousands of people. The situation in eastern Ukraine, which had also been called a frozen conflict before 2022,[74] became a full-scale war with Russia's invasion that year. Additionally, the alleged stability conveyed by the adjective 'frozen' implies a sense of passivity among both the parties involved and actors that are not involved. Labelling a conflict as frozen invites inaction by supporting the assumption that the conflict is of marginal relevance and that addressing it is not urgent.[75] To underline that frozen conflicts are not

69 Condello (n 52) 22.

70 Smetana and Ludvík (n 27) 2; UNSC, 'Verbatim Records (21 February 2017) UN Doc S/PV.7886' 6; Sergey Vladimirovich Rastol'tsev, 'Tri Mifa o "zamorozhennykh" Konfliktakh Na Postsovetskom Prostranstve v Evrope: Kriticheskiy Analiz (Three Myths about "Frozen" Conflicts in the Post-Soviet Space in Europe: A Critical Analysis' (2018) 4 Mezhdunarodnye Otnosheniya (International Relations) 82, 85.

71 Bebler (n 27) 9; See also: Dov Lynch, 'New Thinking about "Frozen" Conflicts' (2005) 16 Helsinki Monitor 192, 192.

72 Rastol'tsev (n 70) 84.

73 Smetana and Ludvík (n 27).

74 See e.g. Ludvik and Bahensky (n 43); Thomas de Waal and Thomas Von Twickel, *Beyond Frozen Conflict, Scenarios for the Separatst Disputes of Eastern Europe* (Michael Emerson ed, Rowman and Littlefield International 2020).

75 Bebler (n 27) 9; Smetana and Ludvík (n 27) 3; see, however, Chavez-Fregoso and Živković (n 33) 145, who think that defining a conflict as frozen is a useful step to approach the conflict and the parties from different angles.

actually frozen at all, one author consistently puts the word frozen in brackets: '(frozen) conflicts'.[76]

Second, frozen conflicts are understood to be of long duration, existing for over three decades.[77] Yet from a historical perspective, their duration is not in fact particularly long. Bebler illustrated this criticism with the conflict over Gibraltar between Spain and the United Kingdom, which has endured for 300 years following the British occupation in 1704.[78] Although Gibraltar was donated to the United Kingdom by Spain following the Treaty of Utrecht in 1713, several Spanish governments have since attempted to reclaim the territory, arguing that British sovereignty there violates the territorial integrity of Spain.[79] The conflict, manifested in land blockades, disruptions of traffic, harassment of tourists and Gibraltarians, and intimidation by jets' low overflights of the area,[80] has indeed been named frozen,[81] which is appropriate due to its long duration, according to Bebler.

Third, the term is confusing because it remains unclear what exactly is described as 'frozen'. It can refer to violent actions that are infrequent when compared to full-scale war, it can denote a stalemate in peace negotiations, and it has even referred to human rights being 'frozen',[82] meaning that they are not respected in these regions. Acknowledging this inaccuracy, the present thesis approaches the term 'frozen' in relation to multiple factors at various levels that together convey frozenness.

Finally, some authors have criticized the term's bias.[83] It is not neutral but implies a certain attitude towards Russian policy and interpretation of international law. Indeed, the term has not only emerged in the post-Soviet context but has also been linked to Russia's practices in its 'near abroad' when

76 Cindy Wittke, '"Test the West": Reimagining Sovereignties in the Post-Soviet Space' (2018) 43 Review of Central and East European Law 1.

77 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 173-174; Joachim Pueyo and Marie-Louise Fort, 'Rapport D'Information No 3364 Du 16 Décembre 2015 Par La Commission Des Affaires Européennes Sur La Nouvelle Politique Européene de Voisinage' (Assemblée Nationale 2015).

78 Bebler (n 27) 9.

79 Ibid.

80 Ibid.

81 Paul Ames, 'Spain and Britain Clash over Gibraltar' (*The World from PRX*, 30 July 2016).

82 Lia Neukirch, '"Frozen" Human Rights in Abkhazia, Transdniestria, and the Donbas: The Role of the OSCE in a Shaky System of International Human Rights Protection Mechanisms' in Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed), *OSCE Yearbook 2017* (Nomos 2018).

83 See, e.g., Grant (n 4) 312; Devyatkov (n 34) 177.

pursuing the project of русский мир (russkji mir: Russian world).[84] Despite, or indeed because of, these allegedly problematic implications, a holistic examination of the term is desirable.

II. Use of the Term

A. Empirical Analysis of UN Documents

An empirical analysis of the occurrence of the term 'frozen conflict' can generate quantifiable insights. As mentioned above, there is broad consensus on the term's emergence in the 1990s and its original use to describe conflicts in the post-Soviet context. However, no attempt has yet been made to support this assumption with data. The present work aims to fill this research gap and has therefore empirically analysed the use of the term in the UN digital library. The UN digital library is the bibliographic database of the UN, established in 1979 and curated by the Dag Hammarskjold Library.[85] The UN database was chosen because of its international scope and relevance to both law and politics, the vast array of documents provided, and its inclusion of documents dating back to the foundation of the UN in 1945. The empirical analysis addressed two research questions: first, how often has the term 'frozen conflict' been used over time by state officials and international organization officials? Second, which states have most frequently been mentioned as being affected by a frozen conflict, and which states have most frequently used the term 'frozen conflict' to refer to other states?

The following method was applied: a full text search for 'frozen conflict' was performed on the UN digital library platform, and 234 records were found for the period between 1945 and 2023.[86] After excluding publications, NGOs' letters and statements, footnote references, book quotations, quotations of previous speakers in meetings, and duplicates, exactly 200 documents remained. These documents include meeting records, letters, verbatim notes, reports, and written statements. No UNSC Resolution or UNGA Resolution has included the term yet.[87] In total, the term 'frozen conflict' occurs in these documents 241 times. For each of these instances, three pieces of information

84 Abline (n 20) 586; Agnia Grigas, 'Frozen Conflicts: A Tool Kit for US Policymakers' (Atlantic Council 2016) 1; Lauri Mälksoo, *Russian Approaches to International Law* (Oxford University Press 2015) 144, 182; Wittke (n 76) 5.182; Wittke (n 76

85 'United Nations Digital Library System' (*United Nations Digital Library System*).

86 '"frozen Conflict" — Search Results — United Nations Digital Library System'.

87 As found also by Grant (n 4) 366.

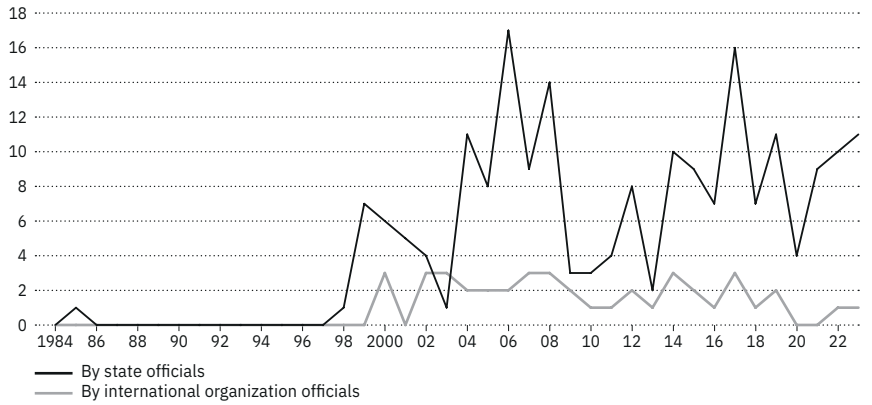
were collected: the year of use, the speaker using the term, and the state mentioned as involved in a frozen conflict.

As far as this third item is concerned, one instance can refer to one or several states. For example, a record such as 'Abkhazia and Transnistria are two of many frozen conflicts in the Black Sea region' would be considered to mention both Georgia and Moldova as states involved in a frozen conflict. Moreover, implicit references were also recorded. For example, the statement that 'we all know that there are dozens of Kosovos throughout the world, just waiting for secession to be legitimized, to be turned into an acceptable norm. Many existing conflicts could escalate, frozen conflicts could reignite, and new ones could be instigated'[88] was registered under 'Kosovo' as a state involved in a frozen conflict. However, overinterpretation of the statements was strictly avoided. Importantly, negations of a frozen conflict were also recorded. For example, 'Ukraine is no longer a frozen conflict' and 'the term frozen conflict is misleading in the case of Nagorno-Karabakh' would still result in Ukraine and Azerbaijan, respectively, being registered as the states referred to as affected by frozen conflicts.

B. Findings

The first research question, how often the term 'frozen conflict' has been used over time by state officials and international organization officials in the UN Documents, is answered in the chart below (*Figure 1*).

Fig. 1: Use of the term 'frozen conflict' over time



88 UNGA, 'Official Records (23 September 2008) UN Doc A/63/PV.5' 29.

As the chart shows, the first use of 'frozen conflict' dates back to 1985. This instance of the term's use has been mentioned above: Chile referred to the Antarctic Treaty System as having 'frozen conflicts over sovereignty'.[89] Thereafter, the term was not used until 1998, when state officials started using it. International organization officials only started using it in 2000. This is slightly later than expected given that, as outlined above, many authors write generally of the emergence of the term in the 1990s. We see two explanations for this. First, although the 'original' frozen conflicts of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh all faced wars after the dissolution of the Soviet Union in 1991, these conflicts only became frozen during the 1990s. As will be discussed later, such a passage of time is a key characteristic for conflicts to be perceived as frozen. Arguably, the longer a conflict is in a deadlock, the more appropriate the term 'frozen' is when referring to its unchanging state. Second, as shall also be discussed later, frozen conflicts are characterized by Russia's approaches to international law and politics. It was in the 2000s that Russia's perspective changed and became more competitive with the West, not in the 1990s, when it was still weak.[90] Accordingly, we think that the wider use of the term falls within this decade because only then were the patterns of Russia's policies recognized.

Another finding concerns the consistency of use of the term since 1998 by state officials. In contrast, international organization officials did not use the term at all in 2001, 2020, or 2021; however, they have still used the term in most of the years since 2000. In fact, the term has never completely disappeared since 1998, although the frequency of its use has fluctuated. Two peaks are evident in the use by state officials, one in 2006 and one in 2017. Although no specific event explains the first peak in 2006, a UNSC meeting in 2017 with the agenda item 'Conflicts in Europe'[91] coincided with most of the references to frozen conflicts that year and thus contributed to the second peak. Finally, it is striking that state officials have employed the term much more often than international organization officials. Among these officials, the term was predominantly used by UN officials (30 out of 42 instances) and less by OSCE officials (6 out of 42 instances). Officials from the EU, ICRC, and the regional organization of Georgia, Ukraine, Azerbaijan and Moldova (GUAM) used the term less than five times.

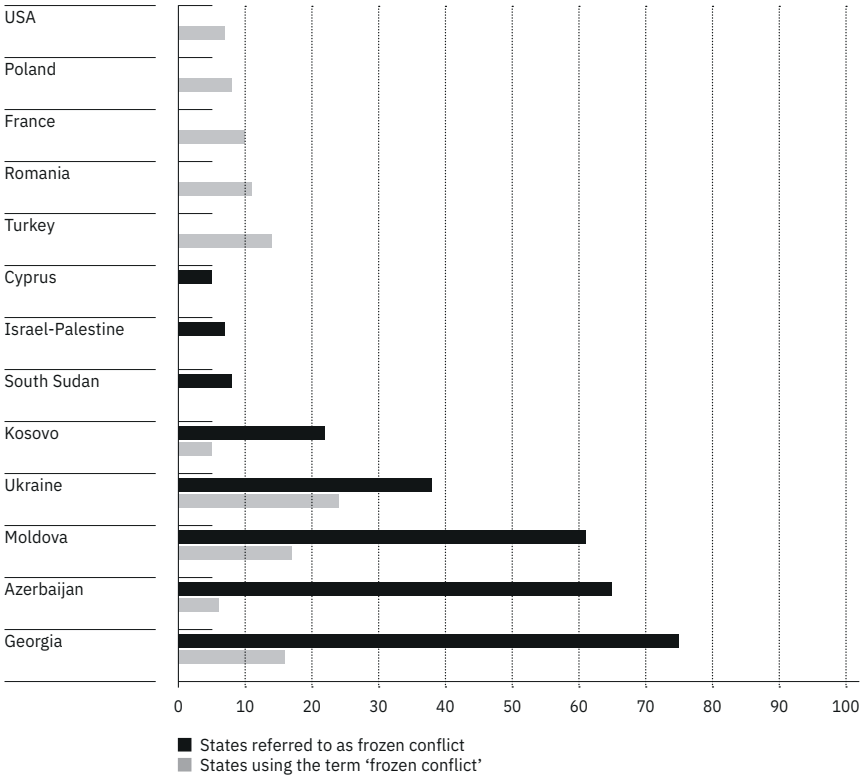
89 UNGA, 'Verbatim Record (25 November 1985) UN Doc A/C.1/40/PV.48' (n 24) 36.

90 Sabine Fischer, 'Not Frozen! The Unresolved Conflicts over Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh in Light of the Crisis over Ukraine' (2016) 9 Stiftung Wissenschaft und Politik 6.

91 UNSC, 'Verbatim Records (21 February 2017) UN Doc S/PV.7886' (n 70).

The second research question is which states were referred to as affected by a frozen conflict, which states referred to frozen conflicts, and how frequently these references occurred from 1945 to 2023. The answer is provided in the chart below (*Figure 2*). The black bars show which states were referred to as affected by a frozen conflict. The grey bars show which states have used the term 'frozen conflict' when referring to other states. The numbers on the horizontal axis of the chart shows how often these references occurred between 1945 and 2023.

Fig. 2: Use of the term 'frozen conflict' regarding states



The graph indicates that Georgia, Azerbaijan, and Moldova are the states most frequently referred to as affected by frozen conflicts (all three states more than 60 times). In Georgia, the conflicts referred to involve South Ossetia and Abkhazia, in Azerbaijan, Nagorno-Karabakh is affected, and in Moldova, Transnistria. The conflicts in these four regions are considered the original or classical frozen conflicts, as has been noted above. However, until now no

data has been presented to confirm this assumption. Figure 2 now provides empirical proof. Additionally, Ukraine has been referred to as affected by frozen conflicts 38 times. These mentions refer to eastern Ukraine as well as Crimea. They became frequent only after 2014, when Russia annexed Crimea and supported the proclamation of independence of Donetsk and Luhansk.

Kosovo has also been referred to as being in a frozen conflict more than 20 times, the fifth most frequent state to be mentioned as such. Its declaration of independence from Serbia in 2008 remains unrecognized by Serbia and several other states, leading to persistent tensions that have repeatedly erupted into violence. The situations in South Sudan, Israel–Palestine, and Cyprus were occasionally referred to as frozen conflicts. However, at the time of writing, full-scale wars and major humanitarian crises are ongoing in both South Sudan and Palestine, such that the term 'frozen conflict' would currently seem inaccurate. States and territories that were mentioned as affected by a frozen conflict less than five times have been omitted from the figure. These include Antarctica, Afghanistan, Bosnia-Herzegovina, Djibouti, Ethiopia, Lebanon, North Korea–South Korea, Pakistan, Syria, and Western Sahara. Geographical regions that were mentioned additionally or alternatively to states as affected by frozen conflicts have also been omitted: the 'Caucasus' was mentioned 16 times, 'Europe' or 'Eastern Europe' (also 'the OSCE region') 16 times, 'post-Soviet' 15 times, the 'Black Sea region' 7 times, and 'Balkan' 4 times. The following regions were mentioned only once: Africa, Central Asia, Middle East, and the Sahel. Finally, 34 mentions of the term 'frozen conflict' could not be attributed to any specific state or region.

Findings are less clear as to which states mentioned frozen conflicts, as the term's usage turns out to be widely dispersed. Ukraine comes out on top of the ranking, having used the term most frequently. Interestingly, 19 of 24 instances of Ukraine using the term happened before 2014 and do not refer to conflicts involving Ukraine but to the usual four regions: South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh. Moldova and Georgia used the term frequently, too, occupying places 2 and 3 in the ranking and referring mainly to their own affected regions. Surprisingly, Azerbaijan, which is affected by the fourth of the classical frozen conflicts, only used the term six times. This is less usage than by Turkey, Romania, or France, each of which used the term ten times or more despite not being affected by a frozen conflict. South Sudan, Israel, Palestine, and Cyprus, which have occasionally been referred to as involved in frozen conflicts, have never used the term themselves. States that used the term less than six times have been omitted from the figure. These were Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Chile, Croatia, Cyprus, Estonia, Gabon,

Germany, Ghana, Hungary, Italy, Japan, Latvia, Lichtenstein, Lithuania, Luxembourg, Malaysia, Montenegro, The Netherlands, North Macedonia, Norway, Russia, Senegal, Serbia, Singapore, Slovakia, Tunisia, the United Arab Emirates, the United Kingdom, Uruguay, and the Holy See. Thus, a wide range of states have referred to frozen conflicts without being affected by one. Therefore, the conclusion can be drawn that the term 'frozen conflict' functions as a self-designator as well as an external designator.

In sum, the empirical findings clearly show that the term 'frozen conflict' has been used mainly by state officials since the late 1990s. Nevertheless, it gained momentum only in the 2000s and has been present in UN documents ever since. Furthermore, Georgia, Moldova, and Azerbaijan are the states mostly referred to as affected by frozen conflicts. It is therefore not only legitimate but also appropriate to focus on the four regions of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh throughout this work. The results also suggest including their post-Soviet context in further analysis. However, the results are less clear about which states use the term. In fact, the states most often referred to as involved in frozen conflicts are not the same as the states that most frequently use the term, although there is some overlap with Georgia and Moldova being among the most frequent users.

III. Conceptual Approaches

After having studied the term's background and use, this chapter next presents conceptual approaches to frozen conflicts. First, it will briefly focus on conceptual approaches and definitions offered by other disciplines than international law, including international relations, political science, and peace and conflict studies. Subsequently, legal approaches to frozen conflicts will be presented. This includes examination of the term's use in legal discourse, suggested definitions and, finally, overlapping legal concepts.

A. Other Disciplines

Scholars of international relations, political science, and peace and conflict studies have suggested some definitions of frozen conflicts over the last decades, some of which will be outlined briefly as examples.[92] In 1966, Holsti, a professor of political science, introduced a definition of 'frozen disputes', rather than 'frozen conflicts':

92 See also Grant (n 4) 373-376, who presents a selection of definitions by international relations scholars up to 2017.

> The category of 'frozen' dispute refers to those conflicts in which both sides have remained fully committed to their incompatible positions but where neither has yet dared to attempt resolution through accommodation, withdrawal, or military conquest.[93]

As will be shown in Part IV, the parties' commitment to incompatible positions is one of the core characteristics of frozen conflicts and is also reflected in their legal arguments. A more recent definition understands a frozen conflict as a state of conflict in which smaller acts of violence can occur, but large-scale hostilities no longer do, and in which the parties have agreed on a ceasefire, but efforts to resolve the conflict and achieve lasting peace have failed.[94] Other examples state that frozen conflicts 'in the post-Soviet space usually refers to four conflicts of an ethnic or ethnolinguistic nature that arose out of the collapse of the USSR in the early 1990s',[95] and that 'the violence stopped, but the underlying interests of the formerly warring parties have neither been abated nor addressed'.[96]

In fact, these examples are working definitions that are better suited to the cases under discussion than to universal application. Scholars have also observed that the concept of frozen conflicts has remained undertheorized.[97] Accordingly, there seems to be an imbalance between its use as a term and its systematic analysis at a conceptual level. A suggestion for a more rigorous conceptualization has been offered by two international relations scholars, Jolicoeur and Campana, in 2009; they suggested that frozen conflicts exhibit the following characteristics:[98] the emergence of a secessionist movement following the dissolution of a communist state of federal type; the suspension of hostilities by the establishment of a ceasefire, usually reinforced by a peacekeeping operation; the victory of a secessionist party followed by the formation of a de facto regime, which in some cases has evolved into a state entity with ambiguous status; and the non-recognition of the victor by the

93 Kalevi J Holsti, 'Resolving International Conflicts: A Taxonomy of Behavior and Some Figures on Procedures' (1966) 10 Journal of Conflict Resolution 272, 283 (Grant erroneously attributes this definition to Louis Kriesberg 1968).

94 S Neil MacFarlane, 'Eingefrorene Konflikte in der ehemaligen Sowjetunion – der Fall Georgien/Südossetien' in Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed), *OSCE Yearbook 2008* (Nomos 2009) 23.

95 Kazantsev and others (n 33) 142, distinguishing between frozen conflicts of the first generation (South Ossetia, Abkhazia, Transnistria, Nagorno-Karabakh) and second-generation frozen conflicts (Donetsk, Luhansk, Crimea; before the war in Ukraine started in 2022).

96 Perry, 'At Cross Purposes?' (n 42) 36.

97 Klosek and others (n 32); see also Jolicoeur and Campana (n 65) 502.

98 Ibid 509.

international community or, for South Ossetia and Abkhazia since September 2008, very limited recognition at the end of evolutionary processes both endogenous and exogenous to the conflict. However, Grant has criticized this definition for being geopolitically limited due to its reference to the 'dismemberment of a communist state of federal type'.[99]

The most comprehensive research on frozen conflicts has been presented by Klosek, Bahenský, Smetana, and Ludvík from the Peace Research Centre Prague: they rigorously conceptualized frozen conflicts and developed the 'Frozen Conflict Dataset', which identified 42 cases of frozen conflicts from 1946 to 2011.[100] Of these, 25 are 'traditional' interstate conflicts, 17 are conflicts between a state and a de facto state, and 23 were still ongoing in 2011.[101] They presented their definition in a special issue of the *Asia Europe Journal* on frozen conflicts in 2019.[102] The definition reads as follows:

> a protracted, postwar conflict process, characterized by the absence of stable peace between the opposing sides. In frozen conflicts, core issues between the opposing sides remain unresolved, the dispute is in the forefront of mutual relations, and there is a looming threat of the renewal of violence. The conflict also remains highly salient in the domestic discourses of both policy makers and the general population.[103]

They also state that a frozen conflict ends by one of three transformative mechanisms: violent thawing (e.g., Russia and Chechnya 1999), peaceful thawing (e.g., Sudan and South Sudan 2011), or conflict withering (e.g., Iraq and Kurdistan 2003).[104] Furthermore, they distinguish the concept from related ones in peace and conflict studies, such as enduring rivalries, strategic rivalries, and protracted conflicts, by emphasizing the specific postwar situation of frozen conflicts: the fact that they can only occur if there was a war at some point.[105] In 2021, the dataset was published in the *Journal of Peace Research*'s article 'Frozen Conflicts in World's Politics: A New Dataset'.[106] The approach is notable for being neither spatially nor temporally specific, be-

99 Grant (n 4) 376.

100 Peace Research Centre Prague, 'PRCP Frozen Conflicts Dataset'.

101 Klosek and others (n 32) 853.

102 See all nine articles of the issue Michal Smetana and Jan Ludvik (eds), 'Between War and Peace: A Dynamic Reconceptualization of "Frozen Conflicts"' (2019) 17 Asia Europe Journal.

103 Smetana and Ludvík (n 27) 4.

104 Klosek and others (n 32) 851; Smetana and Ludvík (n 27) 8.

105 Klosek and others (n 32) 850; Smetana and Ludvík (n 27) 5-7.

106 Klosek and others (n 32).

cause the authors aimed to 'overcome the prevalent understanding of frozen conflicts as a contemporary phenomenon in the post-Soviet space'.[107] Thus, they include conflicts that have not yet been analysed from this perspective.

Given its comprehensiveness and data-based approach, this conceptualization of frozen conflicts is promising as a future standard reference. Moreover, the development of an independent research project shows the growing interest in the topic and the necessity of its examination. This is also reflected in the establishment of a junior research group named 'Frozen and Unfrozen Conflicts' at the Leibnitz Institute for East and Southeast European Studies in Regensburg.[108] However, only time will tell whether the definition by Klosek et al. will prevail and become universally applied, potentially even beyond peace and conflict studies.

B. International Law

1. Use of the Term

Until now, only one thorough study on the etymology, use, and potential meaning of frozen conflicts in international law has been published, that by Grant in 2017.[109] To avoid repetition, his main findings on the use of the term in international law will be briefly outlined here and complemented with more recent findings. In international organizations' practice, as of 2017, Grant found no appearance of the term in the *Repertoire of the Practice of the Security Council* nor in the *Repertory of Practice of United Nations Organs*.[110] Although this assertion was still true of the latter publication in August 2024,[111] the collection of the UNSC now contains one match when searching for 'frozen conflict'.[112] This reference appears in the reproduction of a speech by the High Representative for Bosnia and Herzegovina in 2021, who affirmed that 'Bosnia and Herzegovina remained de facto a frozen conflict, where political leaders continued to pursue wartime goals and generate divisive narratives and nationalistic political agendas'.[113] This document was also included in the empirical analysis on the use of the term in the previous chapter. Grant also ob-

107 Smetana and Ludvík (n 27) 4.

108 See 'IOS Regensburg Political Science Research Group'.

109 Grant (n 4).

110 Ibid 366.

111 No files match when searching for 'frozen conflict' on 'Repertory of Practice of United Nations Organs – Legal Publications'.

112 See the search results on 'Repertoire of the Practice of the Security Council | United Nations Security Council'.

113 UNSC, 'Overview of Security Council Activities in the Maintenance of International Peace and Security – 17. Items Relating to the Situation in the Former Yugoslavia – A. The Situation in Bosnia and Herzegovina (Year 2021, 24th Supplement)' 192.

served that UN officials seldomly use the term and that Francis Deng,[114] UN Secretary General's Representative on internally displaced persons, 'appears to have been the first'[115] in 2000. Yet, in the empirical analysis in this thesis 27 cases of UN officials using the term 'frozen conflict' have been identified by 2023. Among these were not only Deng's successors as UN Secretary General's Representatives on internally displaced persons, Kälin[116] and Beyani,[117] but also Secretary Generals Annan[118] and Guterres[119] in their reports to the UNSC.

Grant further concluded that regional organizations had used the term more frequently than the UN, namely the Parliamentary Assembly of the Council of Europe, NATO, and the OSCE.[120] This assessment is still accurate today: the term is found in the speeches and documents of the organizations in question.[121] Interestingly, the OSCE uses the term even though it was the OSCE Chairman-in-Office who stated when briefing the UNSC in 2008 that frozen conflicts do not exist:

> There really is no such thing as a frozen conflict. I think it is time to banish that term from the political lexicon and act quickly to settle any outstanding conflicts in our region. Let us forget all the talk about frozen conflicts and try instead to resolve them.[122]

Besides the term's use in international organizations, Grant found that 'frozen conflict' had not been invoked in judgements, advisory opinions, or separate

114 UN Economic and Social Council, 'Specific Groups and Individuals: Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis Deng, Submitted Pursuant to Commission on Human Rights Resolution 200/53 (3 July 2000), UN Doc E/CN.4/2001/5/Add.2' nn 5, 12, 16, 19.

115 Grant (n 4) 366.

116 UN Human Rights Council, 'Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin (9 February 2009) UN Doc A/HRC/10/13' n 94 (e).

117 UN Human Rights Council, 'Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, Chaloka Beyani (2 April 2015) UN Doc A/HRC/29/34/Add.3' n 65.

118 UNSC, 'Report of the Secretary-General on the Situation in Abkhazia, Georgia (28 September 2006) UN Doc S/2006/771' (n 1) n 37.

119 UNSC, 'Report of the Secretary-General on the Situation in Abyei (16 April 2019) UN Doc S/2019/319' (n 1) n 63.

120 Grant (n 4) 367.

121 See e.g. PACE, 'The Role of the Council of Europe in Preventing Conflicts, Restoring Credibility of International Institutions and Promoting Global Peace, Doc 15821 Report (5 September 2023)' n 15; 'Keynote Speech by NATO Deputy Secretary General Mircea Geoană at the Bucharest Forum: "Resilience, Pandenomics and the Great Acceleration"' (*NATO*, 8 October 2020); Court of Conciliation and Arbitration within the OSCE, 'Annual Report 2022' (2023) 2, 17, 18.

122 UNSC, 'Verbatim Records (26 September 2008) UN Doc S/PV.5982' 4.

or dissenting opinions of the ICJ,[123] which is still the case today.[124] Neither has the term appeared in the jurisprudence of the ICTY, ICTR, or IRMCT Appeals Chamber.[125] Grant found an instance of the term being used in the *South China Sea Arbitration* before the Permanent Court of Arbitration, where the Philippines used the term in its argument in oral statements.[126] In ECtHR case law, the term 'frozen conflict' appeared in a case against Moldova and Russia, but it only consists of a report with the term in its title being cited and thus does not reflect the court's practice.[127] The same is true for the formulation in the ECtHR's case of Georgia against Russiathat 'Russia was seen as the protagonist responsible for keeping the conflicts in the region frozen',[128] which refers to the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia (henceforth IIFFMCG).[129]

Grant finally examined the use of the term by international law writers. He found that the term 'frozen conflict' has not been invoked by the International Law Commission (ILC), the International Law Association (ILA), or the Institut de Droit International.[130] Again, these findings still hold true at the time of writing.[131] Moreover, the Max Planck Encyclopaedia does not contain an entry for 'frozen conflict'.[132] Nevertheless, as Grant noted,[133] the term does appear in other entries of the encyclopaedia: in the entry on 'irredentism', where it is explained how the nation-building process affects states with artificial or contested borders in particular such as in 'the post-Soviet area, the frozen conflicts of Abkhazia, South Ossetia, and Nagorno-Karabakh',[134]

123 Grant (n 4) 368.

124 'Document Search' (*International Court of Justice*). Although there are some matches, these are footnotes (if at all) naming literature or statements by others.

125 Grant (n 4) 368; 'ICTR/ICTY/IRMCT Case Law Database' (*UN International Residual Mechanism for Criminal Tribunals*).

126 *South China Sea Arbitration (Republic of the Philippines v People's Republic of China), Transcript of Hearing on the Merits and Remaining Issues of Jurisdiction and Admissibility (Day 2)* [2015] PCA Case No 2013-19 128-129; See also Grant (n 4) 368-369.

127 *Ivantoc and Others v Moldova and Russia* App No 23687/05 ECtHR 15 November 2011, para 28; that refers to Borgen (n 58); see also Grant (n 4) 373.

128 *Georgia v Russia (II)* [Merits] App No 38263/08 ECtHR (GC) 21 January 2021, para 156.

129 Independent International Fact-Finding Mission on the Conflict in Georgia, 'Report II' (2009).

130 Grant (n 4) 369-370.

131 No matches are presented when searching on the institutes' platforms: 'International Law Commission'; 'Hein Online Database of International Law Association Reports'; 'Institut de Droit International – Justitia et Pace'.

132 'Oxford Public International Law — Max Planck Encyclopedias of International Law' (*Oxford University Press*); See also Grant (n 4) 271.

133 Grant (n 4) 371.

134 Palermo (n 65) n 7.

and in the entries on South Ossetia[135] and Nagorno-Karabakh[136]. Although not mentioned by Grant, the term also appears in the Max Planck Encyclopaedia's entry on confidence-building measures (CBMs), which explains that

> with the success of CBMs for Bosnia-Herzegovina, it is more likely that similar measures could be addressed in other post-conflict cases (or regions transiting out of conflict). 'Frozen' or low-intensity conflicts (such as Nagorno-Karabakh in Azerbaijan, Abkhazia and South Ossetia in Georgia, and Transnistria in Moldova) are matters of common concern for European security.[137]

International law textbooks typically do not introduce frozen conflicts along with other types of conflict.[138] An exception might be the term's occurrence in the publication of the International Committee of the Red Cross on contemporary practice in international humanitarian law (IHL), where Sassoli et al. discussed the temporal scope of the application of IHL and the corresponding difficulties: 'frequently, most armed conflicts result in unstable ceasefires, continue at a lower intensity, or are frozen by an armed intervention by outside forces or by the international community'.[139] Finally, the term does not appear in the UN Treaty Collection.[140]

2. Suggested Definitions

In contrast to the legal institutions and instruments discussed above, legal literature seems to use the term 'frozen conflict' more frequently. The most prominent and most widely quoted examples may be Bebler, Borgen, Mälksoo, Wittke, and the IIFFMCG.[141] However, in general, the term is used in a descriptive vein and as a label that allows a variety of legal questions that characteristically arise in situations called frozen conflicts to be addressed.

135 Angelika Nussberger, 'South Ossetia', *Max Planck Encyclopedias of International Law* (Oxford University Press 2013) n 13.

136 Andriy Y Melnyk, 'Nagorny-Karabakh', *Max Planck Encyclopedias of International Law* (Oxford University Press 2013) n 15.

137 Zdzislaw Lachowski, 'Confidence-Building Measures', *Max Planck Encyclopedias of International Law* (Oxford University Press 2006) n 16.

138 See e.g. Andrew Clapham, *War* (Oxford University Press 2021); Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014); Elizabeth Wilmshurst, *International Law and the Classification of Conflicts* (Oxford University Press 2012).

139 Marco Sassoli, Antoine A Bouvier and Anne Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (3rd edn, International Committee of the Red Cross 2011) 34.

140 'United Nations Treaty Series Online' (*UN Treaty Collection*).

141 Bebler (n 27); Borgen (n 58); Borgen (n 33); Mälksoo (n 7) 787; Wittke (n 76) 151; Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 7, 18, 26, 56.

These questions typically include secession, the use of force, regional interpretations of international law, and internal displacement. Few conceptual approaches or efforts have been made towards a legal definition. For instance, Bebler simply stated in his introduction to a work titled 'Frozen Conflicts in Europe' that the term's use indicates that the violent stage of each of these conflicts ended in a stalemate and without a peace treaty.[142] Another circumscription reads as follows: 'It is common to call South Ossetia a "frozen conflict", but this name implies certain features besides merely being protracted and unresolved: frozen conflicts typically concern claims to a separate territorial and sovereign status.'[143] And Paraskeva and Meleagrou noted in their book *Cyprus at the European Court of Human Rights* that

> The term 'frozen' in connection with long-standing and unresolved confrontations indicates a lengthy passage of time with inevitable political social and legal changes which influence the negotiating positions of the parties and necessitate readjustments and compromise for the deadlock to be broken.[144]

Some more examples of paraphrasing frozen conflicts in legal literature could be mentioned, as well as authors who reject the term and attribute it to other jargons or disciplines.[145] In contrast, Borgen's oft-quoted study of the conflict in Transnistria on behalf of the New York Bar Association presents a more conceptual approach to frozen conflicts.[146] He studied the interplay of sovereignty, self-determination, and territorial integrity. Instead of suggesting a legal definition, he underlined the necessity of treating frozen conflicts as a legal phenomenon examined from a legal perspective, explaining that realpolitik has its limits and cannot fully explain or resolve these conflicts.[147]

Yet, as mentioned above, the only suggestion for a precise legal definition of the term 'frozen conflict' so far has been offered by Grant.[148] In his paper, he identified a set of seven characteristics that pertains to all of the frozen conflicts in South Ossetia, Abkhazia, Transnistria, and Nargorno-Karabakh

142 Bebler (n 27) 9.

143 Timothy William Waters, 'Plucky Little Russia: Misreading the Georgian War through the Distorting Lens of Aggression' (2013) 49 Stanford Journal of International Law 176, 232.

144 Costas Paraskeva and Eleni Meleagrou, *Cyprus at the European Court of Human Rights* (Brill Nijhoff 2022) 20-21 (note 77).

145 See, e.g., Marc Weller, 'Settling Self-Determination Conflicts: Recent Developments' (2009) 20 European Journal of International Law 111, 137 attributing the term to the diplomatic vocabulary.

146 Borgen (n 58).

147 Borgen (n 33) 478.

148 Grant (n 4).

'and does not describe any situation that is not a frozen conflict'.[149] He followed the approach of what cognitive science calls the classic concept structure, whereby a case is either included in or excluded from the category of frozen conflicts. The seven characteristics are as follows:

> (1) armed hostilities have taken place, parties to which include a state and separatists in the state's territory; (2) a change in the effective control of territory has resulted from the armed hostilities; (3) the state and the separatists are divided by lines of separation that have effective stability; (4) adopted instruments have given the lines of separation (qualified) juridical stability; (5) the separatists make a self-determination claim on which they base a putative state; (6) no state recognizes the putative state; (7) a settlement process involving outside parties has been sporadic and inconclusive.[150]

Despite the identification of these seven characteristics, Grant concluded that the concept of frozen conflict 'remains at best at the edges of legal discourse' and views it as useful not for legal analysis but for the 'exposure of a strategy'.[151] He bolstered this conclusion by three arguments: first, the juridical characteristics of frozen conflicts are highly diffuse and have little or no obvious connection to one another; second, the term is not neutral because it suggests that there is no hope for a resolution of the conflict, whereas in fact lawyers have the duty to find solutions and act as problem-solvers without prejudging the situation; and third, the use of the term implies legal fragmentation with a regional international law imposed by Russia that is at variance with general international law.[152] Apparently, Grant has a very precise idea of what qualifies as a legal concept: it entails a single readily identified core phenomenon, is neutral, and is truly universal in the sense that it does not suggest any regional rules of international law. We certainly agree that frozen conflicts are a complex phenomenon that indeed exhibits a 'mélange of juridical concepts'[153] and thus challenges binary legal thinking, in which objects, ideas, and phenomena are either included in or excluded from a category. However, we differ from Grant by thinking that this reveals as much about international law as it does about the phenomenon of frozen conflicts. Rather than excluding frozen conflicts from the legal realm due to their ambiguity, the more interesting project is to more closely examine this apparent mismatch

149 Ibid 376.
150 Ibid 390.
151 Ibid 413.
152 Ibid 411-412.
153 Ibid 413.

between international law and frozen conflicts. Thinking of frozen conflicts as a legal topic or concept in a wider sense than Grant supposes allows reflection on the legal dilemmas underlying frozen conflicts. It offers an opportunity to discuss how international law deals with ambiguity in general. Thus, the aim of this thesis is not to offer a legal definition of frozen conflicts. Instead, its aim is to study the relationship between international law and frozen conflicts holistically and recognize the ambiguity of the latter. Despite the occasional use of the term 'frozen conflict' by international law authors, this project has not yet been undertaken.

3. Overlapping Legal Concepts

When exploring conceptual approaches to frozen conflicts, the question arises as to which uncontested legal concepts are typically invoked together with that of frozen conflicts. The legal concepts applied to frozen conflicts are primarily international or non-international armed conflict, de facto state, and belligerent occupation. These concepts will repeatedly be revisited throughout this work. For now, it suffices to emphasize briefly that they are connected to frozen conflicts, perhaps even overlapping with the concept to a certain extent, but we consider these three concepts not to be interchangeable with frozen conflict. Consequently, the research that has been conducted on them does not render research on the concept of frozen conflicts redundant. Even if these concepts apply to the same situation, they have different qualities and functions. It is worthwhile to briefly distinguish frozen conflicts from these three concepts.

The first overlapping legal concept is international or non-international armed conflict. International law is relatively straightforward when classifying conflicts. Leaving aside the reasons and motives for the conflict, *jus ad bellum*, *jus in bello* recognizes only two distinct types of conflict: international and non-international armed conflicts.[154] A similar distinction is made by international criminal law, which distinguishes between war crimes during international and non-international armed conflicts and defines these in the same manner as IHL.[155] A potential third category called 'protracted armed conflict', mentioned in article 8 (2) (f) of the Rome Statute,[156] was discussed by some

154 See, e.g., Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012); Sylvain Vité, 'Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations' (2009) 91 International Review of the Red Cross 69.

155 RULAC, 'Classification of Armed Conflicts' (*RULAC Geneva Academy*, 21 April 2017).

156 Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

writers but finally rejected.[157] Considering the complexity of reality and the manifold situations of violence in the world, this dichotomy appears to be an oversimplification – in contrast to the much-lamented fragmentation of international law. Many contemporary armed conflicts challenge these categories due to their combination of non-international armed conflict within a state, international interventions, and spillover effects on other territories.[158] Of course, frozen conflicts can be classified within the categories of international and non-international armed conflict to identify what law is applicable. Typically, frozen conflicts involve aspects of international as well as non-international armed conflict.[159] However, frozen conflicts fit these two categories only as long as there is an armed conflict at all. The 'hot' phases of war that all frozen conflicts have gone through[160] meet this condition. But, as will be outlined later, a frozen conflict is mostly characterized by low-intensity violence and thus stands in contrast to an armed conflict, whether international or non-international. Restricting the analysis to the prevalent categories of international and non-international armed conflict would overlook precisely what makes frozen conflicts unique: the state of frozenness and the absence of obvious armed conflict.

The second overlapping legal concept is that of the de facto state or de facto regime. According to the Max Planck Encyclopaedia of International Law, de facto regimes are entities that have existed for long periods, claim to be states or governments, and control defined territories, but lack recognition, at least by the majority of states, such as North Korea, Taiwan, Northern Cyprus, South Ossetia, and Abkhazia.[161] This definition includes the claim to be a state or a government, but other definitions distinguish between de facto states and de facto regimes. Accordingly, 'the entity that constitutes a de facto state seeks full constitutional independence and widespread recognition as a sovereign state, for example the Republic of Somaliland and the Republic of Kosovo'.[162] In contrast, an entity that constitutes a de facto regime 'aspires to

157 Dustin A Lewis, 'The Notion of "Protracted Armed Conflict" in the Rome Statute and the Termination of Armed Conflicts under International Law: An Analysis of Select Issues' (2019) 101 International Review of the Red Cross 1091, 1112; Vité (n 154) 81–83.

158 RULAC, 'Classification of Armed Conflicts' (n 155).

159 On the qualification of the war in South Ossetia in August 2008 see Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 298–312; Leach (n 8) 330.»plainCitation»:»On the qualification of the war in South Ossetia in August 2008 see Independent International Fact-Finding Mission on the Conflict in Georgia (n 129

160 See, e.g., Grant (n 4); Klosek and others (n 32).

161 Jochen A Frowein, 'De Facto Regime', *Max Planck Encyclopedias of International Law* (2013) n 1.

162 Jonte Van Essen, 'De Facto Regimes in International Law' (2012) 28 Merkourious-Utrecht Journal of International and European Law 31, 33; see in general Scott Pegg, *International Society and the De Facto State* (Ashgate 1998).

be recognized by the international community as being the official government of an already existing state'.[163] The difference between a de facto regime and a de facto state, therefore, is in their ambition: whereas the de facto state aims to be a state through secession or independence from the parent state, the de facto regime seeks recognition as the legitimate government without necessarily violating the parent state's territorial integrity.[164] Writers addressing frozen conflicts normally include a description of a de facto state.[165] As will be outlined later, the concept of a de facto state, the term that will be used henceforth, is one of the core characteristics of frozen conflicts. Accordingly, if no de facto state remains, following absorption by the parent state,[166] we consider a territory to be no longer involved in a frozen conflict. This scenario occurred when Nagorno-Karabakh was absorbed by Azerbaijan in 2023. Nevertheless, the concepts of de facto state and frozen conflict are not interchangeable. Some de facto states have never been involved in a frozen conflict, for instance Somaliland.[167] The concept of the de facto state is important, even in cases of obligatory non-recognition following a UNSC decision, to draw the consequences of the fact that a territory is fully governed by the entity.[168] Such entities are partial subjects of international law and are thus holders of some rights as well as some obligations.[169] Interestingly, the concept of the de facto state blurs the binary legal logic of states versus nonstates. Similar to frozen conflicts, it softens rigid categorizations.

The third overlapping legal concept is belligerent occupation. As will be explained in greater detail in Part III, regions affected by frozen conflicts are characterized by a high military presence. According to article 42 Hague Convention IV,[170] a territory is considered occupied when it is placed under the authority of a hostile army without the consent of the territorial state to which

163 Jochen A Frowein, *Das de Facto-Regime im Völkerrecht: Eine Untersuchung zur Rechtsstellung 'nichtanerkannter Staaten' und ähnlicher Gebilde* (Heymann 1968) 6–7.

164 Van Essen (n 162) 33; see also Sergo Turmanidze, 'Status of the De Facto States in Public International Law' (PhD Thesis, Universität Hamburg 2010) 2–3.

165 See, e.g., David X Noack, 'De-Facto-Staaten: Prekäre Staatlichkeit und eingefrorene Konflikte' (2017) 4 Eingefrorene Konflikte, Wissenschaft und Frieden 6.

166 Frowein (n 161) n 12.

167 James Ker-Lindsay, 'De Facto States in the 21st Century', *Oxford Research Encyclopedia of International Studies* (Oxford University Press 2022); Michael Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized de Facto Regimes in International Law: The Case of 'Somaliland'* (Brill Nijhoff 2004).

168 Frowein (n 161) n 12.

169 See also Frowein (n 163); Schoiswohl (n 167); Van Essen (n 162).

170 Hague Convention (IV) concerning the Laws and Customs of War on Land and its Annex: Regulations Respecting the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 October 1910) 205 CTS 277.

it belongs. Although no international tribunal has affirmed belligerent occupation in the cases of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh, the situations have sometimes been qualified as such. The Rule of Law in Armed Conflicts (RULAC) online portal run by the Geneva Academy classifies the parent states, Georgia and Moldova, as occupied by Russia and, up to 2023, classified Azerbaijan as occupied by Armenia.[171] However, literature on belligerent occupation barely discusses the frozen conflicts of South Ossetia, Abkhazia, Transnistria, or Nagorno-Karabakh.[172] It can be inferred that frozen conflicts are not textbook examples of belligerent occupation. Two aspects might be atypical: first, a belligerent's control over another actor can be regarded as occupation by proxy when a subordinated de facto administration controls the territory.[173] Second, the occupation is combined with claims for self-determination and the separation of the territory.[174] Therefore, the question of belligerent occupation plays a role in frozen conflicts but it is not congruent with the latter concept.

IV. Conclusion

Investigations of the term 'frozen conflict' produce various findings. First, it remains unclear when and by whom the term was first introduced. Although some trivial references have been found before the 1990s, the consensus is that its origin is in that decade. The historical context was the dissolution of the Soviet Union in 1991 and the outbreak of wars in regions that sought independence. These wars quickly entered a less violent phase and thus were described as frozen conflicts. Many authors speak of the emergence of the term in the 1990s without specification. The empirical analysis of UN Documents allows for some specifications: the analysis shows that the term emerged at the very end of the 1990s but suggests that its use gained momentum only in the 2000s, when state officials and international organization officials started using it frequently. Therefore, the emergence of the phenomenon at the beginning of

171 RULAC, 'Military Occupation of Moldova by Russia' (*RULAC Geneva Academy*, 2 February 2022); RULAC, 'Military Occupation of Georgia by Russia' (*RULAC Geneva Academy*, 27 September 2022); RULAC, 'Military Occupation of Azerbaijan by Armenia' (*RULAC Geneva Academy*, 9 October 2022).

172 See, e.g., Yoram Dinstein, *The International Law of Belligerent Occupation* (2nd edn, Cambridge University Press 2019) who once mentions Abkhazia in his work of more than 300 pages (at page 13) and South Ossetia twice (at page 13 and 225). Transnistria and Nagorno Karabakh are not mentioned.

173 Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law* (Oxford University Press 2022) 51.

174 Grant (n 4) 394.

the 1990s has to be distinguished from the emergence or conventionalization of the term in the late 1990s and 2000s. This is because only after the passage of time were these conflicts perceived as frozen and the metaphor became conventionalized. Furthermore, it was only in the 2000s that Russia changed its policy towards surrounding states. The empirical findings also show that the four conflicts in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh were the first to be labelled frozen and are still the ones most frequently referred to as such. Nevertheless, over time, the term's application has expanded to other conflicts beyond the post-Soviet context.

Second, despite the frequent use of the term 'frozen conflict', few conceptual approaches have been attempted. To fill this research gap, the Peace Research Centre Prague offered a rigorous conceptualization in 2019 and identified 42 cases of 'frozen conflicts' from 1946 to 2011. Whether this definition becomes a standard reference in peace and conflict studies and beyond remains to be seen. International law has shown only marginal interest in conceptual approaches to frozen conflicts. One reason may be that the term rarely appears in legal instruments. Only international legal writers, state officials, and international organization officials have employed it occasionally. So far, only Grant has examined whether the term 'frozen conflict' has any legal content and presented a legal definition. He concluded that the concept is not relevant to legal analysis.

Finally, it has been acknowledged that looking at the situations called frozen conflicts from a legal perspective typically brings other legal concepts into play. These are the undisputed legal concepts of international or non-international armed conflict, de facto state, and belligerent occupation. These concepts may overlap with frozen conflicts and lack a clear distinction from them. However, they are not interchangeable with the concept of frozen conflict. Moreover, it is the very ambiguity of the concept of frozen conflict, including its overlapping with other concepts, that characterizes the relationship of international law with frozen conflicts. Closer examination is required not only of the phenomenon but also of the discipline's categories.

Part II: Case Study — Overview

This section presents an overview of the four cases of frozen conflicts: South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh. Each conflict's history and recent developments will be addressed. A basic understanding of the conflicts will be provided that allows for further analysis of their frozen status. Two preliminary remarks must be made. First, we cannot cover the regions' complex histories in full and shall focus only on the most relevant facts. However, unlike most of the literature dealing with the four cases, we do not start only with the Soviet Union's disintegration in the 1990s but also examine earlier historical roots that contributed to the conflicts. Second, sometimes facts are hard to identify, if they exist at all and are not merely interpretations, as Nietzsche suggested. In frozen conflicts, as in every conflict, each side has its own interpretation of history, shaped by ideologies and emotions. Literature discussing the conflicts in question thus often explicitly distinguishes between the perspectives of the two sides when outlining the origins of the conflict.[175] This approach will also be adopted here when necessary.

I. South Ossetia

The Republic of South Ossetia, sometimes styled the State of Alania,[176] is located in the centre of the Caucasus, in the north of Georgia and bordering the Russian region of North Ossetia. Covering 3900 square kilometres, it comprises little more than 5.6 per cent of the Georgian territory.[177] South Ossetia and North Ossetia are both inhabited by Ossetians, who are recognized as a people.[178] The two regions are divided by the Caucasian mountains. In 1989, the

175 See, e.g., Benedikt Harzl, *Der Georgisch-Abchasische Konflikt: eine rechtliche und politische Analyse* (Nomos 2016) 27; Angelika Nussberger, 'Abkhazia', *Max Planck Encyclopedias of International Law* (Oxford University Press 2013); Independent International Fact-Finding Mission on the Conflict in Georgia (n 129).

176 Liz Fuller, 'South Ossetia Referendum On Name Change Steers Clear Of Thornier Unification Issue' (*Radio Free Europe/Radio Liberty*, 8 February 2017).

177 'South Ossetia Profile' (*BBC News*, 25 October 2024).

178 Bill Bowring, 'International Law and Non-Recognized Entities: Towards a Frozen Future?' in Benedikt Harzl and Roman Petrov (eds), *Unrecognized Entities Perspectives in International, European and Constitutional Law* (Brill Nijhoff 2022) 12; Christopher

population was at 98,527.[179] Migration and forced dislocation have lowered this number; recent population estimates vary between 53,000[180] and more than 56,000.[181]

A. History

The conflict in and about South Ossetia is embedded in the history of Georgia and its relations with Russia. The origins of Georgia's national identity date back to the fourth century and the foundation of an autocephalous Georgian church, followed by the development of its own language and alphabet in the fifth century.[182] A distinct Georgian Christian culture and civilization emerged during the time of the United Georgian Christian Kingdom from the eleventh to the thirteenth century.[183] Throughout the centuries, the region of today's Georgia was home to various ethnic groups and entities with their own cultures, traditions, and languages or dialects. The Ossetians are one of these and have their ethnic and linguistic roots in what is today Iran.[184] Heterogeneity is characteristic not only of the population of Georgia but also of its politics: Georgia has been characterized by phases of unification and fragmentation and by a wide variety of political entities. It has been a mosaic of different political entities with varying degrees of autonomy, and throughout the centuries, external powers such as Mongolia, Ottoman Turkey, and Safavid Persia have repeatedly invaded and controlled parts of the land.[185]

Russia entered the Black Sea region in the second half of the eighteenth century seeking greater political influence. Interestingly, it was the Ossetians that invited them: after centuries of isolation, the Ossetians emerged in 1774 when a delegation travelled to St. Petersburg and asked Empress Catherine the Great to incorporate their land into the Russian Empire,[186] a fact that is rarely mentioned in literature. Nine years later the Georgian King Erekle II followed the Ossetians in asking Russia for protection against Turkish and

Waters, 'South Ossetia' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 185.

179 Parlament Respubliki Yuzhnaya Osetiya, 'O Respublike (about the Republic)'.

180 Richard Foltz, *The Ossetes: Modern-Day Scythians of the Caucasus* (IB Tauris 2021) 2.

181 'South Ossetia Profile' (n 177).

182 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 2.

183 Ronald Grigor Suny, *The Making of the Georgian Nation* (2nd edn, Indiana University Press 1994) 38.

184 Foltz (n 180) 1 ff.; David Marshall Lang, *The Georgians* (Praeder 1966) 239.

185 Suny (n 183) 55.

186 Foltz (n 180) 82.

Persian invasions. They concluded the Treaty of Georgievsk, which declared eastern Georgia, including South Ossetia, as a Russian protectorate.[187] However, Russia did not defend Georgia when Persia invaded once more in 1795.[188] When Georgia requested support from Russia again while trying to find an agreement with Persia, Russia answered by proclaiming the annexation of the Georgian kingdom, including South Ossetia.[189] The consequences were protection against external enemies, the unification of a fragmented land, and social progress at the price of Russification and denationalization, including the subordination of the autocephaly of the Georgian Church to the Russian Orthodox Church.[190] Russia and Georgia have their own understanding of this event, considering it a progressive step bringing civilization to the region[191] or a fatal distortion of Georgia's development, respectively.[192]

In the Tsarist period, Georgia was under Russian military administration initially and became fully integrated in 1881, which led to increased Russification. The region of Ossetia was troublesome and rebellious, as the peasants who inhabited the mountain region refused to fulfil duties to their lords, and numerous uprisings took place in the first half of the nineteenth century.[193] The peasants were mainly Ossetians belonging to Georgian aristocratic families.[194] In reaction to the uprisings, Russia separated the problematic region from Georgia as a distinct district under military control. This entity was dissolved again in 1849 and divided into two entities: North Ossetia became part of the Vladikavkaz Military District, and South Ossetia became part of the Tiflis Governorate.[195] South Ossetia remained a rural area with limited industrialization. The suppression of South Ossetian peasants by the Georgian aristocratic families to whom they had to pay taxes for the use of land remained.[196] A chasm developed, across which social class correlated with ethnicity.[197] In 1920, as Georgia rejected Bolshevik ideology, Ossetians participated in uprisings

187 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 2.

188 Ibid.

189 Ibid 2-3.

190 Ibid 2.

191 See Mikail Mamedov, 'From Civilizing Mission to Defensive Frontier: The Russian Empire's Changing Views of the Caucasus (1801-1864)' (2014) 41 Russian History 142.

192 Suny (n 183) 63.

193 Arsène Saparov, *From Conflict to Autonomy in the Caucasus: The Soviet Union and the Making of Abkhazia, South Ossetia and Nagorno Karabakh* (Routledge 2014) 29.

194 Foltz (n 180) 125.

195 Saparov (n 193) 30.

196 Ibid.

197 Ibid 30-31.

against the upper class and fought for the independence of their region but were brutally crushed by the Georgian army, with thousands of deaths.[198] Part of the Ossetian population was expelled and deported — events that are frequently referred to as 'genocide' in the public and political discourse of South Ossetia.[199] What started as a social conflict turned into an ethnic one between Ossetians and Georgians.[200]

With the collapse of the Russian Empire, Georgia became independent as the Democratic Republic of Georgia in 1918. This entity existed for three years and was in control of South Ossetia.[201] In February 1921, the Red Army invaded Georgia and established the Georgian Soviet Socialist Republic (Georgia SSR). The rebellions and bonds of Ossetians with the Bolsheviks continued, and South Ossetia declared its autonomy, a move that was not recognized by Georgia.[202] In April 1922, the Ossetian Autonomous Oblast was declared within the Georgian SSR.[203] North Ossetia also became an autonomous oblast within the Russian Soviet Federative Socialist Republic (Russian SFSR). The two Ossetias aimed to merge into a single political entity and even presented a petition to Stalin in 1925, which was clearly rejected.[204] The situation of the Autonomous Oblast of South Ossetia was complex: no clearly defined borders remained from the entity of the Tsarist period, nor did all ethnic Ossetians within the Georgian SSR live in this specific region.[205] The boundaries were drawn from scratch by the Bolsheviks, and expelled Ossetians were able to return to their land.[206] During the Soviet era, South Ossetia's status was never upgraded, whereas its counterpart North Ossetia turned from an autonomous oblast to an autonomous republic within the Russian SFSR in 1936.[207] Ironically, today the small and economically weak South Ossetia is acknowledged as an independent state by Russia while the bordering North Ossetia, with its much larger population and economy, is 'only' an autonomous republic within Russia.[208]

198 Foltz (n 180) 126; Saparov (n 193) 70, 74.
199 Saparov (n 193) 74.
200 Ibid 73.
201 Ibid 86.
202 Ibid 76.
203 Ibid 82.
204 Foltz (n 180) 127.
205 Saparov (n 193) 77.
206 Ibid 76, 82.
207 Nussberger (n 135) n 5.
208 De Waal and Von Twickel (n 74) 190.

The relationship between South Ossetia and Georgia was mostly peaceful throughout the Soviet era; or at least tensions were hidden.[209] Only in the late 1980s did the relationship obviously become more tense. Whilst South Ossetian officials complained about cultural and linguistic oppression, Georgia criticized the region's disloyalty.[210] Violence broke out in 1989 following the speech in which the Georgian leader Gamsakhurdia referred to the minorities living in Georgia as 'guests' and proposed that South Ossetians should go 'back to their homeland' in North Ossetia.[211] South Ossetia declared its sovereignty as a Soviet Democratic Republic within the USSR on 20 September 1990, but this was abolished by Georgia.[212] In March 1991, South Ossetia voted in favour of the preservation of the USSR, whereas Georgia voted against it and consequently declared its independence on 9 April 1991.[213] In January 1992, South Ossetia voted for independence from Georgia and its incorporation into Russia; this was refused by both Georgia and Russia.[214] South Ossetia held on firmly to its independence and declared it again in May 1992, but the entity was not recognized as a state by any other state. In parallel to the dissolution of the Soviet Union between 1990 and 1992, a violent conflict evolved that caused thousands of casualties and displaced thousands of people.[215] The situation was stabilized through a ceasefire agreement, the Sochi Agreement, signed on 24 June 1992 by the Georgian leader Shevardnadze and the Russian president Yeltsin.[216] They agreed on the withdrawal of all armed formations, demilitarization of the region, the formation of a joint control commission, and a peacekeeping force. In 1994, the Agreement on Further Development of the Georgian-Ossetian Peaceful Settlement Process and on the Joint Control Commission between Georgia, South Ossetia, North Ossetia, and Russia further consolidated the situation.[217] In 1996, the Memorandum on Measures of Providing Safety and Strengthening of Mutual Confidence between the Sides in

209 Foltz (n 180) 126–127.

210 Nussberger (n 135) n 7.

211 Stuart Kaufmann, *Modern Hatreds: The Symbolic Politics of Ethnic War* (Cornell University Press 2001) 111.

212 Nussberger (n 135) n 10.

213 Ibid 11.

214 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 72, 151; Nussberger (n 135) n 11.

215 Waters, 'South Ossetia' (n 178) 176.

216 'Agreement on Principles of Settlement of the Georgian – Ossetian Conflict (Sochi Agreement) (Georgia-Russia), Signed 24 June 1992'.

217 'Agreement on Further Development of Georgian-Ossetian Peaceful Settlement Process and on Joint Control Commission (Georgia-Russia-North Ossetia-South Ossetia), Signed 31 October 1994'.

the Georgian-Ossetian Conflict was signed in Moscow by Georgia, Russia, South Ossetia, North Ossetia, and the CSCE (the predecessor of the OSCE).[218] They agreed that the use of force is no means of conflict resolution and that they would continue negotiations with the aim of achieving full-scale political settlement.[219] The process was supported not only by the CSCE Mission in Georgia but also by the EU offering assistance for post-conflict economic rehabilitation.[220] These mediation efforts managed to keep the conflict relatively calm, or frozen,[221] for about a decade. However, it became increasingly evident that a resolution of the conflict was unlikely in the near future.[222] Over this period, state-building in South Ossetia progressed steadily, with a legislature and courts being established and presidential elections conducted.[223]

In the 2000s, the conflict intensified. The growing antagonism between the US and Russia over NATO expansion in Eastern Europe and the declaration of independence by Kosovo from Serbia in February 2008 were contributing factors.[224] In April 2008, Russia expanded its cooperation with South Ossetia in areas such as trade, economy, social issues, science and technology, information, culture, and education.[225] In July 2008, Georgia and South Ossetia launched artillery attacks on each other's villages and checkpoints.[226] The conflict escalated in August when Georgia and Russia launched military operations. The responsibility for the war starting on 7 August 2008 remains disputed.[227] What is certain is that the events in August 2008 occurred within broader developments over a longer period.[228] The IIFFMCG found in its report (also called the Tagliavini Report) that Georgia's on-the-spot reactions against Ossetian troops before 7 August 2008 were necessary and proportionate, but its subsequent actions did not qualify as self-defence.[229] Conversely,

218 'Memorandum on Measures of Providing Safety and Strengthening of Mutual Confidence Between the Sides in the Georgian-Ossetian Conflict (Georgia-South Ossetia), Signed 16 May 1996'.

219 Ibid, paras 1, 9.

220 Nussberger (n 135) n 14.

221 Ibid 13; Waters, 'South Ossetia' (n 178) 177.

222 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 7; Waters, 'South Ossetia' (n 178) 177.

223 Nussberger (n 135) nn 13–17; Waters, 'South Ossetia' (n 178) 177.

224 De Waal and Von Twickel (n 74) 192.

225 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 27.

226 Ibid 31.

227 Nussberger (n 135) n 27; Waters, 'South Ossetia' (n 178) 178.

228 Waters, 'South Ossetia' (n 178) 178.

229 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 249–251.

South Ossetia's military operations were justified as self-defence until 12 August 2008, but subsequent operations were not, due to the absence of any ongoing attack by Georgia.[230] Finally, Russia's intervention in the war was considered contrary to the prohibition of the use of force, despite attempts at justifying it as humanitarian action, aimed at protecting nationals abroad, and at the invitation of South Ossetia.[231] During the short war, the separatists, backed by Russian forces, recaptured territories on the periphery of the region that had come under Georgian control in 2004.[232] The war ended officially with the adoption of the EU-brokered Six-Point Ceasefire Agreement between Russia and Georgia on 12 August 2008,[233] but violence continued even after that date.[234]

Prior to 2008, an independent state of South Ossetia had not seriously been discussed. Neither the constitution of the USSR[235] nor that of the Georgian SSR[236] nor that of post-Soviet Georgia[237] allowed for its secession. The international community recognized Georgia's independence and accession to the UN on 31 July 1992 and included South Ossetia as an integral part of its territory. UN Resolution 1808 of April 2008, by which point tensions had already heightened, reaffirmed the commitment of all member states to the integrity of Georgia's territory, including South Ossetia.[238] Yet following the war in 2008, a few states recognized South Ossetia's statehood: Russia and Nicaragua in 2008; Venezuela and Nauru in 2009; the microstates of Vanuatu and Tuvalu in 2011, which revoked their recognitions in 2013 and 2014, respectively; and Syria in 2018. South Ossetia had been recognized by its allies Abkhazia, Transnistria, and Nagorno-Karabakh in 2006.[239] Therefore South Ossetia's right to self-determination and secession was suddenly discussed under international law. However, this right has been denied, and the putative state remains largely

230 Ibid 262-263.

231 Ibid 263-289.

232 Andras Racz, *The Frozen Conflicts of the EU's Eastern Neighbourhood and Their Impact on the Respect of Human Rights* (European Parliament 2016) 9.

233 Reprinted in: Independent International Fact-Finding Mission on the Conflict in Georgia, 'Report III' (2009) p. 587-594.

234 Nussberger (n 135) n 26.

235 Constitution (Fundamental Law) of the Union of Soviet Socialist Republics (7 October 1977), Marxist Internet Archive, art 72.

236 Constitution of the Soviet Socialist Republic of Georgia (adopted 13 February 1925, entered into force 15 April 1978), Regional Research Center, art 70, 71.

237 Constitution of Georgia (adopted 24 August1995, entered into force 17 October 1995) Regional Research Center, art 1.

238 UNSC, 'Res 1808 (15 April 2008) UN Doc S/RES/1808', para 1.

239 Nussberger (n 135) n 18.

unrecognized.[240] In the words of the IIFFMCG, South Ossetia is considered an entity 'short of statehood'.[241] Discussions on South Ossetia's putative independence take into account its dependence on Russia, which has increased since the war in 2008 and been further formalized through treaties and agreements, particularly on military and strategic cooperation.[242] Georgia considers Russia's course of action a creeping annexation of its territory.[243]

B. Recent Developments

The present situation in South Ossetia remains tense for various reasons. First, the core issue of the conflict remains unresolved: while Georgia stresses its territorial integrity including South Ossetia, bolstered by international law, South Ossetia de facto forms a state that insists on its independence and is supported at various levels by Russia. Moreover, the area remains highly militarized by Russian troops that have never been withdrawn even though this has been proposed in several agreements.[244] While this militarization is in accordance with South Ossetia's de facto authorities, Georgia has never consented. Russia has even increased the number of troops and placed its personnel of the Fourth Military Base in South Ossetia.[245] Russia exercises overall control over the separatist armed groups.[246] A fence of 80 km has been built in the last decade separating the region from Georgia in a process termed 'borderization'.[247] More land is gradually added by moving the fence, for instance by just a few meters overnight.[248] The region is highly dependent on Russia in various respects. For example, in 2018, 86% of South Ossetia's 7,672 million rouble state budget, 6,592 million roubles, came from Russia.[249]

240 Waters, 'South Ossetia' (n 178) 184 ff.

241 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 134.

242 See Socher (n 5) 133.

243 Civil Georgia, 'Moscow, Tskhinvali Sign "Integration Treaty"' (*Civil Georgia*, 18 March 2015).

244 RULAC, 'Military Occupation of Georgia by Russia' (n 171).

245 David Batashvili, 'Russian Military Forces: Interactive Map' (*Rondeli Foundation: Georgian Foundation For Strategic and International Studies*, February 2022).

246 RULAC, 'Military Occupation of Georgia by Russia' (n 171).

247 ICG, 'Fenced In: Stabilising the Georgia-South Ossetia Separation Line' (6 December 2022).

248 See, e.g., *Grenzerfahrung Russland – Konfliktzone Kaukasus* (Directed by Christof Franzen and Lisa Röösli, SRF Schweizer Radio und Fernsehen 2022).

249 Gosudarstvennoe Informatsionnoe Agentstvo 'Res' Respublika Yuzhnaya Osetiya (State Information Agency 'Res' South Ossetia), 'O Gosudarstvennom Byudzhete Respubliki Yuzhnaya Osetiya Na 2018 God (On the State Budget of South Ossetia for 2018)' (31 December 2017).

This financial assistance has enabled some economic growth in the region; however, the per capita gross domestic product (GDP) of South Ossetia is inferior to that of Russia, Georgia, or North Ossetia.[250] People living in South Ossetia are also closely linked to Russia personally. Large-scale extraterritorial naturalizations by Russia, termed 'passportization', have played an important role in increasing dependence on the patron state ever since 2002.[251] Moreover, nearly all political positions in South Ossetia are held by ethnic Russians.[252]

The war in Ukraine that started in 2022 has widened the political gulf between South Ossetia and Georgia. While it has brought South Ossetia even closer to Russia, it has brought Georgia closer to the West. South Ossetian officials called for accession to Russia after the beginning of the war in 2022, and in March 2024, Russian presidential elections were conducted in South Ossetia and Abkhazia with overwhelming support for Putin.[253] The voting was condemned as illegal by Georgia, the EU, and NATO's Secretary General.[254] Georgia applied for EU membership shortly after the outbreak of the war and was granted Candidate Status by the European Council on 14 December 2023.[255] However, Russia's war against Ukraine has not spilled over into Georgia yet, despite initial concerns. People in South Ossetia have even spoken of a remarkably calm period since 2022.[256]

II. Abkhazia

The Autonomous Republic of Abkhazia is located in the extreme west of Georgia on the coast of the Black Sea. Like South Ossetia, it has a direct border with Russia to the north. The region is limited on the northern and eastern sides by the Psou river and the Caucasian Mountains, in the south by the Inguri river, and in the west by the sea. The region covers 8665 square kilometres, which is more than twice the area of South Ossetia, and comprises 12.6% of Georgian

250 AB Sebentsov and others, 'Economic Development as a Challenge for "De Facto States": Post-Conflict Dynamics and Perspectives in South Ossetia' (2022) 12 Regional Research of Russia 414, 418.

251 Anne Peters, 'Passportisation: Risks for International Law and Stability—Part I' (*EJIL: Talk!*, 9 May 2019).

252 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 132.

253 ICG, 'CrisisWatch: Tracking Conflict Worldwide, Georgia'.

254 Ibid.

255 European Council, 'Conclusions of the European Council Meeting (14 and 15 December 2023) EUCO 20/23' n 16.

256 ICG, 'Fenced In: Stabilising the Georgia-South Ossetia Separation Line' (n 247).

territory.[257] More than 245,000 people live in the region, five times as many as in South Ossetia.[258] Like Ossetians, Abkhazians are recognized as a people.[259] The histories of Abkhazia and South Ossetia are partly similar but also distinct in many aspects.

A. History

Like South Ossetia, Abkhazia is also inhabited by an ethnic group distinct from the Georgian ethnicity. The Abkhazians, or Apsua as they call themselves, are a western Caucasian ethnic group that played an important role in the cultural development of the Caucasus.[260] According to the Abkhazian narrative, they are one of the earliest ethnic groups to inhabit the Caucasus, since the fifth century BC, whereas Georgians immigrated to the region later.[261] In contrast, Georgian historians assert that the region has been populated at least partially by Georgians since ancient times.[262] Like South Ossetia, the region has been invaded and influenced by various external powers throughout the centuries: Romans, Byzantines, Mongols, Ottomans, and Russians.[263] Both regions have experienced several alternations between separation and unification in their territories and politics.[264] Yet, in comparison to South Ossetia, Abkhazia was more powerful and autonomous, and at times even annexed parts of Georgia.[265] Notably, the Abkhazian ruler Leon II ended the Byzantine rule over the country and united western Georgia in the 780s, calling it the Abkhazian kingdom.[266] In the tenth century, Abkhazia was united with regions further to the east, forming the kingdom of Georgia.[267] The Ottomans ruled Abkhazia and western Georgia from the mid-sixteenth century. They largely replaced Christianity, which had been introduced in the

257 'Abkhazia Profile' (*BBC News*, 28 August 2023).

258 Ani Zirakashvili, 'The Population of Abkhazia and Ethnic Composition' (*Rondeli Foundation: Georgian Foundation For Strategic and International Studies*, 12 May 2021).

259 Bowring (n 178) 12.

260 Sergey Markedonov, 'The Conflict in and over Abkhazia' in Anton Bebler (ed), *'Frozen Conflicts' in Europe* (Verlag Barbara Budrich 2015) 74.

261 TM Shamba and AI Negroshin, *Abkhaziya. Pravovye Osnovy Gosudarstvennosti i Suvereniteta (Abkhazia. Legal Foundations of Statehood and Sovereignty)* (2nd edn, RGTEU Publishing House 2004) ch 1.1.

262 Nussberger (n 175) n 2.

263 Ibid 3.

264 Suny (n 183) 64.

265 Nussberger (n 175) n 3.

266 Tim Potier, *Conflict in Nagorno-Karabakh, Abkhazia and South Ossetia: A Legal Appraisal* (Kluwer Law International 2001) 8; Suny (n 183) 29.

267 Potier (n 266) 8.

sixth century,[268] by Islam.[269] Nevertheless, Abkhazia retained some autonomy under Ottoman rule.

When the Georgian King Erekle II and the Russian Empress Cathrine the Great concluded the Treaty of Georgievsk in 1783 to declare eastern Georgia, including South Ossetia, a Russian protectorate, Abkhazia was not affected.[270] Only in 1810 was the region conquered and annexed by the Russian Empire.[271] Initially, Abkhazia retained a high degree of autonomy and was ruled by its traditional elites, unlike the regions to the east,[272] but over time, the Russian Empire gained more control over Abkhazia. It abolished local autonomy in 1864 and integrated Abkhazia into the Sukhumi district in 1883.[273] Rebellions by Abkhazians against the Tsarist regime resulted in mass repressions and the expulsion of the mostly Muslim population to the Ottoman Empire, and Georgians, Armenians, Greeks, Russians, and others were invited to settle the newly vacant land.[274]

Following the Russian Revolution in 1917, the Bolsheviks founded the Abkhaz People's Council to pave the way for establishing the Soviet Socialist Republic of Abkhazia.[275] However, in 1918, the Democratic Republic of Georgia was proclaimed; this included the territory of Abkhazia, albeit with some autonomy.[276] The Democratic Republic existed only until the Soviets invaded in 1921 and proclaimed the Soviet Socialist Republic of Georgia (Georgian SSR) and the Soviet Socialist Republic of Abkhazia (Abkhazian SSR).[277] By establishing an independent Soviet Socialist Republic, Abkhazians sought protection from Soviet Russia against Georgia.[278] Notably, Abkhazia's status as a Soviet Socialist Republic was recognized by the Georgian SSR shortly after its proclamation.[279] The Abkhazian SSR stressed its independence in article 5 of its Constitution of 1925,[280] emphasizing its sovereignty and independence

268 Ibid.

269 Nussberger (n 175) n 3.

270 Ibid 4.

271 Ibid.

272 Saparov (n 193) 20.

273 Nussberger (n 175) n 4.

274 Eiki Berg and Shpend Kursani, *De Facto States and Land-for-Peace Agreements: Territory and Recognition at Odds?* (Routledge 2021) 153.

275 Nussberger (n 175) n 5.

276 Ibid.

277 Ibid 5-6.

278 Berg and Kursani (n 274) 153.

279 Nussberger (n 175) n 6.

280 Constitution of the Soviet Socialist Republic of Abkhazia (1 April 1925), AbkhazWorld.

from any other powers. However, the Union Treaty of 1922 united the Georgian and Abkhazian SSRs; this treaty entailed close military, political, and financial cooperation and left the foreign policy of both SSRs fully within Georgian competence.[281] In 1931, Abkhazia's status was downgraded from that of an SSR to that of an autonomous republic within Georgia, and a process of Georgianization was rapidly implemented.[282] For example, the Latin alphabet of the Abkhazian language was replaced by the Georgian alphabet, Abkhaz-language schools were closed, and other ethnic groups were settled in Abkhazia.[283] As a countermeasure, some compensatory measures for Abkhaz people, such as quotas in government and administrative positions, were implemented, but these were understood as discriminating against ethnic Georgians.[284] In 1931, 1957, 1967, and 1977, Abkhazia prepared appeals to the leadership of the USSR for secession from the Georgian SSR, either to join the Russian SSR or to form a separate Abkhazian SSR.[285]

Throughout the Soviet era, relations between Georgia and Abkhazia were strained but not violent. Tensions were aggravated in 1989 when the USSR began to dissolve and Georgia moved towards independence.[286] Abkhazia declared its state sovereignty on 25 August 1990, but this was judged invalid by Georgia.[287] The sharp divide between the two camps again became apparent when Georgia held two referenda in early 1991 for either the preservation of the Soviet Union or the independence of Georgia. Whereas Abkhazia, like South Ossetia, voted to remain in the USSR, Georgia voted for independence, which it declared on 9 April 1991.[288] After the dissolution of the Soviet Union in December 1991, Georgian territory was internationally recognized as including Abkhazia. Abkhazia declared secession and independence from Georgia on 23 July 1992, but this has not been recognized.[289] In August 1992, Georgian troops entered Abkhazia, and a war broke out, leading to 8000–9000 deaths; some 250,000 people, mostly Georgians, being internally displaced; and gross human rights violations on both sides.[290]

281 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 67; Nussberger (n 175) n 6.

282 Berg and Kursani (n 274) 153.

283 Nussberger (n 175) n 10.

284 Ibid.

285 Markedonov (n 260) 77.

286 Nussberger (n 175) n 11.

287 Ibid.

288 Ibid.

289 Ibid 12.

290 Berg and Kursani (n 274) 154.

The Moscow Agreement of 3 September 1992 recognized Georgia's territorial integrity, called for a ceasefire, and declared the neutrality of Russian troops located in the area,[291] but the Agreement fell apart almost immediately.[292] In October 1992, Abkhazia, backed by volunteers from the North Caucasus and other parts of Russia, initiated an attack that resulted in a military defeat for Georgia: Abkhazia regained territory in the west, overcame its 'sandwich position' encircled by Georgia, and by consequence obtained a direct border with Russia.[293] On 27 July 1993, an agreement was concluded on a ceasefire and monitoring arrangements.[294] It forbade the introduction of further forces into the area, foresaw a Russian-Abkhaz-Georgian monitoring group, and provided for a joint commission by observers from the UN and CSCE. Subsequently, UNSC resolution 858 of 24 August 1993 established the UN Observer Mission in Georgia (UNOMIG), tasked with examining reports on ceasefire breaches and resolving incidents with involved parties.[295] The mandate was prolonged until 2009 to allow time for a comprehensive political settlement, when Russia made use of its veto power in the UNSC and ended the mission.[296] Further agreements have since been concluded, such as one in 1994 including the voluntary return of refugees and internally displaced persons to Abkhazia and admitting that Abkhazia 'shall have its own constitution, legislation, and appropriate state symbols such as an anthem, emblem and flag'.[297] Moreover, the Agreement on a Ceasefire and Separation of Forces[298] stationed a Commonwealth of Independent States (CIS) peacekeeping force, composed solely of Russian soldiers, in the conflict zone, and this was subsequently bolstered by the UNSC.[299] In comparison to South Ossetia, Abkhazia received

291 UNSC, 'Annex to Letter Dated 8 September 1992 from the Charge d'Affaires A.I. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council (Signed 8 September 1992) UN Doc S/24523'.

292 Grant (n 4) 387.

293 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 77.

294 'Agreement on a Ceasefire in Abkhazia and Arrangements to Monitor Its Observance (Georgia-Abkhazia-Russia), Signed 27 July 1993' paras 1, 2, 4.

295 UNSC, 'Res 858 (25 August 1993) UN Doc S/RES/858'.

296 Nussberger (n 175) n 15.

297 UNSC, 'Annex I to Letter Dated 5 April 1994 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council (Signed 4 April 1994) UN Doc S/1994/397', para 6.

298 UNSC, 'Annex I to Letter Dated 17 May 1994 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council (Signed 14 May 1994) UN Doc S/1994/583'.

299 Nussberger (n 175) n 6.

more international attention and involvement: the CIS and the UN were present, and Russia acted as a mediator.[300]

The war in August 2008 took place mainly in South Ossetia; however, Abkhazia also entered a phase of violence with Georgia that year. Abkhaz and Russian troops attacked the Georgian positions in the upper Kodori valley and established full control over the entire territory of the former Abkhazian Autonomous Soviet Socialist Republic.[301] The IIFFMCG found that this attack was a breach of the Agreement on a Ceasefire and Separation Forces of 1994, because the upper Kodori valley was not part of Abkhaz-controlled territory.[302] Consequently, the events were judged to breach the prohibition on the use of force in the sense of article 2(4) UN Charter[303] and constituted an armed attack against Georgia in the sense of article 51 UN Charter.[304] The justifications presented by the Abkhaz side referred to liberation of the Kodori Valley, safeguarding civilians against terrorist assaults, prevention of a Georgian offensive, and the need to establish a second front in line with the Treaty on Friendship and Cooperation with South Ossetia, but these were not considered lawful.[305] As in South Ossetia, the five-day war in August 2008 officially ended with the EU-brokered Six-Point Ceasefire Agreement mentioned above. In contrast to South Ossetia in 2008, Abkhazia was not the target of an armed attack prohibited by international law immediately before being recognized as a state by Russia.[306]

As in the case of South Ossetia, an independent state of Abkhazia was not seriously discussed prior to 2008. No UN member state had recognized its independence before the war, whereas they and the UNSC had repeatedly referred to the territorial integrity of Georgia.[307] However, acknowledgment became a topic of discussion after the war, and the countries that acknowledged South Ossetia's independence did the same for Abkhazia: Russia and Nicaragua in 2008; Venezuela and Nauru in 2009; the microstates of Vanuatu and Tuvalu in 2011, which revoked their recognitions in 2013 and 2014, respectively; and Syria in 2018. Additionally, South Ossetia, Transnistria, and Nagorno-Karabakh rec-

300 Ibid 14.

301 Markedonov (n 260) 98.

302 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 291-294.

303 Charter of the United Nations (adopted 26 Juni 1945, entered into force 24 October 1945) 1 UNTS XVI.

304 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 291-294.

305 Nussberger (n 175) n 18.

306 Ibid 34.

307 UNSC, 'Res 1808 (15 April 2008) UN Doc S/RES/1808' (n 238) para 1.

ognized Abkhazia as an independent state.[308] Notably, Abkhazia's state-building process was more advanced than South Ossetia's. It was considered a 'state-like entity' and a 'stabilized de facto regime' prior to the war in 2008.[309] Consequently, recognition was refused by the international community 'for political reasons only', according to Nussberger.[310] However, arguably Abkhazia's state-like quality has diminished since 2008, due to the subsequent conclusion of several agreements[311] that make it more dependent on Russia, for instance for military cooperation, border surveillance, laws, and the economy.[312] In 2020, a 45-point programme was introduced on the formation of a common social and economic space, which Georgia saw as another step to a de facto annexation of Abkhazia by Russia.[313] The agreement plans the harmonization of Abkhazian with Russian laws in social, economic, health, and political spheres.[314]

B. Recent Developments

Until today, the conflict in Abkhazia remains unresolved, and the overall situation tense. Again, the region's status is the core issue of the dispute: while Georgia claims its territorial integrity, bolstered by international law, the de facto state of Abkhazia insists on its independence, backed by Russia and a few other states. It is noteworthy that Russia's role in Abkhazia has changed: whereas in the early 1990s it held a peacekeeping status, and even recognized Georgia's territorial integrity in article 1 of the Moscow Agreement of 1992,[315] it later became the patron of the claims for self-determination from Abkhazia.[316] Peacekeepers were replaced by military troops of the seventh Military Base under agreement with Abkhazian leaders but without Georgia's consent.[317] They are still present and exercise overall control over the separatist

308 Nussberger (n 175) n 33.

309 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 134; Nussberger (n 175) nn 23, 31.

310 Nussberger (n 175) n 27.

311 See Socher (n 5) 141.

312 Berg and Kursani (n 274) 155; Helge Blakkisrud and others, 'Navigating de Facto Statehood: Trade, Trust, and Agency in Abkhazia's External Economic Relations' (2021) 62 Eurasian Geography and Economics 347, 353.

313 Civil Georgia, 'Moscow, Sokhumi Sign "Common Social-Economic Space" Program, Tbilisi Decries' (*Civil Georgia*, 25 November 2020).

314 Ibid.

315 UNSC, 'Annex to Letter Dated 8 September 1992 from the Charge d'Affaires A.I. of the Permanent Mission of the Russian Federation to the United Nations Addressed to the President of the Security Council (Signed 8 September 1992) UN Doc S/24523' (n 291).

316 Markedonov (n 260) 99.

317 Batashvili (n 245).

armed groups.[318] Dependence on Russia remains in both financial and personal terms.[319] Through 'passportization', almost all Abkhazians have obtained Russian citizenship, which has effectively turned Abkhazia into a 'Russian protectorate'.[320] Thus, similarly to South Ossetia, recent developments have intensified relations and increased military, economic, political, and personal dependency on Russia.[321]

As in the case of South Ossetia, the war in Ukraine has not spilled over to Abkhazia. However, the war once more clearly illustrated the conflict between Georgia, supported by the West, and the break-away region, supported by Russia. As mentioned above, both regions participated in Russia's presidential elections in March 2024, while Georgia waits for EU membership.

III. Transnistria

The Pridnestrovian Moldavian Republic, also referred to as Transnistria and as Transdniestria, comprises a strip of land in eastern Europe. The territory is separated from its parent state, Moldova, by the Dniester river: Moldova is located on the west of the river, Transnistria on the east, bordering Ukraine. Literally, trans-Dniester means across the Dniester river. The region encompasses 4163 square kilometres and comprises 12.3% of Moldova's territory.[322] Its population is 465,000.[323] The Transnistrian conflict contrasts with the previous two in terms of ethnicity: no Transnistrian people or language exists.[324] The population and language is Moldovan for the most part, although with a higher proportion of Russians.[325] The conflict concerns geopolitical preferences and social perceptions rather than ethnic or religious animosities.[326] However, politicians on both sides emphasize the distinct history, language, and culture when attempting to justify their positions.[327]

318 Markedonov (n 260) 99; RULAC, 'Military Occupation of Georgia by Russia' (n 171).

319 See, e.g., Elizaveta Egorova and Ivan Babin, 'Eurasian Economic Union and the Difficulties of Integration: The Case of South Ossetia and Abkhazia' (2015) 14 Connections 87.

320 Berg and Kursani (n 274) 156.

321 Markedonov (n 260) 99.

322 'Transnistria Profile' (*BBC News*, 25 October 2024).

323 Ibid.

324 Bowring (n 178) 12.

325 Natalya Belitser, 'The Transnistrian Conflict' in Anton Bebler (ed), *'Frozen Conflicts' in Europe* (Verlag Barbara Budrich 2015) 45.

326 Ibid.

327 Steven R Roper, 'From Frozen Conflict to Frozen Agreement, The Unrecognized State of Transnistria' in Tozun Bahcheli, Barry Bartmann and Henry Srebrnik (eds), *De Facto States, The Quest for Sovereignty* (Routledge 2004) 102.

A. History

Throughout the centuries, the strip of land that is Transnistria has undergone constant changes in affiliation and has been a crossroad of Russian, Ukrainian, Romanian, Jewish, and German cultures, a 'classic borderland where ethnic identities have been fluid and situational'.[328] From around the ninth and tenth centuries to the thirteenth century, Transnistria belonged to the Kievan Rus and the Galicia-Volhynia principality.[329] In the fifteenth century, the Moldovan principality emerged under Ștefan (Stephen) the Great, who was able to defend the territory against Ottoman invasion and even enlarged the territory.[330] Nevertheless, in the late sixteenth century the Moldovan principality fell under Ottoman rule.[331] After the Russo-Turkish war (1787–1791), the Peace Treaty of Iasi of 1791 designated the Dniester river as the dividing line between the Russian and the Ottoman Empire: the territory east of the river, including Transnistria, belonged to the Russian Empire, that to the west of it to the Ottoman Empire.[332] After the next Russo-Turkish war (1806–1812), which was concluded by the Treaty of Bucharest, the Russian Empire extended its reach and annexed territories to the west of the Dniester river.[333] This land, to the west of the Dniester and to the east of the Prut, became known as Bessarabia.[334] Although Transnistria and Bessarabia now both belonged to the Russian Empire, they developed quite differently: while Bessarabia remained a rural and agricultural area, Transnistria fell under strong Slavic influence and became urbanized and economically developed.[335] Efforts to assimilate Bessarabia to Russia began to balance the differences: the local government was replaced and the Romanian language was replaced by Russian.[336] However, after losing the Crimean War (1854–1856), Russia was forced to give up Bessarabia, which was included in the Kingdom of Romania established in 1859.[337] The Treaty of Berlin of 1878 restored Bessarabia to Russia,

328 Charles King, *The Moldovans: Romania, Russia, and the Politics of Culture* (Hoover Institution Press 2000) 181.

329 Ibid 179; Pål Kolstø, Andrei Edemsky and Natalya Kalashnikova, 'The Dniester Conflict: Between Irredentism and Separatism' (1993) 45 Europe-Asia Studies 973, 976.

330 Kolstø, Edemsky and Kalashnikova (n 329) 976.

331 Borgen (n 58) 13.

332 Kolstø, Edemsky and Kalashnikova (n 329) 977.

333 King (n 328) 180; Kolstø, Edemsky and Kalashnikova (n 329) 977.

334 Kolstø, Edemsky and Kalashnikova (n 329) 977.

335 Ibid 977.

336 Roper (n 327) 103.

337 Bill Bowring, 'Transnistria' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014) 160.

and the newly founded Romanian state received Dobruja in compensation.[338] Moldova vanished from the map.[339]

Amid the turmoil of the Russian Revolution, Bessarabia's and Transnistria's paths separated again. Like many other provinces of Russia, Bessarabia sought independence, and its predominantly ethnic Romanian population aimed to join Romania.[340] In contrast, Transnistria remained Russian and subsequently became part of the Soviet Union. In 1924, the Moldovan Autonomous Soviet Socialist Republic (MASSR) was founded. It was an autonomous province of the Ukrainian Soviet Socialist Republic and included Transnistria along with parts of today's Ukraine.[341] Yet, during the Second World War, the east and west banks of the Dniester river were merged again. The Ribbentrop-Molotov Pact of 1939 transferred Bessarabia from Romania to the USSR. The ceded territory, together with the former MASSR, became the Moldavian Soviet Socialist Republic (Moldavian SSR) in 1940.[342] To strengthen and legitimize the new nation, Soviet policy emphasized the distinction between Moldovans and Romanians.[343] For instance, Soviet linguists were instructed to present fundamental differences between the Romanian and the Moldovan languages—findings that were criticized by scholars outside the USSR.[344]

Unified within the Moldavian SSR, Transnistria and Bessarabia shared both similarities and differences. Of course, both were infused with the same Soviet political culture, ruled by the same administrative centres, and incorporated into the Soviet economy.[345] However, while Transnistria became a centre of the Soviet defence sector with heavy industries and military industrial complexes, Bessarabia developed as a centre of agriculture.[346] Transnistria had a privileged status within the Moldavian SSR and played an important role that was disproportionate to its small size.[347] Additionally, it experienced a greater degree of 'Sovietization' than Bessarabia, and due to its high concentration of military personnel, it was even considered one of the most Sovietized

338 Ibid.

339 Kolstø, Edemsky and Kalashnikova (n 329) 977; Roper (n 327) 103.

340 Borgen (n 58) 13.

341 Ibid; King (n 328) 181; Kolstø, Edemsky and Kalashnikova (n 329) 978.

342 Borgen (n 58) 13.

343 Charles King, 'Moldovan Identity and the Politics of Pan-Romanianism' (1994) 53 Slavic Review 345; Roper (n 327) 105.

344 King (n 343) 149.

345 Kolstø, Edemsky and Kalashnikova (n 329) 979.

346 Graeme P Herd, *Moldova and the Dniestr Region: Contested Past, Frozen Present, Speculative Futures?* (Defence Academy of the United Kingdom 2005) 2; King (n 328) 183.

347 King (n 328) 182-183.

territories within the USSR.[348] Given the differences in social development, economic structure, and general importance within the USSR, by the end of the 1980s Transnistria and Bessarabia were two 'increasingly distinct worlds'.[349]

In the late 1980s, the Moldovan national movement grew stronger, with an orientation towards Romania and away from Russia. In 1989, the parliament of the Moldavian SSR passed a series of language laws that declared the Moldovan language as the official state language and required the use of the Latin alphabet instead of the Cyrillic.[350] This new legislation is widely regarded as a central factor leading to the outbreak of the conflict, since it was perceived as a suppression of the Russian language.[351] Moreover, the Moldavian Supreme Soviet adopted a flag and an anthem that were the same as Romania's.[352] Not surprisingly, some called for reunification with Romania.[353] Moldova declared its sovereignty on 23 June 1990 and its independence as the Republic of Moldova on 27 August 1991.[354] Opposing Moldova's emancipation from the Soviet Union, and fearing incorporation into Romania as the next step, Transnistria established the independent Pridnestrovian Moldavian Republic in 1990.[355] Gagauzia, a region in the south of Moldova, likewise proclaimed the Republic of Gagauzia. When parliaments and presidents were elected for these newly established entities, the central government in Chisinau declared these actions null and void.[356]

The situation escalated into a short war between Transnistria and Moldova from March to July 1992. The Russian Fourteenth Army, stationed in Transnistria since Soviet times, directly and indirectly supported the secessionists.[357] Moreover, they were supported by Cossacks — an association recognized by Russian authorities[358] — and volunteer fighters from other parts of the Soviet Union.[359] The fighting caused several hundred deaths and some 100,000 people becoming refugees.[360] In contrast, the dispute in Gagauzia did not escalate

348 Ibid 184.
349 Ibid.
350 Kolstø, Edemsky and Kalashnikova (n 329) 981.
351 OSCE, 'Transdniestrian Conflict: Origins and Issues (10 June 1994)' 3.
352 *Ilaşcu and Others v Moldova and Russia* App No 48787/99 ECtHR (GC) 8 July 2004, para 29.
353 OSCE, 'Transdniestrian Conflict: Origins and Issues' (n 351) 1.
354 Ibid.
355 Ibid 1-2.
356 Ibid 2.
357 Ibid; *Ilaşcu and Others v Moldova and Russia* (n 352), para 203.
358 *Ilaşcu and Others v Moldova and Russia* (n 352), para 66.
359 Borgen (n 58) 16.
360 OSCE, 'Transdniestrian Conflict: Origins and Issues' (n 351) 2.

into violence, and in 1994, a special law adopted by Moldova granted the autonomous status of this region.[361] The result of the war in Transnistria was that the Moldovan central government in Chisinau lost control over the region that from now on formed a distinct administrative entity.[362] On 21 July 1992, a ceasefire agreement was concluded between Moldova and Russia promoting a peaceful solution to the armed conflict.[363] The agreement provided for an immediate ceasefire and the establishment of a demilitarized security zone between the parties, implemented by a joint control committee involving Russia, Moldova, and Transnistria.[364] In a joint statement, the presidents of Moldova and Russia outlined a set of principles that included respect for the sovereignty and territorial integrity of Moldova, the need for a special status for Transnistria and the right of its population to decide on its own future if Moldova sought to reunite with Romania.[365] Moreover, the parties agreed on the gradual withdrawal of the Russian Fourteenth Army.[366]

Since the ceasefire in 1992, the conflict has resulted in almost no further violence. However, the core issue of the status of Transnistria has not been resolved, despite many attempts. In 1993, the CSCE published Report Nr. 13, which offered a basis for future talks about a solution to the conflict: it proposed establishing a 'Special Region of Transnistria with its own regional executive, elective assembly, and court', but this region would remain an integral part of Moldova.[367] Besides the CSCE, Russia, Ukraine, and the CIS have also repeatedly offered mediation without a solution being achieved. In 1997, for instance, the conflict parties signed the Moscow Memorandum on the normalization of the relations between the Republic of Moldova and the Pridnestrovian Moldavian Republic.[368] The document foresaw the establishment of a 'common state' within the borders of Moldavian SSR as of 1990.[369] Yet the term 'common state' was not defined, which led to criticisms and distinct in-

361 Weller (n 145) 119.

362 Borgen (n 58) 17; King (n 328) 189; OSCE, 'Transdniestrian Conflict: Origins and Issues' (n 351) 2.

363 UNSC, 'Appendix to Note Verbale Dated 31 July 1992 from the Permanent Mission of Moldova to the United Nations Addressed to the Secretary General (6 August 1992) UN Doc S/24369'.

364 Ibid, art 1, 2.

365 OSCE, 'Transdniestrian Conflict: Origins and Issues' (n 351) 2.

366 Kolstø, Edemsky and Kalashnikova (n 329) 994.

367 CSCE Mission to Moldova, 'Report No 13 by the CSCE Mission to Moldova (1993)' 1.

368 'Memorandum on the Bases for Normalization of Relations Between the Republic of Moldova and Transdneistria (Moldova-Transnistria), The Moscow Memorandum, Signed 8 May 1997'.

369 Ibid, para 11.

terpretations of its meaning by the parties.[370] The Memorandum failed, and according to Borgen, it was never submitted to the Moldovan Parliament for ratification and its status under Moldovan law was unclear.[371] It was followed by the Memorandum on the Basic Principles of the State Structure of a United State in Moldova, also called the Kozak Plan, which envisaged a federal state structure and was a near-resolution. However, the plan failed in the last minute, and negotiations on the issue of final political status had turned into a prolonged deadlock.[372] The OSCE, EU, and US are reported to have opposed the plan, fearing it would formalize the status quo and hinder Moldova's future as a viable European state.[373] Thus, in the absence of any basis on which to negotiate the status of Transnistria, both sides, with the OSCE Mission to Moldova, began to concentrate on confidence and security building measures.[374] The discussions included not only Transnistria, Moldova, Ukraine, Russia, and the OSCE, but also the EU and the US, a format that has hence been called 5 + 2. Since 2016, modest progress has been made in implementing such confidence-building and integration measures, mediated by the OSCE and accepted by both sides.[375] Transnistria's right to external self-determination has been dismissed and has been seriously discussed only in the case that Moldova surrenders its statehood or merges with Romania.[376] Until today, Transnistria has not been recognized as a state by any other state, not even by Russia, only by its allies South Ossetia and Abkhazia.[377]

B. Recent Developments

Although Transnistria has not experienced outbreaks of violence since the war in 1992, its status remains unresolved. International law and the international community protect Moldova's territorial integrity, including the east bank of the Dniester. However, Transnistria insists on its statehood and has a de facto government, parliament, president, military power, and constitution.

370 Borgen (n 58) 18.

371 Ibid.

372 Claus Neukirch, 'From Confidence Building to Conflict Settlement in Moldova?' in Institute for Peace Research and Security Policy at the University of Hamburg / IFSH (ed), *OSCE Yearbook 2011* (Nomos 2012) 145; de Waal and Von Twickel (n 74) 145.

373 Borgen (n 58) 19.

374 Neukirch, 'From Confidence Building to Conflict Settlement in Moldova?' (n 372) 139.

375 De Waal and Von Twickel (n 74) 136.

376 CSCE Mission to Moldova (n 367) 1.

377 'Abkhaziya, Yuzhnaya Osetiya i Pridnestrovye priznali nezavizimost' drug druga i prizvali vzekh k etomu zhe (Abkhazia, South Ossetia and Transnistria recognized each other's independence and called on everyone to do the same)' (*NEWSru.com*, 17 November 2006).

There is no desire among the population to change this and reunite.[378] Like South Ossetia and Abkhazia, Transnistria's putative state is dependent on the support of Russia in many respects.[379] Russia still has military personnel and ammunition there that belonged to the Fourteenth Army in Soviet times and ought to have been withdrawn according to various agreements.[380] These troops remain without Moldova's consent and despite international calls for their withdrawal.[381] The situation is considered an occupation, except for Russia's peacekeeping contingent, which is present with Moldova's consent.[382] The ECtHR has repeatedly found that Russia exercises effective control over the territory, as will be discussed below in Part III (chapter III, C, 1).

Financially, Transnistria profits, for example, from the subsidy of free gas provided by the Russian gas giant Gazprom. Debts resulting from the free use of gas by Transnistria throughout the last decade are estimated at between 6 and 7.5 billion US dollars.[383] Despite its dependence on Russia, Transnistria is much less isolated economically or socially than South Ossetia and Abkhazia. It has an export market for industrial plants and light industry and certainly also benefits from Moldova's trade agreement with the EU, the Deep and Comprehensive Free Trade Area (DCFTA) that began operating in 2014.[384] Transnistria's social and cultural life benefits from a high level of contact between people east and west of the Dniester. Because Transnistria has never closed its borders, people can always travel to both Moldova and Ukraine.[385]

Since Russia started the war against Ukraine in 2022, the relative stability of the situation in Transnistria has been more threatened than in South Ossetia and Abkhazia. Its geographical location speaks for itself. In April 2022, a Russian commander announced a plan to establish a corridor from Russian-occupied eastern Ukraine through Odessa to Transnistria.[386] Fears of a spill-

378 De Waal and Von Twickel (n 74) 137.

379 ICG, 'Moldova: Regional Tensions over Transdniestria, Europe Report No 157—17 June 2004' 1.

380 OSCE, 'Istanbul Document 1999 (Istanbul Summit), 19 November 1999, SUM.DOC/2/99' 49-50, para 19; UNGA, 'Res A/72/282 (26 June 2018), UN Doc A/RES/72/282'.

381 See, e.g., PACE, 'The Honouring of Obligations and Commitments by the Republic of Moldova, Res 1955 (2 October 2013)' nn 27-29; 'General Assembly Adopts Texts Urging Troop Withdraw from Republic of Moldova, Strengthening Cooperation in Central Asia' (*UN Press*, 22 June 2018).

382 RULAC, 'Military Occupation of Moldova by Russia' (n 171).

383 de Waal and Von Twickel (n 74) 150-151.

384 Ibid 151.

385 Ibid 147.

386 Roth, 'Russian Commander Suggests Plan Is for Permanent Occupation of South Ukraine' *The Guardian* (22 April 2022).

over of the war into Transnistria and attacks by Russia on Moldova have been expressed by the Moldovan government in Chisinau.[387] Explosions,[388] an attack on the de facto ministry of the interior,[389] the murder of a politician,[390] and drone attacks on a military base[391] all illustrate that the situation is tense and risky, especially because the originators of these events remain unidentified. What is sure is that the war has brought Moldova closer to the West; the EU granted it Candidate Status for membership in 2022.[392] Transnistria is in a tricky position, being clearly allied with Russia but having always fostered deep ties with Ukraine, especially in the economic sphere.[393]

IV. Nagorno-Karabakh

The Republic of Nagorno-Karabakh or Republic of Artsakh, simply termed Nagorno-Karabakh, covered a landlocked mountainous region in the Caucasus that contained 3170 square kilometres and thus was smaller than the other three regions.[394] It was entirely surrounded by Azerbaijan, and only the Lachin Corridor connected the territory to its patron state, Armenia. The population of the region was Armenian[395] and totalled 120,000 people in 2022.[396] This conflict has been judged the most dangerous of the four cases, considering that it saw repeated escalations of violence in recent years.[397] Both Azerbaijan and Armenia were in a perpetual state of military readiness.[398] In September 2023, Azerbaijan, which Nagorno-Karabakh had always

387 ICG, 'CrisisWatch: Tracking Conflict Worldwide, Moldova' Post from October 2023; see also Vivian Beaupoil, 'Zeitenwende: Geopolitics of de Facto States and the Russian War against Ukraine—The Case of Transdniestria' in Klemens H Fischer (ed), *European Security: Put to the Test* (Nomos 2022).

388 Monika Pronczuk, 'Explosions in Separatist Region of Moldova Raise Fears of Wider War' *New York Times* (26 April 2022).

389 ICG, 'CrisisWatch: Tracking Conflict Worldwide, Moldova' (n 387) Post from April 2022.

390 Ibid, Post from July 2023.

391 Ibid, Post from March 2024.

392 European Council, 'Conclusions of the European Council Meeting (23 and 24 June 2022), EUCO 24/22' n 11.

393 Beaupoil (n 387) 157; Fischer (n 90) 5 where this position is already described after Russia's annexation of Crimea.

394 'Nagorno Karabakh Profile' (*BBC News*, 30 January 2024).

395 Bowring (n 178) 12.

396 'Nagorno Karabakh Profile' (n 394).

397 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 2014) 214.

398 De Waal and Von Twickel (n 74) 206.

legally belonged to, regained control over the territory in a short war. In January 2024, the Republic of Nagorno-Karabakh officially ceased to exist, and the de facto and the de jure status of the region now coincide. Therefore, we no longer consider Nagorno-Karabakh a frozen conflict. However, for three decades it was one, which is why it remains relevant to our analysis. Unless otherwise specified, statements about and analysis of this conflict refer to the period before September 2023.

A. History

Armenian and Azerbaijani historians both consider the region of Nagorno-Karabakh as an integral part of their culture and nation and thus have diverging views of its history.[399] Armenian scholars argue that the original inhabitants were Armenians and that the region was part of the Armenian kingdom from the first century BC.[400] In contrast, Azerbaijani scholars stress that the Armenian King Tigran II relinquished most of the territory and that by the end of the first century BC it formed part of Caucasia Albania, from which Azeris descend.[401] According to the Azerbaijani view, Armenians portray an idealized picture of the Armenian kingdom that is contrary to reality.[402] What is clear is that in the history of Nagorno-Karabakh, like in South Ossetia and Abkhazia, various empires have clashed throughout the centuries. It, too, has been home to many ethnic groups and religions. From the third to the thirteenth centuries, Karabakh was under frequently changing rule by groups such as the Caucasian Albanians, Arabs, Turks, and Mongols.[403] During the seventeenth and the first half of the eighteenth centuries, it was the arena for continuous wars between Iran and Turkey.[404] In the mid-eighteenth century, Panah Ali-Khan founded the Karabakh Khanate and ruled it under Persian suzerainty.[405] In 1805, Russia gained control over the Karabakh Khanate, and after a war against Persia (1804–1813), the treaty of Gulistan formally ceded the land to the Tsar.[406] Local principalities were absorbed into the Tsarist administrative system by dividing them into large provinces, highly heterogeneous ethnically but convenient for the governance and maintenance of economic

399 Melnyk (n 136) n 1.

400 Nora Dudwick, 'The Case of the Caucasian Albanians: Ethnohistory and Ethnic Politics' (1990) 31 Cahiers du Monde Russe et Soviétique 377, 379.

401 Ibid.

402 Ibid.

403 Potier (n 266) 1.

404 Ibid.

405 Ibid.

406 Ibid.

units.[407] The settlement of a second war between Russia and Persia (1826–1828) incorporated today's eastern Armenia and today's northern Azerbaijan into the Russian Empire, leading to mass immigration of Armenians into the Karabakh region.[408]

After the Russian Revolution, the Caucasus disintegrated into the three independent republics of Armenia, Azerbaijan, and Georgia. At that time, only the external borders with Turkey and Persia were clearly defined, whereas the borders between the three entities remained ambiguous, becoming an issue of dispute in the following years.[409] Territorial claims were based on two principles: first, the administrative divisions of Tsarist times were kept because they had functioning administrations and strong economic connections, regardless of ethnic heterogeneity; second, areas with related minority groups in neighbouring regions were also claimed, regardless of economic ties or access issues.[410] In Karabakh, these two principles collided, and therefore both Azerbaijan and Armenia claimed it for themselves.[411] Armenians predominated in the highlands of Karabakh, Azeris in the plains.[412] Due to geography, the Karabakh highlands were much more easily accessible from Baku in the east than from Erevan in the west.[413] These facts resulted in the integration of Karabakh into the Republic of Azerbaijan, provisionally in 1919 and finally at the Paris Peace Conference in 1920.[414] The process was accompanied by several rebellions by Karabakh Armenians. Large-scale clashes culminated in the war of 1919–1920.[415] In 1921, the Bolsheviks occupied Transcaucasia, and in 1923, the Soviet authorities established the Nagorno-Karabakh Autonomous Oblast (NKAO), still inhabited mainly by Armenians, within the Azerbaijani Soviet Socialist Republic (Azerbaijani SSR).[416] The oblast did not have any border with the Armenian SSR, because the Azerbaijan SSR surrounded the region completely.

The ensuing decades were relatively peaceful. But during Perestroika, autonomy movements within the USSR also arose in Nagorno-Karabakh, and the situation became tense. At that time, the population of NKAO consisted of 77% Armenians and 22% Azeris, with Russian and Kurdish minorities, whilst

407 Saparov (n 193) 90.
408 Potier (n 266) 2.
409 Saparov (n 193) 90.
410 Ibid 90–91.
411 Krüger (n 397) 215.
412 Saparov (n 193) 91.
413 Ibid.
414 Potier (n 266) 2.
415 Melnyk (n 136) n 2.
416 Ibid.

in the bordering region of Lachin, also part of the Azerbaijani SSR, the opposite was the case: Azeris and Turks comprised the majority, and only 5–6% were Armenians.[417] In 1988, demonstrations took place in Stepanakert, the capital of NKAO, and in Yerevan for NKAO's secession from Azerbaijan and its incorporation into Armenia.[418] This request was also brought to the Supreme Soviets of the Armenian SSR, the Azerbaijani SSR, and the USSR; however, only the Armenian SSR supported the unification.[419] Consequently, the demonstrations escalated, leading to many deaths and hundreds of thousands becoming refugees on both the Armenian and the Azerbaijani side.[420] Following the violent escalations, the NKAO was temporarily placed under the direct rule of Moscow in 1989.[421] When control was returned to Azerbaijan a few months later, the Supreme Soviet of the Armenian SSR and the Nagorno-Karabakh Regional Council adopted a joint resolution on the reunification of Nagorno-Karabakh with Armenia.[422] In the early 1990s, the conflict escalated again, and as a consequence Soviet troops arrived in Nagorno-Karabakh to place it under a state of emergency and occasionally intervened in violent confrontations between Azeris and Armenians.[423]

On 31 August 1991, both Azerbaijan and Armenia declared independence from the collapsing USSR.[424] Just two days later, Nagorno-Karabakh proclaimed the establishment of the Republic of Nagorno-Karabakh, which was rejected by Azerbaijan.[425] With the withdrawal of the Soviet army in December 1991, military control over Nagorno-Karabakh was handed over to the Karabakh Armenians.[426] The conflict 'gradually escalated into a full-scale war' in 1992 and spilled over into other parts of Azerbaijan, where forces of Armenian ethnicity conquered the Azerbaijani districts of Lachin, Kelbajar, Jebrayil, Gubadly, and Zangilan and substantial parts of Agdam and Fizuli.[427] The war caused approximately 25,000 deaths and the displacement of over one million refugees on both sides.[428]

417 *Chiragov and Others v Armenia* App No 13216/05 ECtHR (GC) 16 June 2015, para 13.

418 Ibid, para 14.

419 Ibid.

420 Ibid, para 15.

421 Ibid.

422 Ibid, para 15.

423 Ibid, paras 15–16.

424 Melnyk (n 136) n 3.

425 Ibid.

426 *Chiragov and Others v Armenia* (n 417), para 17.

427 Ibid, paras 18, 23.

428 Human Rights Watch/Helsinki, *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh* (Human Rights Watch 1994) ix.

The ceasefire agreement of 5 May 1994, named the Bishkek Protocol, was signed by Armenia, Azerbaijan, and the Republic of Nagorno-Karabakh following Russian mediation and set an end to the war.[429] However, this agreement was repeatedly breached over the years along the borders, causing many deaths.[430] The UNSC unanimously adopted a series of resolutions in 1993 that reaffirmed the territorial integrity of Azerbaijan, condemned the occupation of the territory by Armenian forces, and demanded their unconditional withdrawal.[431] Negotiations for a resolution to the conflict have been conducted by the OSCE and the Minsk Group, co-chaired by Russia, France, and the US. They have repeatedly presented bases for future negotiations, for instance at the OSCE summit in Lisbon in 1996[432] and at the summit in Madrid in 2007. The latter established a set of basic principles, the Madrid Recommendations for future settlement, including the return of the territories surrounding Nagorno-Karabakh to Azerbaijani control, an interim status for Nagorno-Karabakh providing guarantees for security and self-governance, a corridor linking Armenia to Nagorno-Karabakh, future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will, the right of all internally displaced persons and refugees to return to their homes, and international security guarantees including a peacekeeping operation.[433] Despite the optimistic signals and updated versions of the Recommendations being presented at the three ensuing summits at Muskoka (2010), Deauville (2011), and Los Cabos (2012), no tangible progress was achieved in clarifying the status of Nagorno-Karabakh.[434] In sum, the OSCE's negotiating processes were without success, and renewed outbreaks of violence could not be avoided.

In 2014 and 2015, tensions intensified, and fighting started again, leading to a four-day war in April 2016 at the line of separation with hundreds of casualties on both sides.[435] For the first time since 1994, Azerbaijan conquered some of its formal territory. Russia managed to mediate a ceasefire. Indeed, Russia has been the main mediator in this conflict, not only within the framework of

429 The Bishkek Protocol (Armenia-Azerbaijan-Russia), Signed 5 May 1994.

430 *Chiragov and Others v Armenia* (n 417), para 28.

431 UNSC, 'Res 822 (30 April 1993) UN Doc S/RES/822'; UNSC, 'Res 853 (29 July 1993), UN Doc S/RES/853'; UNSC, 'Res 874 (14 October 1993), UN Doc S/RES/874'; UNSC, 'Res 884 (12 November 1993), UN Doc S/RES/884'.

432 OSCE, 'Lisbon Document 1996 (Lisbon Summit), 3 December 1996, Doc.S/1/96'.

433 OSCE, 'Statement by the OSCE Minsk Group Co-Chair Countries, L'Aquila, Italy' (10 July 2009).

434 Melnyk (n 136) n 12.

435 ICG, 'The Nagorno-Karabakh Conflict: A Visual Explainer' (16 September 2023).

the OSCE negotiations but also in trilateral settings with the two conflict parties. Presidential meetings were held in Moscow in 2008, in Kazan in 2011, and in Sochi in 2012. However, Russia's agenda in this conflict has remained unclear,[436] in contrast to the situations in South Ossetia, Abkhazia, and Transnistria. Traditionally it is the power protecting Armenia, but it has, for example, sold weapons to both sides.[437]

In September 2020, intense violence broke out again and led to the second Karabakh war. For almost three decades, the conflict had not caused as much bloodshed; the 2020 outbreak resulted in the deaths of 7,000 military personnel and 170 civilians.[438] Azerbaijan sought to recover the territory.[439] Again, Russia brokered a ceasefire between Armenia and Azerbaijan, on 10 November 2020.[440] Under the agreement, the districts of Agdam, Kalbajar, and Lachin were returned to Azerbaijan. Due to their weaker military position, Nagorno-Karabakh and its patron state Armenia had very limited options. Furthermore, the agreement deployed Russian 'peacemaking forces' along the contact line and the Lachin corridor.[441] The Lachin corridor guaranteed a connection between Armenia and Nagorno-Karabakh, controlled by the Russian 'peacemaking forces'.[442] In contrast to the other three cases, only in 2020 were Russian forces deployed. Russia had offered this repeatedly since 1994 but had been rejected each time by Azerbaijan, Armenia, and/or the Karabakh Armenians.[443] They feared Russian military domination in the region, the undermining of sovereignty, and increasing dependence on Moscow.[444]

B. Recent Developments

The initial situation of Nagorno-Karabakh was similar to the three cases previously presented: ever since the proclamation of the Nagorno-Karabakh

436 De Waal and Von Twickel (n 74) 218.

437 ICG, 'Digging out of Deadlock in Nagorno-Karabakh, Europe Report No 255 – 20 December 2019' 19, referring to interviews with officials in Baku and Yerevan, December 2018 and April 2018.

438 ICG, 'The Nagorno-Karabakh Conflict: A Visual Explainer' (n 435).

439 On wars of recovery see Eliav Lieblich, 'Wars of Recovery' (2023) 34 European Journal of International Law 349.

440 'Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation, 10 November 2020'.

441 Ibid, paras 2, 3, 6.

442 Ibid, para 6.

443 De Waal and Von Twickel (n 74) 219; ICG, 'Digging out of Deadlock in Nagorno-Karabakh, Europe Report No 255 – 20 December 2019' (n 437) 19.

444 ICG, 'Digging out of Deadlock in Nagorno-Karabakh, Europe Report No 255 – 20 December 2019' (n 437) 19, referring to interviews with officials in Baku and Yerevan, December 2017 and March to May 2018.

Republic in 1991, the de facto state had existed outside the political and legal control of Azerbaijan, to which the territory belonged under international law.[445] It was politically, legally, economically, militarily, and culturally connected with and dependent on a third state, Armenia. For instance, the ECtHR found that Armenia wielded effective control over Nagorno-Karabakh in the *Chiragov* case and emphasized the integration of the two entities in virtually all important matters.[446] The Parliamentary Assembly of the Council of Europe noted the occupation by Armenian forces of 'considerable parts of the territory of Azerbaijan' in 2005 when it reaffirmed that the secession or independence of an entity cannot be achieved by de facto annexation by Armenia.[447] Moreover, Nagorno-Karabakh has never been recognized as an independent state by any other state, not even by its patron state Armenia. Only South Ossetia, Abkhazia, and Transnistria recognized its independence.

Yet, recent developments have radically changed the situation. After the second Karabakh war in 2020, the ceasefire agreement mentioned above concluded that Armenian forces were to be withdrawn from Nagorno-Karabakh simultaneously with the deployment of Russian peacekeeping forces. According to the ICG, this happened within two weeks of the ceasefire agreement, and Armenia also halted military supplies to Nagorno-Karabakh.[448] Despite other ties with Nagorno-Karabakh, from this moment it was questionable whether Armenia still was in effective control over the region.[449] Violence erupted repeatedly in the following two years. In summer 2023, Nagorno-Karabakh experienced a humanitarian crisis due to shortages of food, fuel, and medical supplies following Azerbaijan's blockade of the Lachin corridor. Although the UNSC held an emergency session at Armenia's request, it failed to pass a resolution.[450] On 19 September 2023, Azerbaijan launched a military operation including heavy bombing and a ground offensive in Nagorno-Karabakh and gained control within 24 hours, thus ending three decades of de

445 Narine Ghazaryan, 'The Legal System of Nagorno-Karabakh' in Benedikt Harzl and Roman Petrov (eds), *Unrecognized Entities: Perspectives in International, European and Constitutional Law*, vol 69 (Brill Nijhoff 2022) 177.

446 *Chiragov and Others v Armenia* (n 417), paras 172, 186.

447 PACE, 'The Conflict over the Nagorno-Karabakh Region Dealt with by the OSCE Minsk Conference, Res 1416 (25 January 2005)'.

448 ICG, 'Post-War Prospects for Nagorno-Karabakh, Europe Report No 264 – 9 June 2021' 1.

449 On this question see Júlia Miklasová, 'Post-Ceasefire Nagorno-Karabakh: Limits to the ECtHR's Approach to Jurisdiction over Secessionist Entities under the ECHR' (2022) 82 Heidelberg Journal of International Law 357.

450 ICG, 'CrisisWatch: Tracking Conflict Worldwide, Armenia-Azerbaijan'.

facto rule.[451] Within one week, more than 100,000 refugees arrived in Armenia.[452] Russia started to withdraw its peacekeepers in April 2024.[453] For these reasons, the current situation in Nagorno-Karabakh differs from those in South Ossetia, Abkhazia, and Transnistria and is no longer considered a frozen conflict.

451 ICG, 'CrisisWatch Database, Azerbaijan' Post from September 2023.

452 UNHCR, UN Refugee Agency, 'Armenia Operational Update' 30 September 2023.

453 ICG, 'CrisisWatch Database, Azerbaijan' (n 451) Post from April 2024.

Part III: Case Study—Analysis

Following an overview on the history and recent developments of the four frozen conflicts, the present part focuses on their legal analysis, answering the following question: what common legal characteristics portray the conflicts' frozenness? The aim is to approach the conflicts from the term 'frozen' and to uncover the legal dilemmas underlying their deadlocked nature. The aim is not to offer a legal definition with a set of criteria that need to be met to qualify as a frozen conflict. Neither is the aim to answer all the legal questions that arise from the situations, such as which law is applicable, which norms have been breached, what conflict resolution looks like, and so forth. These points have been discussed elsewhere and do not particularly deal with the fact that the conflicts are considered frozen. The aim is to translate what is perceived as frozen into legal terms. Four characteristics will be discussed: first, the core issue of the conflicts and mutually exclusive claims to territory; second, the time factor and its consequences; third, the low intensity of the conflicts; and fourth, the proliferation of frozen conflicts in the post-Soviet space and Russia's interpretations of international law.

I. Core Issue

The core issue of frozen conflicts is the territorial status of the break-away regions. The separatists of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh claim peoples' right to self-determination to secede and establish an independent state. Conversely, Georgia, Moldova, and Azerbaijan invoke their territorial integrity, which includes the regions in question. International law favours the latter position but has not been capable of resolving the conflicts based on this consideration. De facto, the regions did secede and have become independent from the parent states. For three decades, the conflict parties have not managed to agree on final settlements on the regions' status, because each insists on its territorial claims, regardless of their objective legal validity. Yet, these claims are mutually exclusive: the regions' pursuit of self-determination conflicts with the parent states' territorial integrity, and retaining this integrity means that the regions cannot

secede. Either one or the other principle must give way.[454] This dilemma characterizes the deadlocked nature of frozen conflicts and requires examination.

A. Peoples' Right to Self-Determination

On one side of the mutually exclusive claims to territory in frozen conflicts lies the principle of peoples' right to self-determination. This right is enshrined in article 1(2) and article 55 UN Charter, in UNGA Resolution 1514,[455] and in article 1 of both the International Covenant on Civil and Political Rights[456] and the International Covenant on Economic, Social and Cultural Rights.[457] The right has also been affirmed by the OSCE in the Helsinki Final Act of 1975[458] and in the Charter of Paris for a New Europe 1990.[459] Two types of self-determination are distinguished: internal and external. The first entails the autonomy of a people through self-government, protectorate, trusteeship, or free association.[460] The second is a 'principle concerned with the right to be a state',[461] which can be achieved through secession from a parent state. Although no international legal document addresses this distinction, the consensus has emerged in case law that the right to external self-determination is granted only as ultima ratio, when the internal right to self-determination has been denied by the parent state.[462] In fact, the applicability and implementation of external self-determination outside the original colonial context is complex,

454 Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) Paper 2434 Yale Law School, Faculty Scholarship Series 177, 178.

455 UNGA, 'Res 1514 (XV) (14 December 1960), UN Doc A/RES/1514'.

456 International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

457 International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3.

458 OSCE, 'Helsinki Final Act of the Conference on Security and Cooperation in Europe, Adopted 1 August 1975'.

459 OSCE, 'Charter of Paris for a New Europe, Adopted 21 November 1990'.

460 Milena Sterio, 'International Power Politics and Secession' in Peter Radan, Aleksandar Pavković and Ryan D Griffiths (eds), *The Routledge Handbook of Self-Determination and Secession* (Routledge 2023) 334-335.

461 James R Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2007) 107.

462 Important cases are *Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Questions* (League of Nations Official Journal, Special Supplement No 3); *Reference re Secession of Quebec* (Supreme Court of Canada, 2 SCR 217); *Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Advisory Opinion)* (2010, ICJ Rep 403).

and in many respects it falls on the margins of political philosophy and evolving international law.[463] Koskenniemi commented on this:

> It is a paradoxical characteristic of a generally formulated right or a principle such as 'self-determination' that, stated *in abstracto*, it seems to convey a value that most people will immediately endorse. The more concrete it is made, however — that is, the more it is applied as a right of this or that entity — the more controversial it starts to appear, with the result, finally, that it becomes useless when it seems most needed: in a dispute about the boundaries of a particular 'self' against another.[464]

Accordingly, power politics significantly influence the outcome of external self-determination efforts, insofar as peoples that have successfully seceded have usually been supported by at least one great power.[465] One famous and controversial example is the case of Kosovo in 2008. Moreover, despite the multiple layers of meaning associated with self-determination, such as the right to democratic participation, group rights, and certain additional human rights for minorities and for indigenous peoples, in the end the doctrine is simplistic and operates as an all-or-nothing approach that exacerbates conflicts rather than resolving them.[466]

In frozen conflicts, the separatists seek independence based on the right to self-determination.[467] Several attempts at secession were expressed through unilateral declarations of independence at the beginning of the 1990s. The declaration of independence has a twofold function: it legitimizes the separatists' claim, and it delegitimizes the parent state's sovereignty over the territory in question.[468] The right to self-determination has not been guar-

463 Róisín Burke, 'International Law in the Buffer: Nagorno-Karabakh and Intractable Territorial Disputes' (2020) 23 Journal of International Peacekeeping 249, 255.

464 Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 The International and Comparative Law Quarterly 241, 264.

465 Sterio (n 460) 338.

466 Weller (n 145) 112, 114.

467 Constitution of the Pridniestrovan Moldovan Republic (adopted by referendum 24 December 1995, signed into law 17 January 1996, amended 30 June 2000), Ministry of foreign affairs of Pridnestrovian Moldovan Republic, art 1; Konstitutsiya Yuzhnoy Osetii (Constitution of South Ossetia) (8 April 2001), preamble; Constitution of the Republic of Abkhazia (Apsny) (adopted 26 November 1994, approved by referendum and amended 3 October 1999), AbkhazWorld, preamble; Constitution of the Republic of Artsakh (adopted 10 December 2006, entered into force 11 December, amended 20 February 2017), WorldStatesmen, preamble.

468 Argyro Kartsonaki and Aleksandar Pavković, 'Declarations of Independence' in Peter Radan, Aleksandar Pavković and Ryan D Griffiths (eds), *The Routledge Handbook of Self-Determination and Secession* (Routledge 2023) 282.

anteed in any of the regions in this case study. Apparently, these four claims to external self-determination attracted no support — or not enough of it — from the great powers. In the cases that have received attention from the UN system, the territorial integrity and political unity of the states concerned has been reaffirmed, meaning that there is no right to secede. In none of the four cases has the UN system directly or indirectly supported the desire for independence — or even mentioned the term 'self-determination'.[469] Besides the territorial integrity of the parent states, the arguments against secession include the unlawful use of force by which the secessionists achieved control over the territories in the early 1990s,[470] the lack of effectiveness of the putative states, given that effective control has been exercised by the patron states, and the question as to whether the regions' populations qualify as peoples entitled to claim the right to self-determination, which is generally denied for Transnistria and Nagorno-Karabakh.[471]

Yet it is important to emphasize the territorial meaning of the right to self-determination. Discussions on self-determination often concern the question of who constitutes a distinct people, but it is crucial to bear in mind that it is primarily a right to territory and a remedy for past injustices.[472] It connects identity to a specific place.[473] The issue at the core of these frozen conflicts is the territory and the question of legitimate ownership of this piece of land. In the separatists' view, sovereignty over the region in question has been built on unjust historical events — even though they themselves conquered the land by dubious and even unlawful means in the 1990s. A general question posed by Brilmayer is 'the extent to which the status quo should be altered to rectify past wrongs', considering that hardly any territorial boundary in the world would remain if all historical wrongs were corrected.[474] Sim-

469 Urs Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung: Selbstbestimmung, Konfliktmanagement, Anerkennung und Staatennachfolge in der neueren Völkerrechtspraxis* (Springer 2010) 591.

470 See, e.g., Anne Peters, who argues that the condemnation of the secession by international institutions in the case of Abkhazia should have been based on the unlawful use of military means by the secessionists more than on the argument of Georgia›s territorial integrity to be satisfactory and legally sound. Anne Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' in James Crawford and Sarah Nouwen (eds), *Select Proceedings of the European Society of International Law*, vol 3 (Bloomsbury Publishing 2012) 179.

471 Melnyk (n 136) n 14.

472 Brilmayer (n 454) 179.

473 Timothy William Waters, 'The Map Makes the People' in Peter Radan, Aleksandar Pavković and Ryan D Griffiths (eds), *The Routledge Handbook of Self-Determination and Secession* (Routledge 2023) 118.

474 Brilmayer (n 454) 199.

ilarly, Mladic, the convicted war criminal, observed that 'borders have always been drawn with blood'.[475]

The relationship between self-determination and territory has changed over time: in the pre-classical era, from the nineteenth century to the Wilsonian era, self-determination could shape territories and move borders: people came first and territorial units were the consequence.[476] In the classical era, which was introduced by the UN Charter and continues to this day, the relationship has flipped: territories exist and define the people that have a right to them.[477] In particular through decolonization, self-determination has been tied to territory: 'the existence of a distinct territory, physically separated from the metropolitan state's territory … became a necessary condition for identifying a colonial people possessed of self-determination'.[478] This shift from a people-first to a territory-first meaning of self-determination reduced the number of potential cases.[479] South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh are not among those cases. They are within the continuous land borders of Georgia, Moldova, and Azerbaijan, which are protected by the principle of territorial integrity. However, this legal assessment has not hindered the regions from de facto secession and insistence on their self-determination. As long as they hold on to their territorial claims, backed by the de facto situation on the ground, each conflict is deadlocked.

B. Territorial Integrity

On the other side of the mutually exclusive claims to territory in frozen conflicts lies territorial integrity. The principle was introduced by article 2(4) UN Charter and further guaranteed in ensuing international instruments such as the Charter of the Organization of American States, the Helsinki Final Act of the OSCE, and the Constitutive Act of the African Union.[480] According to the principle, a state's territorial integrity is protected both against the use of force by another state and against internal threats.[481] Territorial integrity as

475 Erich Follath, 'Portrait of a Man Possessed: A Search for the Real Ratko Mladic' [2011] Spiegel online.

476 Waters, 'The Map Makes the People' (n 473) 118–119.

477 Ibid.

478 Ibid 119.

479 Ibid 120.

480 OSCE, 'Helsinki Final Act of the Conference on Security and Cooperation in Europe, Adopted 1 August 1975' (n 458) art IV; Charter of the Organisation of American States (adopted 30 April 1948, entered into force 13 December 1951) 119 UNTS 3 art 17; Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3 art 3(b).

481 Waters, 'The Map Makes the People' (n 473) 120.

a legal norm emerged in the postwar era, coinciding with the establishment of the right to self-determination.[482] Before the outlawing of war, the concept of territorial integrity would have been an anachronism: only with the prohibition of the use of force and the parallel evolution of human rights was the term 'integrity' associated with territory.[483]

Yet, to protect its integrity, the territory first needs to be identified through boundaries. To define interstate borders, territorial integrity is complemented by the *uti possidetis juris* principle (henceforth *uti possidetis*). Stemming from Roman private law, *uti possidetis* was the praetor's prohibition on disturbing an existing state of possession of immovables between two individuals.[484] Originally invoked in the nineteenth century during the decolonization of Spanish America, the principle was also applied in the twentieth century during the decolonization of Africa. The principle holds that the legal title, rather than the effective possession of land, defines the borders and provides the basis for sovereignty.[485] This means that when a new independent state emerges, its international borders are defined by the internal borders of the previous administration. According to the ICJ, the principle is general and applicable to all forms of decolonization wherever it occurs.[486] Similarly to the right to self-determination, the *uti possidetis* principle was shaped most decisively in the context of decolonization. However, while *uti possidetis* has been applied to many situations beyond colonial contexts, self-determination has been applied more restrictively. The *uti possidetis* principle has notably also been applied to the post-Soviet space after the dissolution of the Soviet Union in 1991.[487] It upgraded the boundaries between the first-level

482 Ibid.

483 Ibid.

484 John Bassett Moore, *Memorandum on Uti Possidetis: Costa-Rica Panama Arbitration* (The Common Wealth Co Printers 1913) 5; see also, at 6, the Latin original: 'Uti eas aedes, quibus de agitur, nec vi nec clam nec precario alter ab altero possidetis, quominus ita possideatis, vim fieri veto' literally translated as: 'As you possess the house in question, the one not having obtained it by force, clandestinely, or by permission from the other, I forbid force to be used to the end that you may not continue so to possess it'.

485 *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (1986, ICJ Rep 554), para 23.

486 Ibid.

487 For a detailed assessment of the applicability of *uti possidetis* to the dissolution of the Soviet Union and Yugoslavia, see Anne Peters, 'The Principle of Uti Possidetis Juris' in Christian Walter, Antje Von Ungern-Sternberg and Kavus Abushov (eds), *Self-Determination and Secession in International Law* (Oxford University Press 2014). See also Júlia Miklasová, *Secession in International Law with a Special Reference to the Post-Soviet Space* (Brill Nijhoff 2024) 497 ff, 544 ff, 559 ff.

territorial entities of the Soviet Socialist Republics (henceforth Union Republics) to the international boundaries of the new states.

The mutual exclusivity of the territorial claims can be illustrated by analysing the interplay of self-determination and *uti possidetis*. During the collapse of the USSR, these principles interplayed in two distinct ways: for the Union Republics, the *uti possidetis* principle aligns with the right to self-determination—they are mutually supportive.[488] Therefore the Union Republics of Georgia, Moldova, and Azerbaijan were entitled to claim self-determination and to secede from the USSR, encompassing the entire territory defined by *uti possidetis*, which means within the boundaries of the former Union Republics. As a consequence, the principle of territorial integrity is 'a corollary of the right to self-determination' for the Union Republics.[489] However, for the lower-level federalist units, the principles of self-determination and *uti possidetis* at the time of dissolution contradicted each other.[490] Because South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh did not constitute Union Republics at the time of dissolution, they were not entitled to self-determination. Instead, they were included within the boundaries of the Union Republics, defined by *uti possidetis*, and shared the fates of their parent states. A notable effort was made to avoid opening a Pandora's box of debates about historical legitimacy and ethnic issues when defining the new state borders due to the inherent risk of provoking further conflict and even war.[491] The application of *uti possidetis* to the dissolution of the Soviet Union, beyond the colonial context, is contentious, because the principle is not codified in a universally binding treaty, nor is it clear whether it is a universally binding customary rule in processes of state dissolution.[492] Although the Russian SFSR has been considered by some a colonial power vis à vis the other former Soviet Republics, this view has never prevailed, and thus their secession had a different legal basis than decolonization.[493]

488 Peters, 'The Principle of Uti Possidetis Juris' (n 487) 127.

489 *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion)* (2019, ICJ Rep 95), para 160.

490 Elena Konnova, 'The Right to Self-Determination and Time' in Isabella Risini, Stefan Lorenzmeier and Sebastian Wuschka (eds), *Zeit und Internationales Recht*, vol 146 (Mohr Siebeck 2019) 286-287.

491 Mälksoo (n 7) 813.

492 Ibid.

493 Jörg Fisch, *Das Selbstbestimmungsrecht der Völker: Die Domestizierung einer Illusion* (CH Beck 2010) 284; see also Peters, 'The Principle of Uti Possidetis Juris' (n 487) 114.

The rationale behind *uti possidetis* is to create stability and order and to prevent disruption.[494] Characteristically, the principle does not assess the legitimacy of the boundaries it identified. In fact, it ignores however arbitrarily the boundaries have been defined,[495] how many times they have changed throughout history, and whether a territory was acquired illegally under today's law, given that according to the doctrine of intertemporal law, historical events are judged by the law in force at the time of their occurrence.[496] Accordingly, *uti possidetis* provides no legal basis on which to justify the formation of a state; instead, these would be consent, self-determination, effectiveness, or historical title.[497] The aim of the principle is precisely to end disputes about prior territorial illegality.[498] Moreover, the principle is characterized by its provisional function. *Uti possidetis* is a temporary and transitional mechanism that provides a territorial delineation in the absence of special factors.[499] It does not define a territorial boundary that can never be changed.[500] The boundaries identified through *uti possidetis* provide a starting point for future negotiations or a fallback position that draws boundaries without any other agreement or principle to be followed.[501] However, without an agreement, the boundaries remain, and 'the principle of *uti possidetis* freezes the territorial title; it stops the clock, but does not put back the hands'.[502] In Konnova's words, ironically, '*uti possidetis* freezes a conflict',[503] which indicates the very essence of the frozen conflicts. In this vein, the doctrine has also been criticised for failing to achieve the actual rationale of avoiding conflicts.[504]

Once the boundaries of a new state are defined according to *uti possidetis*, the principle gives way to territorial integrity.[505] Whereas *uti possidetis* defines the boundaries of the new state, territorial integrity subsequently protects the land against external and internal threads. In the state-centric

494 *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (n 485), para 25.

495 Burke (n 463) 274.

496 S James Anaya, 'The Capacity of International Law to Advance Ethnic or Nationality Rights Claims' (1991) 13 Human Rights Quarterly 403, 405.

497 Peters, 'The Principle of Uti Possidetis Juris' (n 487) 101.

498 Ibid 123.

499 MN Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 European Journal of International Law 478, 495; Saxer (n 469) 774.

500 Shaw (n 499) 495.

501 Peters, 'The Principle of Uti Possidetis Juris' (n 487) 137.

502 *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (n 485), para 30.

503 Konnova (n 490) 289.

504 Ibid 288.

505 Shaw (n 499) 495.

international law system, this protection gives territorial integrity predominance over self-determination.[506] This predominance has been criticized by Peters: she argues that in a world where all land belongs to existing states, forming a new state necessarily affects another state's territorial integrity, but not necessarily the right to self-determination of another people.[507] Prioritizing territorial integrity makes the formation of new states practically impossible and thus renders the concept of a legal claim to statehood ultimately useless. Peters continues by observing that self-determination is *jus cogens*, whereas territorial integrity is not, and concludes that it protects human beings, whilst territorial integrity safeguards the state as such and therefore holds purely instrumental value.[508] In support of this last point, in his separate opinion of the Kosovo Advisory Opinion of the ICJ, Judge Cançado Trindade criticized international law's obsession with the ideas of state sovereignty and territorial integrity to the disadvantage of the states' most crucial constitutive element of human beings.[509] He stressed that 'the *raison d'état* has limits, and the state is not an end in itself, but a means to secure the social order pursuant to the right reason, so as to perfect the *societas gentium* which comprises the whole of humankind (H. Grotius)'.[510] He concluded that after all, states exist for human beings and not vice versa.[511]

Despite these arguments, the territorial integrity of the parent state in a frozen conflict predominates over the claim to self-determination of the separatists. However, the de facto situation gives leverage to the claim to self-determination, even though it is unlawful. The mutually exclusive claims to territory coupled with the gap between the de facto and the de jure situation are characteristic of frozen conflicts. As a contrast, the case of Chechnya can be mentioned: there, separatists also aimed for self-determination, in conflict with the territorial integrity of Russia. However, the region never gained de facto independence but was forcibly reintegrated into Russia. Despite claims to self-determination that would affect Russia's territorial integrity, the de jure and the de facto situation coincided, and therefore the conflict was never

506 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 192; MN Shaw, 'Territory in International Law' (1982) 13 Netherlands Yearbook of International Law 61, 70–71.

507 Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' (n 470) 178.

508 Ibid 178.

509 *Accordance with international law of the unilateral declaration of independence in respect of Kosovo, (Advisory Opinion)* (n 462) Separate opinion of Judge Cançado Trindade, para 77.

510 Ibid, Separate opinion of Judge Cançado Trindade, para 74.

511 Ibid, Separate opinion of Judge Cançado Trindade, para 239.

called frozen. By the same argument, the present situation in Nagorno-Karabakh (since September 2023) is no longer a frozen conflict, because the claim to self-determination is no longer supported by the de facto situation.

C. Maximalist Positions

In these frozen conflicts, both the parent and the de facto states have maintained their maximalist positions: integration into a single state versus separation through secession. Compromises on the status of the territory have never really been discussed.[512] Negotiations have typically concerned ceasefires, the definition of contact lines and grey zones, and the deployment or withdrawal of military personnel. The parties' maximalist positions are reinforced by national or ethnic narratives that attach considerable importance to these specific pieces of land. Myths about who first inhabited the land are propagated in order to support the right to stay there today.[513] At the OSCE summit on the Nagorno-Karabakh conflict in Los Cabos in 2012, the joint statement of co-chairs also highlighted the maximalist positions of the parties and urged them to refrain from these as a sign of political will to resolve the conflict.[514] Similarly, the ICJ highlighted the failure to conduct negotiations in the 2011 case of Georgia against Russia,[515] which dealt with the events on Georgia's territory in August 2008 under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).[516] The ICJ ruled that it lacked jurisdiction to hear the case, because Georgia did not fulfil the requirement to conduct negotiations with Russia beforehand,[517] as stipulated in article 22 of the CERD. The maximalist positions have become more consolidated the longer the conflicts have persisted and the more they have become embedded in the broader legal and political contexts. The local dimensions of the initial conflicts have been compounded by external tensions, transforming the conflicts in these regions into global rivalries.[518]

512 See, e.g., Harzl (n 175) 209.

513 Ibid 209.

514 OSCE, 'Joint Statement by the Presidents of the United States, the Russian Federation and France on Nagorno-Karabakh, Los Cabos, Mexico' (19 June 2012).

515 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia), (Preliminary Objections)* (2011, ICJ Rep 70).

516 International Convention on the Elimination of All Forms of Racial Discrimination (adopted 7 March 1966, entered into force 4 January 1969) 660 UNTS 195.

517 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia), (Preliminary Objections)* (n 515), para 184.

518 Beaupoil (n 387) 130.

Resolving frozen conflicts through compromise therefore seems unrealistic. Psychological factors also play a role. In fact, willingness to compromise has a bad reputation and is seen as a sign of weakness or lack of persistence.[519] Yet, Habermas argues that under certain circumstances moral reasons require compromises: if war cannot be avoided and ended by the international regime through sanctions and suchlike, then the alternative is the search for bearable compromises.[520] At a certain point, so the argument goes, it is no longer reasonable to continue a war and to require the maximum, which would be a clear victory.[521] His plea for negotiations and compromise referred to the war in Ukraine, which by the time the article was published had persisted for one year with immense losses but no clear indication as to which side might prevail—and both sides, Russia and Ukraine, still pursued maximalist goals. Zanetti observed something similar when analysing the Truth and Reconciliation Commission of South Africa.[522] She stated that compromise in conflicts does not necessarily have to be fair; indeed, it need not even result in a good solution, simply one that is preferable to endless war or the collapse of society.[523]

Compromises are possible if the disputed issue is divisible or negotiable.[524] For instance, whereas human rights are neither negotiable nor divisible, resources and income can be divided between parties.[525] With territories, the situation is more complex. A territory can certainly be divided, because the state borders that limit territories are artificial and manmade, not natural or logical but pure social facts.[526] However, international law is designed around state borders that protect the territory and sovereignty they define and indeed imply indivisibility. The principle of territorial integrity clearly supports the idea of the indivisibility of a territory. This understanding is rooted in the emergence of nation states in the nineteenth century, which often saw state territories compared with the human body.[527] The language used for territory is brimming with traumatological metaphors: *violation* of territorial *integrity*, a *break-away* region, secession (from *secedere*—literally 'go apart'), and recently, in the war in Ukraine, the loss of territory has been

519 Volker M Heins, 'Eine Verteidigung des Kompromisses' [2023] Republik.

520 Jürgen Habermas, 'Ein Plädoyer für Verhandlungen' *Süddeutsche Zeitung* (14 February 2023).

521 Ibid.

522 Véronique Zanetti, *Spielarten des Kompromisses* (Suhrkamp 2022).

523 Ibid 269-276.

524 Heins (n 519).

525 Ibid.

526 Ibid.

527 Ibid.

described as resulting in an '*amputated* nation'.[528] The understanding of territory as a body not only applies in today's international law but is also crucial to the entire international order. Nevertheless, this widespread metaphor may well encourage intransigence and increase the risk that a territorial conflict enters a never-ending spiral of violence.[529]

A compromise in the frozen conflicts might consist of a 'land-for-peace' agreement: the secessionists would give parts of the territory they control back to the parent state and in return gain full recognition for the remaining part of the territory.[530] Both sides would win and lose some land. The conclusion of such agreements is highly unrealistic and has not been debated. Given that parties retain their maximalist positions, it is much more probable that one of them will prevail over the other by the use of force, as Azerbaijan prevailed over Nagorno-Karabakh in September 2023. In frozen conflicts, the moral incentives for compromise are relatively weak compared to the moral considerations arguably present in the ongoing war in Ukraine. In the absence of a full-scale war and daily casualties, it seems more acceptable to maintain the status quo and insist on maximalist territorial claims. As a result, the conflict remains in deadlock. In Weller's words, 'when autonomy or federalization is not acceptable to one side and secession is not on the cards for the other, the option of a deferral of the issue comes to the fore. This allows both sides to retain their legal positions'.[531] Indeed, their insistence on maximalist positions is directly linked to the deferral of the issue, which can also be viewed as playing for time. In fact, the time factor is another characteristic that portrays the frozen state of the conflicts, as is discussed below.

II. Time Factor

Time plays a crucial role in frozen conflicts. They have frequently been defined by their longevity and their persistence for over three decades.[532] However, whether three decades is a long or short duration for a conflict is relative. Furthermore, the legal content of such temporal descriptions is limited. The essential issue is not the duration of the conflicts per se but the various legal questions that emerge over time. The following chapters discuss three time-related

528 Daniel Cohn-Bendit, 'Debatte um Verhandlungen im Ukrainekrieg: Habermas unterschlägt die Risiken' *TAZ* (19 February 2019).

529 Heins (n 519).

530 Berg and Kursani (n 274) 3.

531 Weller (n 145) 137.

532 See, e.g., Bebler (n 27) 9; Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 173-174; Pueyo and Fort (n 77) 11.

questions that arise in frozen conflicts. First, reflecting on the duration of a conflict prompts the question of when a war truly ends. Second, the question arises whether international law recognizes any time frame to settle a dispute or whether the parties to a conflict can defer the status question ad infinitum. Finally, a long-lasting conflict has consequences for both the title over territory and the de facto state. Discussing these points will show how the time factor contributes to the frozenness of the conflicts in many ways.

A. Short Wars and Long Conflicts

When looking at the conflicts in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh from the perspective of the passage of time, two initial observations can be made. First, effective control over the four regions was established by the separatists, with support by their patron states, in relatively short armed conflicts that lasted for some weeks or months at the beginning of the 1990s.[533] In contrast, the de facto states that were established after these short wars and the ensuing disputes over the territories' status have persisted for the relatively long period of more than three decades.[534] Commenting on the duration of the conflicts involves grappling with the question of when a war or conflict truly terminates: can we say definitely when an armed conflict no longer exists under international law?[535] In Orend's words, '*who can say, around the dawn, exactly where night ends and day begins?*'.[536] According to the ILA Report on the Definition of Armed Conflict, 'international law contains no rule … as to how long the cessation needs to last for an armed conflict to be considered legally at an end'.[537] Similarly to defining the existence of an armed conflict, defining its end involves considering a number of factors. These include considerations on the maintenance of battle positions, the withdrawal of forces, the risk of renewal of fighting at any time, the resumption of peacetime activities such as trade, commerce, agriculture, and manufacturing, and the return of refugees and displaced people.[538]

533 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 173.

534 Ibid 173–174.

535 The question is posed by Dustin Lewis, Gabriella Blum and Naz Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict* (Harvard Law School Program on International Law and Armed Conflict 2017).

536 Brian Orend, 'Jus Post Bellum: The Perspective of a Just-War Theorist' (2007) 20 Leiden Journal of International Law 571, 574.

537 ILA, 'Final Report on the Meaning of Armed Conflict in International Law' (The Hague Conference 2010: Use of Force) 31.

538 Ibid 31.

The most obvious and ideal termination of a war is the conclusion of a peace treaty between the warring parties.[539] Such a treaty is the counterpart to the formal declaration of war that marks the beginning of a war and decides the temporal scope of the application of the laws of war. Yet, in none of the frozen conflicts has a peace treaty been concluded. In fact, neither peace treaties nor declarations of war have been common since the Second World War.[540] The states of war and peace have both been deformalized, and today it is the factual situation that determines the application of the laws of war, rather than formal criteria of declarations. By consequence, peace treaties have mostly been replaced by armistices or ceasefire agreements.[541] Traditionally, ceasefires and armistices were intended to be of short duration until a peace treaty is concluded. However, they can also be prolonged for decades, for instance in the case of North and South Korea.[542] The practice of agreeing on ceasefires developed decisively after the end of the Cold War in cases of non-international armed conflicts.[543] Normally, ceasefire agreements provide for the physical separation of forces, including the definition of ceasefire lines and buffer zones.[544]

Given the quasi-replacement of peace treaties by ceasefire agreements, the question arises whether the ceasefire agreements that have been concluded in frozen conflicts have terminated the conflicts. On the one hand, they have successfully ended recurring armed hostilities, not only in the early 1990s but in 2008 for South Ossetia and Abkhazia and in 2020 for Nagorno-Karabakh as well. They effectively put an end to the armed conflicts, and the laws of war no longer applied. On the other hand, the underlying disputes have not been resolved. The established case law of the ICJ defines a dispute as a 'disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'[545] and notes 'that the claim of one party

539 Akande (n 154) 42; Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017) 36.

540 Akande (n 154) 42.

541 Ibid.

542 Antonio Cassese, 'Current Challenges to International Humanitarian Law' in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (Oxford University Press 2014) 7.

543 Christine Bell, 'Ceasefire', *Max Planck Encyclopedias of International Law* (Oxford University Press 2009) n 14.

544 Ibid 17.

545 *The Mavrommatis Palestine Concessions (Greece v United Kingdom)* (1924, PCIJ Series A, No 2) 11.

is positively opposed by the other'.[546],[547] Moreover, the factual situation on the ground presents a permanent breach of international law concerning the territorial integrity of the parent state. Thus, despite the growing importance of ceasefire agreements, it must be stressed that they do not 'introduce peace in the full sense of that term'.[548] Although there is no official legal definition of 'ceasefire', it has been described as a suspension of acts of violence by military and paramilitary forces, usually resulting from the intervention of a third party.[549] It indicates a temporary or permanent cessation of hostilities, but without normalization of the relations between the parties.[550] Thus, Grotius might still have a point in saying that in a ceasefire, a war is 'not dead, but only sleeping'.[551]

This holds true particularly for frozen conflicts. Although large-scale hostilities and full-scale wars have been terminated by ceasefire agreements, relations between the parties have not been normalized, and the question of the status of the break-away regions has not been settled. The status question has instead been postponed, and violence still breaks out from time to time, except in Transnistria, where hardly any violence has occurred since the war in 1992. There is a permanent risk that the parent state might seek to reincorporate the break-away region by military force, resulting in a permanent state of readiness for war.[552] Therefore, it is accurate to refer to the frozen conflicts as ongoing, long-lasting, protracted, and so forth. However, such time-related labels do not carry a substantial value on their own. Likewise, the notions of 'prolonged occupation', as opposed to 'occupation', and 'protracted armed conflict' (as in article 8(2) (f) Rome Statute), as opposed to 'armed conflict', have been found to be descriptive

546 *South West Africa (Ethiopia and Liberia v South Africa)* ***(Preliminary Objections)*** (1962, ICJ Rep 319) 328; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* ***(Jurisdiction and Admissibility)*** (2006, ICJ Rep 6) 40, para 90.

547 *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia)*, ***(Preliminary Objections)*** (n 515) 84, para 30; see also Phoebe Okowa, 'The International Court of Justice and the Georgia/Russia Dispute' (2011) 11 Human Rights Law Review 739.

548 Dinstein (n 539) 44.

549 SD Bailey, *How Wars End: The United Nations and the Termination of Armed Conflicts 1946-1964* (Oxford University Press 1982) 37; See also Bell (n 543) n 1.

550 Bell (n 543) n 6.

551 Hugo Grotius, *On the Rights of War and Peace. An Abridged Translation (William Whewell Tr.)* (Cambridge University Press 1853) 434.

552 Helge Blakkisrud, 'Surviving without Recognition' in Peter Radan, Aleksandar Pavković and Ryan D Griffiths (eds), *The Routledge Handbook of Self-Determination and Secession* (Routledge 2023) 348.

and not to carry any distinct legal significance.[553] Similarly, the ICJ held that the fact that Israel's occupation of the Palestinian territory 'is prolonged does not change its legal status under IHL'.[554] It is therefore valuable to further explore the time factor beyond merely describing frozen conflicts as long-lasting.

B. Playing for Time

Considering the persistence and long-lasting nature of frozen conflicts, the question why they endure emerges. The parties' maximalist legal positions have already been identified as a key factor leading to indefinite deadlock. The parties prefer to uphold the status quo rather than achieve a consensus through compromise.[555] Similarly, Borgen stated that the conflict in Transnistria 'has been frozen not so much because there are no other options under domestic and international law besides secession, but because the separatists gained by making the conflict seem intractable'.[556] Considering the time factor, this strategy can be regarded as playing for time. Wordings such as 'frozen agreement'[557] and 'deferral of the issue'[558] support the view that playing for time is one of the parties' tactics. This tactic is facilitated by the fact that international law defines no time frame in which to settle disputes. 'Long-term diplomatic negotiations on the settlement of territorial disputes with de facto regimes have no time frames and their success depends on the parties' and international organisations' political considerations.'[559] Negotiations on the final status of the break-away regions in question have been unsuccessful for decades without any final deadline being set for status talks.[560] Under international law, the parties have no binding obligation to further status negotia-

553 On 'prolonged occupation', see Lieblich and Benvenisti (n 173) 109–118; on 'protracted armed conflict', see Lewis (n 157).

554 *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion)* (2024, ICJ Rep 186), para 109. In para 243 it held, nevertheless, that Israel's policies and practices being prolonged aggravates their violation of the right of the Palestinian people to self-determination. It did not, however, use the term 'prolonged occupation' anymore.

555 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 181.

556 Borgen (n 58) 49.

557 Roper (n 327).

558 Weller (n 145) 137.

559 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 176.

560 Ibid 177.

tions;[561] however, on the basis of their prior political commitments, they arguably have the duty to conduct negotiations in good faith.[562]

The UN Charter has enshrined the pacific settlement of disputes in Chapter VI. According to article 33, the parties to any dispute shall seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resorting to regional agencies or arrangements, or other peaceful means of their own choice. The rule has crystallized as customary law and applies not only to UN member states but also to third parties and to all other entities enjoying the protection of the ban on the use of force, including de facto states.[563] The rule does not explicitly require the dispute to be of an international character, but purely domestic disputes are clearly excluded from its scope.[564] It does not set any time frame, for instance by adding the words 'in a timely manner'; neither does the UNGA Friendly Relations Declaration, which entails the obligation to refrain from the use of force in territorial dispute settlements.[565]

Furthermore, the parties' playing for time is facilitated because international organizations and third states do not act vis à vis frozen conflicts in a timely manner. In none of the cases examined here has the UNSC exercised its powers under Chapter VII of the UN Charter to regulate post-conflict political transformation. As a result, no peace-building mission or international territorial administration has been mandated for the purpose of de-occupation transition.[566] Article 41(1) of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts[567] holds that states shall cooperate to bring to an end through lawful means any serious breach of an obligation arising under a peremptory norm of general international law. According to the commentary, such cooperation must be by lawful means, the choice of

561 Ibid 180.

562 Philippe Gautier, 'Non-Binding Agreements', *Max Planck Encyclopedias of International Law* (Oxford University Press 2022) n 19; Melnyk (n 136) n 14.

563 Christian Tomuschat, 'Article 33' in Bruno Simma and others (eds), *The Charter of the United Nations: a Commentary* (3rd edn, Oxford University Press 2012) nn 8–9.

564 Ibid 11.

565 UNGA, 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, Annexed to Res 2625 (XXV) (24 October 1970), UN Doc A/RES/2625'.

566 Antal Berkes, 'International Law and De-Occupation Legislation' (2023) 4 Rutgers International Law and Human Rights Journal 45.

567 Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001, UN Doc A56/10, Yearbook of the International Law Commission 2001, Vol II, Part Two).

which will depend on the circumstances of the situation.[568] Berkes discussed this obligation to cooperate by international organizations and third states to end the unlawful territorial situation in frozen conflicts.[569] He emphasized that this rule, again, does not explicitly set any time frame for the obligation to cooperate, and the speed of any collective action is at the states' discretion.[570] However, he further argued that according to a progressive interpretation of the notion of 'cooperation', it has to occur in a timely manner in order to eliminate the wrongful situation as fast as possible.[571] He bolstered this argument with the rationale of solidarity, the duty to cooperate, and with the nature of the breach of the peremptory norm that has to be terminated: especially when a breach of the peremptory norm is likely to cause irreparable damage to individuals, collective action by the international community should be taken in a timely manner.[572] Examples that require collective action 'in a timely and decisive manner' include the breach of a ceasefire agreement in eastern Ukraine,[573] the shooting down of a civilian aircraft over eastern Ukraine,[574] and the four most serious international crimes—genocide, war crimes, ethnic cleansing, and crimes against humanity.[575]

Yet, in frozen conflicts, Berkes considered it more problematic to argue for the duty of timely cooperation of international organizations and third states. He stressed that the general problem is that most of the time there is no breach of *jus cogens* to provoke an emergency situation, nor ongoing armed hostilities.[576] In other words, frozen conflicts are not sufficiently disruptive so as to deserve decisive intervention by third states.[577] Therefore, the international community and third states do not cooperate to take timely and decisive actions.[578] Hence, frozen conflicts are addressed instead through dialogue

568 Ibid 114, para 3.

569 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38).

570 Ibid 193.

571 Ibid.

572 Ibid 194.

573 UNSC, 'Press Statement on Deterioration of Situation in Donetsk Region, Ukraine, UN Doc SC/12700' (31 January 2017).

574 UNSC, 'Res 2166 (21 July 2014), UN Doc S/RES/2166'.

575 UNGA, 'Res 60/1 (24 October 2005), UN Doc A/RES/60/1', para 139.

576 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 195.

577 James J Coyle, *Russia's Border Wars and Frozen Conflicts* (Springer International Publishing 2018) 9.

578 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 195.

and the facilitation of endless, time-consuming talks, in which the parties restate their maximalist positions, rather than through rapid emergency measures.[579] Considering the distinction between conflict management and conflict settlement, Berkes found that the international community holds itself bound to act urgently only in conflict management but not so much in conflict settlement.[580] The fact that frozen conflicts can persist for more than three decades surely does not support their perception as emergency situations. Such situations are described by Orwell: 'But when war becomes literally continuous, it also ceases to be dangerous. When war is continuous there is no such thing as military necessity.'[581] Therefore, as long as frozen conflicts do not escalate into emergency situations or actual armed conflicts, neither involved nor uninvolved parties take rapid action, which results in the continuation of the status quo—possibly ad infinitum.

C. Consequences of Protracted Conflicts

1. Territorial Title

The discussion above has shown two points: first, that frozen conflicts are indeed persistent and of a long duration and that ceasefire agreements have not succeeded in terminating the underlying conflicts and normalizing relations between the parties; second, that international law facilitates this protraction, because there is neither a time frame for territorial dispute negotiations nor an emergency situation that requires decisive and timely action by the international community. This section now examines the consequences of these protracted conflicts on the territorial title.

The *uti possidetis* principle has already been introduced. In addition, the temporal element[582] of *uti possidetis* must be considered. In territorial disputes, there is a critical date at which the principle is applied. Normally, that critical date is the moment the new state declares its independence, with the effect that from this moment the territorial title is frozen.[583] Accordingly, for Georgia, Moldova, and Azerbaijan, the critical dates were the moments they

579 Ibid.

580 Ibid.

581 George Orwell, *1984* (Signet Classics 2023) 198.

582 See Marcelo G Kohen, *Possession Contestée et Souveraineté Territoriale* (Graduate Institute Geneva / Presses Universitaires de France 1998) 169, distinguishing between the normative element (the different sources of territorial sovereignty), the subjective element (concerning the subjects), the spatial element (the territory that is subject to the principle), and the temporal element (the moment of application of the principle).

583 *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (n 485), para 23; Peters, 'The Principle of Uti Possidetis Juris' (n 487) 124.

each declared independence from the USSR. On these specific dates, the territorial titles over South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh were fixed, assigning each to its respective parent state, and became immutable.

The process of fixing territorial titles at the critical date is explained by the ICJ in the *Frontier Dispute Case*: the delimitation is made as if by taking a photograph of the territorial situation at that specific date, 'it freezes the territorial title; stops the clock', no matter if the facts change later.[584] Interestingly, the ICJ used the metaphor of 'freezing' to describe the fixation of the territorial title at one specific point in time. The description also stresses the resistance of the title to all subsequent factual changes of boundaries with the metaphor of a photograph. The critical date thus signifies a break in the sequence of state actions related to establishing sovereignty over a disputed territory.[585] The *uti possidetis* principle and the critical date doctrine are blind to dynamism or changes over time, no matter how long such changes persist, in pursuit of the overall aim of stability. In the *Minquiers and Ecrehos* case (France v UK) before the ICJ, the UK's legal advisor stated in an oral submission that the critical date theory

> means that, whatever was the position at the date determined to be the critical date, such is still the position now. Whatever were the rights of the Parties then, those are still the rights of the Parties now. If one of them then had sovereignty, it has it now, or is deemed to have it. If neither had it, then neither has it now. And if both did — that is to say, if there was some sort of joint régime, or condominium — then that régime is still deemed to exist and to govern the rights of the Parties to-day. The whole point, the whole raison d'être, of the critical date rule is, in effect, that time is deemed to stop at that date. Nothing that happens afterwards can operate to change the situation that then existed. Whatever that situation was, it is deemed in law still to exist; and the rights of the Parties are governed by it.[586]

The quotation makes explicit how change to territorial titles is deemed to stop at the critical date. Time is not an agent of law but one of its dimensions; it neither establishes nor extinguishes territorial titles.[587] Only states can

584 *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (n 485), para 30.

585 Giovanni Distefano, 'Time Factor and Territorial Disputes' in Marcelo G Kohen and Mamadou Hébié (eds), *Research Handbook on Territorial Disputes in International Law* (Edward Elgar Publishing 2018) 399.

586 See the arguments of Sir Gerald Fitzmaurice in oral submissions for UK, *The Minquiers and Ecrehos Case (France v United Kingdom)* (1953, ICJ Rep 47) 64.

587 Distefano (n 585) 416.

change territorial titles by their relevant acts over time, such as treaties.[588] Thus, whoever holds enduring factual control over territory in a frozen conflict, the formal territorial titles remain fixed as they were at the critical date. Neither the passage of time nor the persistence of frozen conflicts over three decades have consequences for the territorial title of the break-away regions. In other words, the passage of time does not affect the de jure title over territory. However, it does affect the de facto situation on the ground, which becomes more consolidated over time.

2. Consolidation of the De Facto States

Examining the consequences of protracted conflicts requires a closer look at the de facto states that have emerged from these situations. First, the persistence of a frozen conflict has distinct effects on both the parent state and the de facto state. For the former, the prolonged conflict exacerbates the injustice due to the ongoing loss of territory, while the latter enjoys continued de facto control over the territory and tends to consolidate it.[589] Expressed succinctly, time works for the de facto states.[590] The passage of time normalizes and entrenches the status quo and thus has a consolidating effect on the de facto states.[591] Consolidation or stabilization of the de facto states means strengthening the 'effectiveness' and the degree of fulfilment of the factual elements of statehood[592] according to article 1 of the Montevideo Convention of 1933.[593] However, this consolidation is relative, as the de facto states can only exist with the patron state's support and do not qualify as states. To explain the idea of consolidation, each statehood criterion and its consolidation over time will be briefly outlined following Berkes's overview.[594]

The first criterion for statehood is a permanent population. Berkes points out that despite the populations' decrease during or shortly after the wars in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh, in

588 Ibid.

589 Lieblich (n 439) 353.

590 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 176.

591 Lieblich (n 439) 353; Weller (n 145) 137.

592 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 175.

593 Convention on Rights and Duties of States adopted by the Seventh International Conference of American States (Montevideo Convention) (adopted 26 December 1933, entered into force 26 December 1934) 165 LNTS 19.

594 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 181 ff.

more quiet times they have stabilized and sometimes even grown.[595] There is no threshold for a minimal population; what is important is that the individuals have a shared allegiance.[596] The regions affected by frozen conflicts have been populated throughout the duration of these conflicts. Moreover, their persistent isolation from the parent states has sustained and deepened the distinction between their and the parent states' populations and shaped the collective identity of the de facto states.[597] For example, according to the OSCE, a distinct feeling of Transnistrian identity has developed in Transnistria.[598] Berkes also argues that international tribunals applying human rights treaties to the break-away regions help normalize the de facto situation and render the status quo more acceptable to the local population.[599]

The second criterion for statehood concerns effective control over a defined territory. The regions in question, with the exception of Nagorno-Karabakh since 2023, are under effective control of the separatists supported by Russia. In fact, exercising effective control over a territory is the key characteristic of a de facto state. As explained above, factual control over the territory has no power to change the formal title, even if it has lasted for decades. Where a title of sovereignty exists, *effectivités contra legem* cannot prevail over it.[600] In other words, even if consolidation of a de facto state occurs, it does not go as far as to alter the territorial title, nor does it render the situation lawful. Nevertheless, Berkes argued that in the long term, international dispute settlement mechanisms have a consolidating effect on the ceasefire lines and, consequently, the de facto states' control over a defined territory.[601] The border management and peacekeeping missions that followed the ceasefire agreements in the frozen conflicts have stabilized the lines between the parent states and the de facto states and thereby de facto consolidated the latter's territory.[602] Instances include the EU Border Assistance Mission to Moldova

595 Ibid 182.

596 James Crawford, 'State', *Max Planck Encyclopedias of International Law* (Oxford University Press 2011) n 21.

597 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 182.

598 OSCE, 'Transdniestrian Conflict: Origins and Issues' (n 351) 6.

599 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 183.

600 Marcelo G Kohen and Mamadou Hébié, 'Territory, Acquisition', *Max Planck Encyclopedias of International Law* (Oxford University Press 2021) n 23; *Case Concerning the Frontier Dispute (Burkina Faso v Republic of Mali)* (n 485), para 63.

601 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 186.

602 Ibid.

and Ukraine in Transnistria,[603] the OSCE Mission monitoring the contact line[604] and the Russian peacekeeping mission since 2020 in Nagorno-Karabakh,[605] the UN Observer Mission deployed in Abkhazia between 1993 and 2009,[606] and the EU Monitoring Mission patrolling the ceasefire lines following the Six-Point Ceasefire Agreement in Georgia.[607] To prevent further escalation, these missions aim to stabilize the situations. Although stabilization does not legitimize the status quo, it results in a consolidation of the effective territorial control of the de facto authorities.[608]

The third criterion for statehood is independent government. Both factual and legal evaluations are required to determine the competence to govern a specific territory.[609] Although, like for the other criteria, the passage of time cannot affect the legal claim to this competence, it can strengthen the factual capacity to govern: Berkes highlighted how through the programs of international organizations and donor states, the international community has even helped build institutions and develop public services in de facto states.[610] He pointed to the instances of aid provided to various projects in Transnistria through the European Neighbourhood Instrument for the Republic of Moldova,[611] USAID Moldova,[612] USAID-financed programmes in Nagorno-Karabakh,[613] and the Peace and Development Programme of the UNDP Georgia in Abkhazia and South Ossetia.[614] Over time, these programs have contributed to economic recovery, the improvement of the humanitar-

603 'Memorandum of Understanding between the European Commission, the Government of the Republic of Moldova and the Government of Ukraine of 7 October 2005 on the European Union Border Assistance Mission to the Republic of Moldova and to Ukraine'.

604 OSCE, 'Mandate of the Co-Chairmen of the Conference on Nagorno Karabakh under the Auspicies of the OSCE ('Minsk Conference'), (23 March 1995), Doc 525/95'.

605 'Statement by President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation, 10 November 2020' (n 440).

606 UNSC, 'Res 858 (25 August 1993) UN Doc S/RES/858' (n 295) 858.

607 Council of the European Union, 'Council Joint Action, 2008/736/CFSP of 15 September 2008 on the European Union Monitoring Mission in Georgia, EUMM Georgia OJ L 248/26'.

608 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 186.

609 Crawford (n 596) n 24.

610 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 188.

611 EU Commission, 'Programming of the European Neighbourhood Instrument (ENI) – 2017-2020 – Single Support Framework for EU Support to Moldova (2017-2020)'.

612 See 'USAID Moldova' (*US Agency for International Development*).

613 *Chiragov and Others v Armenia* (n 417), para 185.

614 UN Development Programme, 'Georgia, Crisis Prevention and Recovery'.

ian situation, and institution-building, all of which strengthen the de facto authorities' capacity to govern.[615] Government capabilities in the wider sense also include the judicial branch: certain actions by the de facto authorities can gain validity under international law. This was held for instance by the ECtHR regarding the decisions of de facto courts in Transnistria,[616] which constitutes an exception to the principle that *ex injuria jus non oritur*.[617]

The fourth criterion for statehood is the capacity to enter international relations. The most obvious indication of established international relations would be the recognition of statehood by other states. Remarkably, some de facto states have international networks comparable to the diplomatic relations of regular states.[618] Berkes cited Taiwan and Palestine as prime examples of gradual statehood development over time.[619] According to Frowein, the longer a de facto state exists, the more likely it is to be recognized by other states.[620] However, the development of Taiwan and Palestine is not only a matter of long-term policy but also hinges on the international community's willingness to support their independence.[621] Therefore, Berkes concluded that the passage of time can contribute to the effectiveness of de facto states but does not alone suffice.[622] In the cases of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh, the international community with very few exceptions has always followed the duty of nonrecognition and has therefore not fostered relations with the de facto states.

It is important to note that the criteria for statehood are not met by the de facto states. In particular, the criteria of independent government and the capacity to enter international relations are not fulfilled. An independent government would stand in contrast with the actual dependence of the de facto states on their patron states: Russia in the cases of South Ossetia, Abkhazia, and Transnistria, and Armenia in the case of Nagorno-Karabakh before 2023. However, the key point is that, generally, time helps strengthen de facto states.

615 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 189.

616 *Mozer v Moldova and Russia* App No 11138/10 ECtHR (GC) 23 February 2016, para 460; *Ilaşcu and Others v Moldova and Russia* (n 352), paras 144, 147.

617 Berkes, 'International Law and De-Occupation Legislation' (n 566) 22.

618 Oliver Diggelmann, 'Nagorni Karabach: Aserbaidschan verletzt das Völkerrecht in eklatanter Weise' *NZZ* (19 October 2023).

619 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 190–191.

620 Frowein (n 163) 6.

621 Berkes, 'Frozen Conflicts, Consolidation of De Facto Regimes and the Obligation of Timely Cooperation' (n 38) 191.

622 Ibid.

3. De Facto States' Protection under International Law

The passage of time has further consequences for de facto states. Although the existence of de facto states implies a constant violation of the territorial integrity of their parent states, in some respects de facto states are granted a legal status comparable to states: the prohibition of the use of force or annexation applies equally to de facto states.[623] The rationale is to prevent spirals of violence and support stability. Therefore, a state is not allowed to use force against a de facto state, even if it is de jure within its territory.

Azerbaijan's use of force in 2023 to reconquer Nagorno-Karabakh thus violated the prohibition of the use of force.[624] Ruys and Rodrigues Silvestre comprehensively discussed the unlawfulness of Azerbaijan's use of military force in alleged self-defence in the second Karabakh war in 2020.[625] They found that Azerbaijan had no right to the use of force for self-defence, because the factual territorial status of Nagorno-Karabakh had already been established for such a prolonged period that an armed attack from the separatists was no longer ongoing.[626] In other words, Azerbaijan lost any right it may have had to act in self-defence because the status quo of Nagorno-Karabakh had lasted for almost three decades.[627] Even in cases of occupation, where the immediacy requirement of self-defence according to article 51 UN Charter should be construed flexibly, the 'lapse of time between the initial attack and the invocation of self-defence cannot be extended indefinitely'.[628] This assessment underscores how time works for the de facto states. However, instances where states have used armed force to challenge the existing territorial status have been rare, and even fewer instances exist where they have justified such actions by invoking the right to self-defence.[629]

623 Christian Tomuschat, 'Article 2 (3)' in Bruno Simma and others (eds), *The Charter of the United Nations: a Commentary* (3rd edn, Oxford University Press 2012) n 31; Diggelmann (n 618).

624 Diggelmann (n 618).

625 Tom Ruys and Felipe Rodriguez Silvestre, 'Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War' (2021) 32 European Journal of International Law 1287, 1292.

626 Ibid 1289; Tom Ruys and Felipe Rodriguez Silvestre, 'Military Action to Recover Occupied Land: Lawful Self-Defence or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited' (2021) 97 International Law Studies 665, ch 4.1 (b).

627 See Dapo Akande and Antonios Tzanakopoulos, 'Legal: Use of Force in Self-Defence to Recover Occupied Territory' (2021) 32 European Journal of International Law 1299, 1300.

628 Ruys and Rodriguez Silvestre (n 625) 1289.

629 Ibid 1292.

In contrast to this perspective, Akande and Tzanakopoulos argued that Azerbaijan still had the right to self-defence against Nagorno-Karabakh in 2020 irrespective of the passage of time.[630] They noted that the occupation of Nagorno-Karabakh by Armenia and the separatists was a direct consequence of the unlawful armed attack of 1994.[631] The situation in 2020 therefore could not but be an integral part of that initial attack, and as a consequence, Azerbaijan had the right to self-defence for as long as the occupation continued.[632] They bolstered the argument by referring to article 3(a) UNGA Resolution on the Definition of Aggression, which states that a military occupation resulting from an invasion or armed attack qualifies as an act of aggression.[633] The view that the prohibition of the use of force protects a de facto state vis à vis its parent state is controversial: although the IIFFCG Report clearly affirmed the application of article 2(4) UN Charter to de facto states when assessing Georgia's attack on Tskhinvali in August 2008, not viewing it as problematic at all,[634] Henderson and Green criticised this approach vehemently.[635] Furthermore, Waters generally stressed that there is simply no prohibition in international law on a state using force within its own territory to supress insurrections.[636]

Lieblich analysed both Ruys and Rodrigues Silvestre's restrictive view and Akande and Tzanakopoulos's permissive view of Azerbaijan's war of recovery in 2020.[637] Analysing Lieblich's paper in detail would exceed the scope of this work. In short, he discusses the complex ethical and legal dilemmas surrounding such wars of recovery. According to Raz, he argued, law fulfils its role if it guides us towards moral behaviour.[638] In wars of recovery, where a state attempts to reclaim lost territory, two principles are in conflict—territorial integrity and individual rights—, and this causes legal and moral ambiguity. Dworkin and Franck, he explained, argued that when rules are not coherently connected to underlying general principles, their legitimacy is compromised. The absence of clear moral and principle-based guidance results in the lack of any

630 Akande and Tzanakopoulos (n 627).

631 Ibid 1300.

632 Ibid 1301.

633 UNGA, 'Definition of Aggression, Annexed to Res 3314 (XXIX) (14 December 1974), UN Doc A/RES/3314'.

634 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 242.

635 Christian Henderson and James A Green, 'The Jus Ad Bellum and Entities Short of Statehood in the Report on the Conflict in Georgia' (2010) 59 The International and Comparative Law Quarterly 129, 130-133.

636 Waters, 'Plucky Little Russia' (n 143) 227.

637 Lieblich (n 439).

638 Ibid 380.

authoritative answer on the issue of wars of recovery.[639] Lieblich concluded that as long as international law oscillates between statism's claim to territorial integrity and individualism's emphasis on individual rights, the legal debate on wars of recovery is likely to continue. He observed that law's legal-illegal binary approach is insufficient to address the topic. Instead, he proposed a more nuanced approach, viewing wars of recovery as non-prohibited rather than strictly legal or illegal. He bolstered this argument by referring to judge Simma, who in the ICJ Advisory Opinion on Kosovo introduced the concept of toleration regarding Kosovo's independence.[640] Such nonbinary concepts beyond legal-illegal 'could open space for contestation of wars of recovery'.[641]

Without further examining the lawfulness of wars of recovery,[642] for the purpose of this work, two points must be emphasized. First, the time factor plays a crucial role in frozen conflicts and thus in potential or actual wars of recovery. The passage of time complicates arguments for the lawfulness of wars of recovery because, despite their illegal status, the de facto states become more consolidated and stable and can benefit from the prohibition of the use of force. Although the passage of time does not affect the de jure territorial situation, it does strengthen the de facto states' territorial situation. Time thus pulls in two different directions in frozen conflicts, exacerbating the disjunction between the de jure and the de facto territorial situations. This fact contributes to their deadlocked nature. Second, Lieblich's suggestion of introducing more nuanced concepts than the binary of legal-illegal is of broad significance for this thesis. In many respects, frozen conflicts transcend widely accepted binary categories of law and challenge them fundamentally, with the consequence that more effort has to be put into legal argumentation for one position or the other. The transgression of binary categories by frozen conflicts will be examined in the next section.

III. Intensity

Following the analysis of the core issue and the time factor, this chapter addresses frozen conflicts' violence and intensity. It is another focal characteristic because what has been described as frozen conflicts' 'low intensity'[643]

639 Ibid 380-381.

640 Ibid 380.

641 Ibid 381.

642 On this question see also Berkes, 'International Law and De-Occupation Legislation' (n 566) 12 ff.

643 Lachowski (n 137) no 16.

distinguishes them both from full-scale war or armed conflict in the sense of common article 2 of the Geneva Conventions[644] and from peace. Because armed hostilities and attacks are no longer ongoing, frozen conflicts do not meet the criteria of an armed conflict for most of the time. However, if violence were extremely unlikely or entirely absent, they might be called 'frozen' but not a 'conflict'.[645] This subchapter aims to analyse the quality of frozen conflicts by distinguishing them both from full-scale war or armed conflict and from true peace. Subsequently, this low intensity will be defined by military presence and occupation, the human rights situation, and the displacement of people.

A. Distinguishing Frozen Conflicts from Full-Scale Wars or Armed Conflicts

Whether a situation qualifies as an armed conflict depends on factual criteria. Although the Geneva Conventions do not contain any definition of the concept, the ICTY Appeal Chamber stated in *Tadić* that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.[646] In the aftermath of the attacks of 9/11 in 2001 and the US's subsequent 'war on terror', the ILA produced a report on the meaning of war and armed conflict in international law that further outlined the concept.[647] First, the report found that the term 'war', although still used, has in general been replaced by the broader concept of 'armed conflict'.[648] Two criteria are required for a situation to be classified as an armed conflict: first, the existence of organized armed groups, and second, the engagement in fighting of some intensity.[649] These are the basic criteria of an

644 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

645 Grant (n 4) 392.

646 *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (ICTY-94-1, A Ch (2 October 1995)), para 70.

647 ILA (n 537) 1.

648 Ibid.

649 Ibid 2.

armed conflict, determining the application of IHL. There is a further distinction between international and non-international armed conflicts. For the purpose of this work, it is not necessary to consider this distinction. Both types of conflict are present in the four cases, depending on which aspect one considers. It suffices to briefly look at the two basic criteria of armed conflicts.

First, the criterion of organization indicates that armed conflicts involve two or more organized armed groups.[650] Such groups need to show a sufficient level of organization through an 'official joint command structure, headquarters, designated zones of operation, and the ability to procure, transport, and distribute arms.'[651] These are some of the 'indicative factors, none of which are, in themselves, essential to establish whether the "organization" criterion is fulfilled.'[652] In contrast, violence perpetrated by an assassin or terrorist acting alone or the disorganized mob violence of a riot do not meet the criterion of an organization.[653]

Second, the criterion of intensity requires that the hostilities reach a certain level of intensity.[654] The following factors were identified by the ICTY when it summarized case law relevant to the *Boskoski and Tarculovski* judgement:[655]

> These include the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the UN Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire

650 Ibid 28.

651 *Prosecutor v Milosevic (Decision on Motion for Judgement of Acquittal)* (ICTY IT-02-54-T (16 June 2004)), para 23.

652 *Prosecutor v Haradinaj et al (Judgment)* (ICTY IT-04-84-T (3 April 2008)), para 60.

653 ILA (n 537) 28.

654 Ibid 29.

655 *Prosecutor v Boskoski and Tarculovski (Judgment)* (ICTY IT-04-82-T (10 July 2008)), para 177.

> orders and agreements, and the attempts of representatives from international organisations to broker and enforce cease fire agreements.[656]

Again, these factors are merely indicative of the intensity; none of them are essential for the criterion of intensity to be met.[657]

The two basic criteria of armed conflicts were met in the four cases of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh during some periods. South Ossetia experienced a full-scale conflict in 1991 before the ceasefire agreement between Russia and Georgia was signed in Sochi in 1992. A second armed conflict in South Ossetia lasted for five days in August 2008. Abkhazia experienced armed hostilities from 1992 until 1994, with several short-lived armistices, until they were terminated by the Moscow Agreement.[658] In Transnistria, the armed conflict started at the end of 1990 and ended in 1992.[659] Nagorno-Karabakh experienced full-scale war from 1992 to 1994,[660] in the second Karabakh war in 2020[661], and again in 2023 when Azerbaijan established control. These phases did not raise discussions as to whether the criteria of an armed conflict were met, since the level of organization and the intensity of violence can clearly be affirmed. Regarding organization, all four cases involved military forces of the parent state, troops of the de facto state, and troops of the patron state.[662] Regarding intensity, the criterion has also been met regarding attacks by distinct actors, the numbers of deaths and refugees, and the international attention the situations received.

Yet, apart from these rare 'hot' phases, there have been few or no armed confrontations for most of the time. The question arises as to how these 'calmer' periods are to be classified in a binary framework of armed conflict or no armed conflict. For instance, the IIFFCG described the situation in South Ossetia and Abkhazia before the war in August 2008 as 'low-intensity conflicts in the break-away territories' that 'risked developing into large-scale hostilities'.[663] The ECtHR described the relations between Georgia and Russia after the war in August 2008 as an 'extended period of ever-mounting tensions,

656 Ibid.

657 *Prosecutor v Haradinaj et al. (Judgment)* (n 652), para 49.

658 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 76.

659 *Ilaşcu and Others v Moldova and Russia* (n 352), paras 42 ff.

660 *Chiragov and Others v Armenia* (n 417), paras 18, 172.

661 ICG, 'Post-War Prospects for Nagorno-Karabakh, Europe Report No 264 – 9 June 2021' (n 448).

662 *Chiragov and Others v Armenia* (n 417), paras 174-176.

663 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 59.

provocations and incidents'.[664] Similarly, the situation in Nagorno-Karabakh was shaped by tensions and recurring breaches of ceasefire agreements,[665] but only three periods were characterised as wars: the first Karabakh war in the early 1990s, the second Karabakh war in 2020, and the war in September 2023.[666] In Transnistria, there has not been an armed conflict since the war that ended in 1992.[667] In short, the frozen phases of the conflicts are not considered armed conflicts. But can these phases, then, be categorized as peace?

B. Distinguishing Frozen Conflicts from Peace

Peace might even be a more elusive concept in international law than armed conflict. Although according to Lauterpacht the establishment of peace and the protection of human rights are key aims of international law,[668] 'legal literature largely abandoned promoting the establishment of peace as a public good or independent, overarching aim of international law'.[669] Therefore, this concept also lacks clear definitions and boundaries. Galtung introduced two components of peace: negative peace and positive peace.[670] Negative peace simply means the absence of war or armed conflict and can be traced back to Grotius's dichotomy of the law of war and the law of peace. By contrast, positive peace is a broader concept. Instead of referring to the absence of war or armed conflict, it refers to the presence of something, particularly of social justice.[671] In a more modern interpretation, it refers to equal opportunity, enjoyment of social justice, human dignity, respect for human rights, and the elimination of poverty, inequality, exclusion, death, or disability that result from inequitable distribution of resources addressing basic human needs.[672] In other words, according to Galtung, negative peace implies the absence of personal violence, and positive peace the absence of structural

664 *Georgia v Russia (II)* (n 128), para 30.

665 *Sargsyan v Azerbaijan* App No 40167/06 ECtHR (GC) 16 June 2015, para 25.

666 See Diggelmann (n 618); Melnyk (n 136) n 3; Ruys and Rodriguez Silvestre (n 625).

667 Borgen (n 58) 64.

668 Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 British Yearbook of International Law 1, 51.

669 Cecilia M Bailliet, 'Introduction: Researching International Law and Peace' in Cecilia M Bailliet (ed), *Research Handbook on International Law and Peace* (Edward Elgar Publishing 2019) 1; according to Baillient, the reason for this lies in the fragmentation of international law into technical sub-disciplines, insofar as contributions on overall aims and broader values such as peace are rare.

670 Johan Galtung, 'Violence, Peace, and Peace Research' (1969) 6 Journal of Peace Research 167, 183.

671 Ibid.

672 Bailliet (n 669) 5.

violence.[673] Therefore, for the purpose of international law, peace is defined as the absence of aggression, armed conflict, or the use — or threat of the use — of force in violation of the UN Charter, and as the presence of conditions under which fundamental human rights are maintained.[674] Similarly, article 55 UN Charter calls for higher living standards, economic and social progress and development, and respect for human rights as conditions for peaceful and friendly international relations.

Frozen conflicts can be distinguished from peace in several respects. Concerning the absence of war or armed conflict, these situations remain ambiguous. Although most of the time there is no active warfare, there is still a permanent, at least implicit threat of the use of force. All the regions have experienced wars at some point, and the relations between the parties remain tense, as the question of the status of the break-away regions remains unresolved. The territorial integrity of Georgia and Moldova is constantly violated, as was Azerbaijan's before 2023, by the existence of the de facto states. The risk of renewed violence is always present, not only because of the ongoing dispute on the status question but also due to the military presence in the regions. Additionally, the conflicts are embedded in wider geopolitical dynamics involving external powers that control the de facto states, which intensifies the tensions and increases the risk of active conflict. These regions are thus permanently unstable and face an uncertain future. They also face shortcomings concerning fundamental human rights, equal opportunities, living standards, and economic and social progress. Violations of human rights, restrictions on freedom of movement, and economic and social disruption continue. The following subchapter will assess exactly how frozen conflicts differ from both armed conflict and peace.

C. Manifestations of the Low Intensity

1. Military Presence and Occupation

The low intensity of frozen conflicts is manifest in the absence of full-scale war; however, the continued presence of military forces entails a constant risk of renewed armed hostilities.[675] The presence of foreign military forces without the parent state's consent constitutes a belligerent occupation.[676]

673 Galtung (n 670) 183.

674 Henry F Carey and Rebecca Sims, 'The International Law of Peace' in Henry F Carey (ed), *Peacebuilding Paradigms* (Cambridge University Press 2020) 160.

675 Harzl (n 175) 208–211.

676 See, e.g., Annyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva Academy of International Humanitarian Law and Human Rights 2019) 32; RULAC, 'Military Occupation of Moldova by Russia' (n 171); RULAC, 'Military Occupation of Georgia by Russia' (n 171); RULAC, 'Military Occupation of Azerbaijan by Armenia' (n 171).

Belligerent occupation is enshrined in article 42 Hague Convention IV, which states that territory is considered occupied when it is actually placed under the authority of the hostile army and that the occupation extends only to the territory where such authority has been established and can be exercised. Three elements are required: 1) the armed forces of a foreign state are physically present without the consent of the effective local government in place at the time of the invasion; 2) the local sovereign is unable to exercise authority due to the presence of foreign forces; 3) the occupying forces impose their own authority over the territory.[677] Usually, the hostile army that occupies a territory is of a foreign state; nevertheless, situations of occupation by proxies have become more frequent in recent years. In such cases, the principal belligerent has control over another actor, a subordinated de facto administration that controls the territory.[678] Occupation by proxy is relevant to frozen conflicts due to the dependence of separatists on a patron state:[679] Russia in South Ossetia, Abkhazia, and Transnistria, and Armenia in Nagorno-Karabakh before 2023. Furthermore, the concept of occupation has three limitations: it is presumed to be temporary, it does not transfer sovereignty, and it does not grant title over the occupied territory. Since the outlawing of the use of force and prohibition of territorial conquest, the law of occupation has developed as the legal framework governing the limits of a state's power over territories seized during war.[680] Occupation is assumed in all the four cases.

Regarding Georgia, the ICC examined the crimes against ethnic Georgians committed by forces of the de facto administration in South Ossetia and mentioned 'the context of an occupation by the Russian armed forces'.[681] In its application for arrest warrants against three individuals, in March 2022, the ICC stated that Russian forces continued to occupy South Ossetia 'until this day'.[682] It described how Russian forces had substituted the Georgian authorities in the occupied territory by appointing zone commanders, controlling

677 Lieblich and Benvenisti (n 173) 9; RULAC, 'Military Occupation' (*RULAC Geneva Academy*, 4 September 2017).

678 Antal Berkes, *International Human Rights Law Beyond State Territorial Control* (Cambridge University Press 2021) 39-42; Lieblich and Benvenisti (n 173) 51; see in general Tom Gal, 'Unexplored Outcomes of Tadic: Applicability of the Law of Occupation to War by Proxy' (2014) 12 Journal of International Criminal Justice 59.

679 Berkes, 'International Law and De-Occupation Legislation' (n 566) 8.

680 Lieblich and Benvenisti (n 173) 11.

681 *Situation in Georgia* (Office of the Prosecuter ICC 01/15 (10 March 2022)) 2; it qualified the situation as an occupation already in 2016, see *Situation in Georgia: Decision on the Prosecutor's Request for Authorization of an Investigation* (Pre-Trial Chamber I ICC 01/15 (27 January 2016)).

682 *Situation in Georgia* (n 681) n 26.

access to the territory, negotiating prisoner exchanges, repatriating the corpses of Georgian soldiers, and implementing measures to prevent looting.[683] In *Georgia v Russia (II)*, the ECtHR also ruled that Russia exercised effective control over South Ossetia and Abkhazia and the buffer zone from the signature of the ceasefire agreement on 12 August 2008 to 10 October 2008, the date of the withdrawal of the Russian troops from the buffer zone, and beyond, pointing to the strong Russian presence and the dependency of the South Ossetian and Abkhazian authorities on Russia.[684] Thereby, the ECtHR established Russia's extraterritorial jurisdiction over Georgian territory under article 1 ECHR.[685] Even though the notion of 'effective control' in the ECHR is broader than the 'overall control' of the law of occupation,[686] the overall considerations of the ECtHR indicate that Russia was the occupier after 12 August 2008.[687] The Council of Europe also considered South Ossetia and Abkhazia to be occupied by Russia.[688] Georgia for its part adopted the 'Law of Georgia on Occupied Territories' in 2008.[689]

Regarding Transnistria, the situation is similar, and thus it is also considered an occupied territory.[690] The ECtHR has consistently held that Transnistria can only exist because of Russia's military, economic, and political support.[691] In several cases, the ECtHR has ruled that Russia has effective control over Transnistria and thus has extraterritorial jurisdiction in the sense of article 1 ECHR.[692] Again, although the concept of effective control in the ECHR differs from overall control in belligerent occupation, effective control can

683 Ibid 27.

684 *Georgia v Russia (II)* (n 128), paras 165-175; RULAC, 'Military Occupation of Georgia by Russia' (n 171).

685 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221.

686 *Georgia v Russia (II)* (n 128), para 196.

687 Ibid, paras 52 (headline), 83, 145 (headline), 173, 194-199, 291, 310-311, 336.

688 PACE, 'The Progress of the Assembly's Monitoring Procedure (January-December 2022), Doc 15682 Report (9 January 2023)' n 6.5, 68.

689 Law on Occupied Territories of Georgia, 23 October 2008, Printed in: European Commission for Democracy Through Law (Venice Commission), Opinion No 516, CDL(2009) 004 (19 January 2009); See also European Commission for Democracy Through Law (Venice Commission), 'Opinion on the Law of Occupied Territories of Georgia, Opinion No 516, CDL-AD(2009)015 (17 March 2009)'.

690 See, e.g., Borgen (n 58) 64.

691 *Ilaşcu and Others v Moldova and Russia* (n 352), para 392; *Catan and Others v Moldova and Russia* App Nos 43370/04, 8252/05, 18454/06 ECtHR (GC) 19 October 2012, para 122; *Mozer v Moldova and Russia* (n 616), para 110.

692 First ruled in *Ilaşcu and Others v Moldova and Russia* (n 352), para 114; In the same vein see *Mozer v Moldova and Russia* (n 616); *Apcov v Moldova and Russia* App No 13463/07 ECtHR 30 May 2017.

nevertheless be an indicator. The UN, the EU, and the Council of Europe have repeatedly urged Russia to completely and unconditionally withdraw its troops from Moldovan territory.[693] According to the Council of Europe, a belligerent occupation of Transnistria by Russia exists.[694]

Regarding Nagorno-Karabakh, no belligerent occupation has occurred since September 2023. In its own territory, Azerbaijan does not qualify as a hostile army in the sense of article 42 Hague Convention IV of 1907. In 2020, the ceasefire agreement already initiated a process of de-occupation by returning control of seven surrounding districts and parts of Nagorno-Karabakh to Azerbaijan.[695] However, prior to this development, Armenia had repeatedly been considered the occupying power of Nagorno-Karabakh.[696] For example, the UNSC addressed the occupation as early as 1993,[697] the Parliamentary Assembly of the Council of Europe did so in 2005,[698] and the UNGA in 2008.[699] Similarly to the other cases, the ECtHR has consistently stressed the significant and decisive influence of Armenia over Nagorno-Karabakh and the deep interconnections between the two entities in nearly all significant matters, leading to Armenia's effective control over Nagorno-Karabakh and the surrounding territories.[700]

In general, however, the law of occupation has rarely been applied.[701] This holds true for frozen conflicts as well. International tribunals have not applied the law of occupation to any of the four frozen conflict cases. In the

693 PACE, 'The Honouring of Obligations and Commitments by the Russian Federation, Res 1896 (2 October 2012)' n 25.2; PACE, 'The Honouring of Obligations and Commitments by the Republic of Moldova, Res 1955 (2 October 2013)' (n 381) n 27; UNGA, 'Res A/72/282 (26 June 2018), UN Doc A/RES/72/282' (n 380), para 2; European Parliament, 'Res P9_TA(2022)0205 of 5 May 2022 on the State of Play of EU-Moldova, OJ C 465/151', para 24.

694 PACE, 'Consequences of the Russian Federation's Aggression against Ukraine, Opinion 300 (2022) (15 March 2022)' n 5; PACE, 'The Progress of the Assembly's Monitoring Procedure (January-December 2022), Doc 15682 Report (9 January 2023)' (n 688) 31 (Apendix); See also RULAC, 'Military Occupation of Moldova by Russia' (n 171).

695 Berkes, 'International Law and De-Occupation Legislation' (n 566) 15; RULAC, 'Military Occupation of Azerbaijan by Armenia' (n 171).

696 See e.g. Vité (n 154) 74-75.

697 UNSC, 'Res 884 (12 November 1993), UN Doc S/RES/884' (n 431).

698 PACE, 'The Conflict over the Nagorno-Karabakh Region Dealt with by the OSCE Minsk Conference, Res 1416 (25 January 2005)' (n 447).

699 UNGA, 'Res 62/243 (14 March 2008) UN Doc A/RES/62/243'.

700 *Chiragov and Others v Armenia* (n 417), paras 169-186; *Zalyan and Others v Armenia* App Nos 36894/04 and 3521/07 ECtHR 17 March 2016, para 214; *Nana Muradyan v Armenia* App No 69517/11 ECtHR 5 April 2022, paras 88, 91.

701 Lieblich and Benvenisti (n 173) 2; David J Scheffer, 'Beyond Occupation Law' (2003) 97 American Journal of International Law 842, 847.

Chiragov case, the ECtHR addressed the law of occupation but remained ambiguous as to whether Armenia's responsibility derives from it being an occupying power in Nagorno-Karabakh or from other forms of control.[702] Typically, international tribunals addressing frozen conflicts do not deal with questions concerning the law of occupation and focus instead on other issues within their jurisdiction. The ICJ, for example, has adjudicated claims filed by Georgia against Russia and mutual claims from Armenia and Azerbaijan. The jurisdiction in these cases was based on the CERD; hence, the ICJ could only rule on breaches of obligations stemming from the CERD but not on breaches of the law of occupation. Moldova for its part has never filed a claim against Russia at the ICJ. Similarly, the ECtHR adjudicated cases within its jurisdiction under the ECHR, not under the Hague Conventions or Geneva Conventions, and therefore did not deal directly with questions of the law of occupation, but with questions of human rights law instead.[703] Finally, the ICC, when dealing with the situation in Georgia and requesting that arrest warrants be issued for individuals, also applied IHL in the context of an international armed conflict in August 2008, not in the context of a subsequent occupation.[704] Thus, no international tribunal has clarified whether and at which times precisely occupation occurred in the four frozen conflicts. Additionally, South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh are not considered typical cases of occupation; they rarely appear in standard textbooks on occupation.[705] However, for the purpose of this thesis, exploring issues related to the application of the law of occupation is unnecessary. The emphasis is on understanding that the military presence and occupation continuously violate international law. According to the UNGA's definition of aggression, unlawful occupation is considered a form of aggression.[706] The situations analysed here therefore imply a persistent threat of violence that helps characterize the low intensity of frozen conflicts as differing both from full-scale war and from peace.

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702 Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation* (Cambridge University Press 2017) 378 note 143.

703 See Salvatore Caserta and Pola Cebulak, 'Territorial Disputes by Proxy: The Indirect Involvement of International Courts in the Mega-Politics of Territory' (2021) 84 Law and Contemporary Problems 123 who calls the phenomenon 'territorial dispute by proxy'.

704 *Situation in Georgia* (n 681), paras 24 ff.

705 Textbook examples include Israel's post-1967 occupation of Gaza and the West Bank, the US-led coalition's occupation of Iraq in 2003, Turkey's occupation of northern Syria since 2016, or Russia's occupation of Crimea since 2014, see Lieblich and Benvenisti (n 173) 2.

706 UNGA, 'Definition of Aggression, Annexed to Res 3314 (XXIX) (14 December 1974), UN Doc A/RES/3314' (n 633) art 3 (a).

2. Human Rights

The low intensity of frozen conflicts is further manifested in the human rights situation in the regions. Violations occur frequently, and the number of cases before the ECtHR dealing with these European human rights trouble spots is increasing.[707] Human rights claims can serve as proxies for adjudicating underlying territorial disputes.[708] Individuals can access the ECtHR by alleging human rights violations that are disconnected from the territorial issue, over which the court would have no jurisdiction.[709] Nevertheless, beyond its effect on the human rights situation, it is extremely difficult for the ECtHR to influence or stabilize the overall situation around a territorial dispute.[710] As outlined in Part I, the use of the term 'frozen conflicts' by officials of the UN Commission on Human Rights and the UN Human Rights Council, such as Deng,[711] Kälin,[712] and Beyani,[713] implies a link between frozen conflicts and a precarious human rights situation. Although the issue of human rights in conflict zones is attracting increasing attention, their application during armed conflicts remains a debated issue.[714] In the case of *Georgia v Russia (II)*, their application was strictly denied by the ECtHR in the 'context of chaos', meaning armed conflict;[715] only after the fighting are they intended to be applied, thus particularly during the frozen phase of the conflicts. There are two problematic aspects to human rights in frozen conflicts: procedural rights and substantive rights.

Procedural rights are problematic in frozen conflict zones because, under these conditions of weak institutions, it is unrealistic for victims of human rights violations to obtain effective remedies within the de facto states.[716] The four regions have therefore been described as legal 'black holes' for human rights.[717] In other words, the status quo deprives individuals of the rights and opportunities that they typically have in regular states.[718] Although the de

707 Paraskeva and Meleagrou (n 144) 3.

708 Caserta and Cebulak (n 703).

709 Ibid 128.

710 Ibid 150–151.

711 UN Economic and Social Council (n 114) nn 5, 12, 16, 19.

712 UN Human Rights Council (n 116) n 94 (e).

713 UN Human Rights Council (n 117) n 65.

714 Michael n Schmitt, 'Classification in Future Conflict' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 474.

715 *Georgia v Russia (II)* (n 128), para 137.

716 *Chiragov and Others v Armenia* (n 417), para 119.

717 Racz (n 232) 5, 8, 29; *Sargsyan v Azerbaijan* (n 665) Separate Opinion of Judge Yudkivsk, 92.

718 Thomas de Waal, *Uncertain Ground, Engaging with Europe's De Facto States and Breakaway Territories* (Carnegie Endowment for International Peace 2018) 71.

facto states often function similarly to regular states and have developed some legal and institutional structures, including some for human rights protection, in practice, these frameworks scarcely fulfil their purpose.[719] The de facto authorities are frequently unwilling to adequately uphold human rights and democratic freedoms and instead prioritise concerns for regime security.[720] Even if they are inclined to do so, sometimes in order to better present their entity as a legitimate state, no mechanisms have been established.[721] Moreover, the de facto states cannot be subject to multinational human rights treaties, and the link has to be made through the parent state or the patron state.[722]

Yet, both the parent and the patron states typically deny their obligations to address alleged human rights violations in the regions concerned. The parent states of Georgia, Moldova, and Azerbaijan argue that the regions fall exclusively within the jurisdiction of the patron states. In the *Chiragov* case, for example, the government of Azerbaijan argued that the applicants had failed to exhaust domestic remedies because they had not applied to any judicial or administrative body in Armenia, which allegedly had jurisdiction over Nagorno-Karabakh.[723] In the case of *Ilaşcu and others* against Moldova and Russia, the Moldovan government emphasized that when ratifying the ECHR, it had issued a declaration seeking to exempt itself from responsibility for acts committed in Transnistria, which it did not control; this was ultimately rejected by the Court.[724] Georgia and Azerbaijan also attempted to exempt their jurisdictions in the break-away regions by unilateral declarations.[725]

In contrast, the patron states supporting and occupying the break-away regions argue that they do not execute effective control over the regions and that they do not have extraterritorial jurisdiction there. In the case of *Ilaşcu*, Russia denied any influence over Transnistria and asserted that it had never given the authorities 'the slightest military, financial or other support' and that it is an 'integral part of the territory of the Republic of Moldova'.[726] Consequently, Russia argued that no extraterritorial jurisdiction could be established.

719 Racz (n 232) 5.

720 Ibid.

721 Lucia Leontiev, 'The Place of International Human Rights Law in the Territorial Non-State Entities. The Case of Taiwan and Territorial Non-State Entities from the Post-Soviet Space' (2022) 43 Liverpool Law Review 551, 562.

722 Ibid 559.

723 *Chiragov and Others v Armenia* (n 417), para 107.

724 *Ilaşcu and Others v Moldova and Russia* (n 352), para 301.

725 Berkes, *International Human Rights Law Beyond State Territorial Control* (n 678) 57.

726 *Ilaşcu and Others v Moldova and Russia* (n 352), para 357.

Due to their lack of statehood, the de facto states cannot be held responsible for human rights violations; the responsibility is thus shared between the parent state and the patron state.[727] The *Ilaşcu* case was the first case pertaining to one of the frozen conflicts to confirm the exceptional circumstances under which Russia's extraterritorial jurisdiction can be invoked.[728] Nevertheless, the ECtHR emphasized that even when a state is hindered from exercising its authority over its entire territory because of an established de facto state, and whether this is accompanied by military occupation or not, the territorial state still has jurisdiction in the sense of article 1 ECHR.[729] Therefore, the ECtHR ruled that both Russia and Moldova had jurisdiction over Transnistria. This ruling set a precedent for similar cases arising from the four regions.

Substantive rights are equally problematic in frozen conflicts. All four frozen conflicts encompass a wide spectrum of human rights threats and violations. Not only is the right to life constantly challenged,[730] but there are also frequent arbitrary detentions; incidents of torture and ill-treatment; restrictions on freedom of movement, including 'passportization' and special permits being required for border zones, 'borderization', closures of crossing points, and discrimination at de facto border crossings; limitations on the right to education, such as regulations restricting languages of instruction; restrictions on freedom of the media, expression, and freedom of religion, often intertwined with internal political dynamics and discrimination against minority religious groups; and ongoing challenges to political rights.[731]

Regarding Transnistria, the European Parliament strongly deplored the lack of respect for human rights and human dignity in 2007, emphasizing that the right of access to information and education was being ignored, resulting in widespread human trafficking and organized crime.[732] Similarly, in 2021, the national report submitted to the UN Human Rights Council by Moldova underlined the serious and systematic human rights abuses in Transnistria carried out by the entities controlling the region: these violated the rights to liberty and security of person, to freedom of expression, to association, to free

727 Leontiev (n 721) 565.

728 *Ilaşcu and Others v Moldova and Russia* (n 352), para 314.

729 Ibid, para 333.

730 Neukirch, '"Frozen" Human Rights in Abkhazia, Transdniestria, and the Donbas' (n 82) 185.

731 Leontiev (n 721) 564-566; Neukirch, '"Frozen" Human Rights in Abkhazia, Transdniestria, and the Donbas' (n 82) 190.

732 European Parliament, 'Res P6_TA(2007)0358 of 12 July 2007 on Human Rights Violations in Transnistria (Republic of Moldova)'.

movement, not to be arrested without cause, to health, to education, and to live free from torture.[733] In its 2023 report, Freedom House rated Transnistria with a score of 18 out of 100 points for political rights and civil liberties and classified the region as 'not free'.[734]

Regarding South Ossetia and Abkhazia, the human rights situation might be even more concerning and has been deteriorating. The ongoing process of 'borderization' along the administrative boundary lines involves the installation of barbed wire fences, border signs, and trenches combined with surveillance and strict controls that make some villages inaccessible.[735] The national report submitted to the UN Human Rights Council by Georgia in 2020 addressed continuous human rights violations in South Ossetia and Abkhazia, including violations of the right to life, freedom of movement, and property rights, and reported on illegal detentions, kidnappings, and ethnic discrimination against Georgian citizens.[736] The report stressed that under the occupation regime more of the crossing points between the regions and Georgia had been closed, resulting in the complete isolation of some districts.[737] A documentary broadcast in 2023 showed how families are separated such that family members can see each other only through a barbed wire fence.[738] Due to a lack of water supply, family members have to bring water to their relatives personally and hand it over the wire. What is particularly worrying is the lack of information on the human rights situation in the regions due to the denial of access for international institutions, even though, for example, the mandate of the European Union Monitoring Mission (EUMM) covers the entire territory of Georgia.[739] Freedom House classified South Ossetia in 2023 as 'not

733 UNGA, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Republic of Moldova (18 November 2021), UN Doc A/HRC/WG.6/40/MDA/1', para 148.

734 Freedom House, 'Transnistria: Freedom in the World 2023 Country Report' (*Freedom House*).

735 UNGA, 'Compilation on Georgia, Report of the Office of the United Nations High Commissioner for Human Rights (12 November 2020), UN Doc A/HRC/WG.6/37/GEO/2', para 123.

736 UNGA, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Georgia /14 December 2020), UN Doc A/HRC/WG.6/37/GEO/1', paras 19-24.

737 Ibid, para 20.

738 *Grenzerfahrung Russland – Konfliktzone Kaukasus* (n 248) at 1h10min.

739 UNGA, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, Georgia /14 December 2020), UN Doc A/HRC/WG.6/37/GEO/1' (n 736), para 26; Leontiev (n 721) 564.

free', awarding it 12 of 100 points for overall freedom.[740] In contrast, Abkhazia was rated as 'partly free' with a score of 39 out of 100 points.[741]

Regarding Nagorno-Karabakh, the national report of Armenia submitted to the UN Human Rights Council 2019 stressed that the right to life was especially endangered in the region and that the existential security of the people remained the biggest sustained threat.[742] Freedom House assessed the situation in Nagorno-Karabakh in 2022 as 'partly free' with a score of 36 of 100 points,[743] and the overall situation was compared to that in Abkhazia.[744] The situation worsened at the end of 2022 when Azerbaijan blocked traffic between Armenia and Nagorno-Karabakh, causing shortages of food, medication, hygiene products, and so forth.[745] A humanitarian crisis was looming before Azerbaijan's reconquest in September 2023. During this period, Azerbaijan faced criticism for severe restrictions on humanitarian access, arrests, and limitations on freedom of expression, assembly, and media.[746] Moreover, hundreds of thousands of Armenians were forced to flee, as will be outlined below.

3. Displaced Persons

Finally, the low intensity of frozen conflicts is manifest in the high number of displaced persons. Without intending to sound cynical, we address the issue of displaced persons as a characteristic of low-intensity conflicts because, unlike full-scale wars that result in a high number of casualties, frozen conflicts lead to displacement rather than direct loss of life. This is not only a consequence of the short 'hot' phases of the conflicts that forced people to flee violence, but also of subsequent discrimination and even ethnic cleansing during the long-lasting frozen phases of the conflicts. Most of the individuals who fled the frozen conflicts are internally displaced, as they did not leave their country of origin, but a region of their country that is under the control of separatists and their patron state. Georgians from South Ossetia and Abkhazia typically fled to undisputed Georgian territory, and Moldovans

740 Freedom House, 'South Ossetia: Freedom in the World 2023 Country Report' (*Freedom House*).

741 Freedom House, 'Abkhazia: Freedom in the World 2023 Country Report' (*Freedom House*).

742 UNGA, 'National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council rRsolution 16/21, Armenia (19 November 2019), UN Doc A/HRC/WG.6/35/ARM/1', para 138.

743 Freedom House, 'Nagorno-Karabakh: Freedom in the World 2022 Country Report' (*Freedom House*).

744 Leontiev (n 721) 565.

745 Human Rights Watch, 'World Report 2024: Azerbaijan' (3 January 2024).

746 Ibid.

fled from Transnistria to undisputed Moldovan territory. However, substantial international displacement happened in the conflict in Nagorno-Karabakh, from which ethnic Armenians fled to neighbouring Armenia. Simultaneously, Russians have immigrated to South Ossetia, Abkhazia, and Transnistria, and Armenians to Nagorno-Karabakh, at least until 2020.

The link between frozen conflicts and high numbers of displaced persons has been noted repeatedly. One author identified the number of forced displacements as a central and common characteristic of frozen conflicts.[747] Deng, the UN Secretary General's Representative on internally displaced persons, invoked the Guiding Principles on Internal Displacement in connection with frozen conflicts.[748] Moreover, a number of human rights issues arising from frozen conflicts were presented to the ECtHR;[749] these largely involved the rights of displaced persons and their inability to enjoy property rights. The Parliamentary Assembly of the Council of Europe has emphasized that enabling refugees and displaced persons to return voluntarily to the regions they came from remains one of the main aims of conflict settlement in Armenia, Azerbaijan, and Georgia.[750]

Moreover, forced displacements have impacted the demographic composition of the regions. In Abkhazia, as of 1989, the population was composed of 46% Georgians and 18% Abkhazians; the rest were Armenians, Russians, Greeks, and others.[751] Since then, the percentage of Georgians has gradually declined and they are no longer the largest group. The UNSC expressed the unacceptability of demographic changes in Abkhazia resulting from the conflict as early as 2003.[752] In South Ossetia, the population in 1989 was composed of 29% Georgians and 66% Ossetians; the remainder were Russians, Armenians, Jews, and others.[753] Georgians were already a minority, and changes to the demographic composition have thus been less drastic than in Abkhazia.[754] As a result of the armed conflict in 2008, 133,000 Georgians became displaced.[755] The

747 Hadjigeorgiou (n 9) 3.

748 UN Economic and Social Council (n 114) 3.

749 Grant (n 4) 404.

750 PACE, 'Refugees and Displaced Persons in Armenia, Azerbaijan and Georgia, Res 1497 (13 April 2006)' n 7.

751 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 65.

752 UNSC, 'Res 1494 (30 July 2003), UN Doc S/RES/1494', para 14.

753 Independent International Fact-Finding Mission on the Conflict in Georgia (n 129) 65.

754 Ibid 131.

755 UNGA, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, Addendum Mission to Georgia (13 February 2009), UN Doc A/HRC/10/13/Add.2' 2.

UNGA has repeatedly stressed the importance of finding a solution to the problems arising from forced displacement in Georgia, stated its deep concern about 'ethnic cleansing'[756] in the disputed regions, and has repeatedly recognized the right of all internally displaced persons and refugees and their descendants to return to their homes in Abkhazia and South Ossetia regardless of their ethnicity.[757] In *Georgia v Russia (II)*, the ECtHR stressed that a large number of Georgian nationals who fled the conflict no longer reside in South Ossetia but in undisputed Georgian territory and moreover had been prevented from returning.[758] It ruled that the freedom of movement of 32,000 Georgian nationals had been violated by Russia until the hearing on the merits of the case in 2018.[759]

In Nagorno-Karabakh, displacement has been bidirectional. The region's pre-war population was overwhelmingly Azeri. Between 1988 and 1994, an estimated 750,000–800,000 Azeris were forced to flee the occupied regions as well as some bordering Armenian territory; they settled in undisputed Azerbaijani territory.[760] At the same time, Armenian authorities registered 335,000 Armenian refugees from Azerbaijan and 78,000 internally displaced persons from regions in Armenia bordering Azerbaijan.[761] In 2015, the ECtHR estimated the population of Nagorno-Karabakh at between 120,000 and 145,000 people, 95% of whom were of Armenian ethnicity; for decades, hardly any Azeris resided in the region.[762] The situation changed when Azerbaijan regained control over some of the occupied territory in the second Karabakh war in 2020 and total control over the region in September 2023: nearly all of the 120,000 ethnic Armenians fled, and settlement of Azeris into their former homes is planned.[763]

In Transnistria, the war in 1992 caused the internal or international displacement of approximately 130,000 persons.[764] Some 80% of the prewar population were ethnic Moldovans, who had to flee, whereas those from other parts of the former USSR, especially Russians, stayed in Transnistria.[765] How-

756 UNGA, 'Res 62/249 (15 May 2008), UN Doc A/RES/62/249' 1, 2.

757 See, e.g., UNGA, 'Res 64/296 (7 September 2010), UN Doc A/RES/64/296'; UNGA, 'Res 76/267 (8 June 2022), UN Doc A/RES/76/267'.

758 *Georgia v Russia (II)* (n 128), paras 293-294.

759 Ibid, paras 299-301.

760 Human Rights Watch/Helsinki (Organisation: US) (n 428) 58.

761 *Sargsyan v Azerbaijan* (n 665), para 22.

762 Ibid, para 24.

763 Tanya Lokshina, 'Driven by Fear from Nagorno-Karabakh' (*Human Rights Watch*, 17 October 2023).

764 King (n 328) 191.

765 Valeriu Mosneaga, *Asylum-Seekers, Refugees and Displaced Persons in Moldova: Problems of Recognition, Social Protection and Integration* (Migration Policy Centre, CARIM-East, Explanatory Notes, 2013/103 2013) 2.

ever, unlike in the other three regions, displacement in this area was temporary. People were able to return to their permanent homes, resulting in the absence of a large-scale problem.[766] In the 2023 Global Report on Internal Displacement, Moldova is not mentioned, unlike Georgia and Azerbaijan.[767]

In summary, the military presence and occupation, the precarious human rights situation, and the displacement of hundreds of thousands of people characterise the quality of violence present in frozen conflicts. This quality of violence differs from a full-scale armed conflict, but it also differs from positive peace. The three aspects of occupation, precarity of human rights, and displaced persons thus illustrate the liminal state of frozen conflicts between war and peace. Yet, these aspects are closely linked to the involvement and activities of the patron states in these frozen conflicts: Russia in three instances and Armenia in Nagorno-Karabakh before the recent changes. It is therefore crucial to focus on Russia and analyse how its approaches to international law characterize frozen conflicts.

IV. Proliferation

The final characteristic critical to the concept of frozen conflicts is their proliferation. Part I of this work already described how the term 'frozen conflicts' originated in the 1990s, after the dissolution of the Soviet Union. The empirical analysis of UN documents also revealed that the term is unequivocally applied to the cases of South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh. This finding highlights the proliferation of frozen conflicts within the post-Soviet space; it also suggests that the phenomenon is not universal but typical of a certain time and region. However, as also mentioned in Part I, Smetana et al. in their comprehensive conceptualization of frozen conflicts explicitly rejected a spatial and temporal approach and identified 42 cases around the globe from 1946 to 2011.[768] They aimed explicitly to 'overcome' the common understanding of frozen conflicts as a contemporary phenomenon in the post-Soviet space.[769] Contrariwise, this chapter defends the position that it is valid to restrict the concept to the post-Soviet space, and that this context is even a crucial characteristic of frozen conflicts; the chapter provides historical and legal arguments to bolster this view.

766 Ibid 1.

767 IDMC, 'Global Report on Internal Displacement 2023' 81, 85, 137, 141, 142.

768 Smetana and Ludvík (n 27).

769 Ibid 4.

A. Frozen Conflicts as a Pattern

Conflicts can be analysed both individually and as parts of a network of interconnected disputes. When analysing them individually, we can find other conflicts that are characterized by the three aspects discussed above: mutually exclusive territorial claims, the significance of the time factor, and the low intensity of the conflict. For example, the conflict in Northern Cyprus is often compared to the post-Soviet frozen conflicts in legal literature and jurisdiction and has thus also been labelled a frozen conflict.[770] The parallels between Northern Cyprus and the cases above are evident: in Northern Cyprus, the Turkish Republic of Northern Cyprus (TRNC) has existed since 1983 as a de facto state supported by Turkey as its patron state. As in the post-Soviet frozen conflicts, the factual situation on the ground continuously violates the territorial integrity of the parent state, the Republic of Cyprus.[771] Over time, the TRNC has consolidated its status, making a resolution of the dispute extremely unlikely.[772] An example of this consolidation is its achievement of observer state status in the Organization of Islamic Cooperation (OIC).[773] Moreover, consolidation can be seen in the way the ECtHR has dealt with the property rights of displaced persons. It noted the difficulties displaced persons faced when returning to their homes in Northern Cyprus: properties abandoned during the conflict have by now been occupied by others for decades, rendering the original title to the property 'empty of any practical consequences'.[774] Finally, the initial armed conflict[775] following Turkey's invasion of the island

770 See, e.g., Berkes, *International Human Rights Law Beyond State Territorial Control* (n 678); Hadjigeorgiou (n 9); *Chiragov and Others v Armenia* (n 417), paras 128–129; *Georgia v Russia (II)* (n 128).

771 Hoffmeister (n 37) n 25.

772 ICG, 'An Island Divided: Next Steps for Troubled Cyprus, Europe Report No 268 – 17 April 2023' 2.

773 Organisation of Islamic Cooperation: Collective Voice of the Muslim World, 'Observers' (2023).

774 *Demopoulos and Others v Turkey* [Admissibility] App Nos 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04 ECtHR (GC) 1 March 2010, para 111. In para 112, it clarifies: 'This is not to say that the applicants in these cases have lost their ownership in any formal sense; the Court would eschew any notion that military occupation should be regarded as a form of adverse possession by which title can be legally transferred to the invading power. Yet it would be unrealistic to expect that as a result of these cases the Court should, or could, directly order the Turkish Government to ensure that these applicants obtain access to, and full possession of, their properties, irrespective of who is now living there or whether the property is allegedly in a militarily sensitive zone or used for vital public purposes.'

775 Kypros Chrysostomidēs, *The Republic of Cyprus: A Study in International Law* (Brill Nijhoff 2000) 119–120.

in 1974 was of short duration and has been followed by an enduring conflict of low intensity. Although there have been no armed hostilities, the presence of 30,000 to 40,000 Turkish troops[776] constitutes a belligerent occupation[777] and presents a constant threat. The low intensity of the conflict is also manifest in human rights violations, particularly regarding property rights, and finally the displacement of thousands of people. Between 1963 and 1974, approximately 160,000 Greek Cypriots and 45,000 Turkish Cypriots were displaced,[778] leading to demographic changes in both the Republic of Cyprus and Northern Cyprus.[779]

Interestingly, despite these notable parallels and frequent comparisons between Northern Cyprus and the post-Soviet frozen conflicts in legal literature and jurisdiction, the empirical analysis in Part I reveals different results. The findings presented there show that after South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh, the conflicts most frequently referred to as frozen conflicts are those in Ukraine, Kosovo, South Sudan, and Israel-Palestine. Cyprus only ranks ninth, being mentioned as affected by a frozen conflict only five times within the 200 UN documents analysed. The example of Northern Cyprus reveals a discrepancy in the perception of the conflict as a frozen one, between the legal literature and jurisdiction on the one hand and the use of the term evident in the UN documents on the other. It follows that there is an inconsistency in determining whether—and, if so, which—conflicts beyond the post-Soviet sphere should be considered frozen.

This inconsistent application of the term beyond the post-Soviet context highlights the importance of the consensus on the four original frozen conflicts. And there is no hiding the fact that these four conflicts are all located in the post-Soviet space. Thus, when viewed collectively, the wider network gains relevance: they all emerged from the same historical event, the dissolution of the Soviet Union, and are decisively shaped by the latter's successor state, Russia. Moreover, the empirical analysis in Part I showed that following South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh, the conflict most frequently referred to as frozen is in Ukraine. This is largely due to the fact that it shares the same historical background with the four cases. There-

776 RULAC, 'Military Occupation of Cyprus by Türkiye' (March 2023).

777 Eyal Benvenisti, *The International Law of Occupation* (Oxford University Press 2012) 191-194; Chrysostomidēs (n 775) 141 ff.; Ulrike Deutsch, 'Loizidou Case', *Max Planck Encyclopedias of International Law* (Oxford University Press 2007) n 33; UNGA, 'Res 33/15 (9 November 1978), UN Doc A/33/PV.49'; *Demopoulos and Others v Turkey* (n 774), para 94.

778 ICG, 'An Island Divided: Next Steps for Troubled Cyprus, Europe Report No 268 – 17 April 2023' (n 772) 25.

779 Hoffmeister (n 37) nn 23-24.

fore, we argue that it is important to examine frozen conflicts as part of a broader phenomenon, a pattern, rather than as isolated or individual cases. Analysing these conflicts together requires a deeper examination of Russia's involvement and its approaches to international law.

B. Russian Approaches to International Law

Despite earlier acts of aggression, Russia's policies towards states of the former Soviet Union have become most clear with its invasion of Ukraine in 2022. The full-scale invasion in Ukraine can be viewed as the culmination of a long-standing policy, evident in earlier events such as the war on Georgian territory in 2008, the annexation of Crimea in 2014, and the frozen conflicts addressed in this work. Here, instead of analysing Russia's policies, the aim is to translate these policies into legal terms and to examine how they characterize frozen conflicts.

According to Mälksoo's theory, Russia's government and supportive experts in international legal academia have inconsistent approaches to international law that also diverge from Western approaches in various ways.[780] Mälksoo described patterns of post-Soviet Russian state practice in three subfields: Russia's approaches to European and international human rights law, to international economic law, and to *jus ad bellum*.[781] For the analysis of frozen conflicts, the approach to *jus ad bellum* is of particular importance because it is directly connected with Russia's thinking on territorial entitlement rights.[782] In fact, Russia's approach to the use of force and territorial rights is inconsistent and depends on the geographical location of the disputed territory.

Russia takes a strict view on the use of military force in territories within its borders, considering it legal only when carried out in self-defence against armed attack or authorized by the UNSC.[783] Accordingly, Russia has strictly abided by the principle of *uti possidetis* and clearly prioritized its own sovereignty over the self-determination of people when its own territory was threatened, as seen in its brutal suppression of independence movements in Chechnya or Ingushetia.[784] In the same line of argument, Russia has consistently rejected Western attempts to legalize or legitimize humanitarian interventions such as the NATO intervention in Kosovo in 1999.[785] Russia saw a risk

780 Mälksoo (n 84).

781 Ibid 159–184.

782 Ibid 172.

783 Ibid 132.

784 Ibid 180; Mälksoo (n 7) 814.

785 Mälksoo (n 84) 173.

that the international community might respond similarly in Chechnya, where Russia had previously used military force against the separatists to protect its territorial integrity.[786]

In contrast, Russia's approach to the territories of former Soviet republics is permissive of the use of force and alterations of territorial titles. Russian military and paramilitary forces and volunteers supported South Ossetia and Abkhazia in seceding from Georgia, and Transnistria from Moldova.[787] In Nagorno-Karabakh, Russia helped Armenia realize the region's secession from Azerbaijan.[788] There, Russia had no territorial interests of its own, but aimed to secure its influence over both the Armenian and the Azerbaijani sides.[789] As a consequence, 'in these territories, frozen conflicts were born and the de facto situation on the ground differed from the situation de jure.'[790] In other words, while Russia uses military force to suppress secessionist movements within its own borders, it actively supports such movements in the neighbouring and nearby states of its 'near abroad'. The term 'near abroad' has been used since the beginning of the 1990s and means a 'politicized geographic space where Russia has special interests and influence and that appears, in effect, to be a space of particular contested, conditional, and hierarchal sovereignties'.[791] In this near abroad, Russia's stance on the prohibition of the use of force is permissive, particularly when arguing for the protection of its nationals living in these regions and as far as its own actions are concerned. With the independence of the former Soviet republics, hundreds of thousands of ethnic Russians suddenly became minorities in foreign states.[792] Russia's policy of extraterritorial mass naturalizations has produced even more Russian citizens,[793] which has helped leverage the argument of protecting nationals abroad. However, the protection of nationals abroad is generally not regarded as a valid justification to intervene in other states and use force.[794]

786 Ibid 174.

787 Mälksoo (n 7) 813-814.

788 Ibid 815.

789 Ibid.

790 Mälksoo (n 84) 173.

791 Wittke (n 76) 3.

792 Mälksoo (n 84) 136.

793 For a detailed analysis of extraterritorial mass naturalizations see Peters, 'Extraterritorial Naturalizations: Between the Human Right to Nationality, State Sovereignty, and Fair Principles of Jurisdiction' (n 6).

794 See, e.g., the cases of Ukrainian applicants who unsuccessfully claimed a breach of the ECHR by Ukraine regarding its positive obligations towards its nationals in Transnistria: *Kolobychko v Moldova, Russia and Ukraine* App No 36724/10 ECtHR 18 September 2018, para 37; *Soyma v Moldova, Russia and Ukraine* App No 1203/05 ECtHR 30 May 2017, para 16.

Russia's inconsistent approaches to these legal principles can be traced back to the dual challenges it faced following the dissolution of the Soviet Union. First, Russia was weak in the 1990s, and there was a real possibility that Russia might disintegrate as the Soviet Union had.[795] Its territorial integrity was threatened by separatist movements in Chechnya, and, to a lesser extent, in Tatarstan and Bashkiria.[796] Second, the new sovereign states emerged within what had historically been Russia's sphere of influence, a perception rooted in both the Soviet era and the earlier Russian Empire. Russia struggled to cope with the loss of its previous influence and control over these territories.[797] In particular, these newly independent states grew more self-assured and began aligning themselves with powers other than Russia. In Russia's understanding of international law, it is still a great power and has special rights and prerogatives in the post-Soviet space, for historical, geographical, cultural, linguistic, and even religious reasons.[798] This approach mirrors the Brezhnev Doctrine of the Soviet era, which considered the Soviet Union's intervention in other socialist countries as justified if their actions threatened to diverge from communism.[799]

Frozen conflicts are the best illustration of Russia's opportunistic arguments, which do not follow one overarching legal principle but reflect changing power politics.[800] Russia's relationship with Georgia, Moldova, and Ukraine has rarely been determined by international law; instead, Russia has fostered vassal-like relationships with these states.[801] Russia uses and abuses legal rhetoric to justify its efforts to consolidate hegemony over its near abroad, bolstering its influence by supporting the de facto states of South Ossetia, Abkhazia, and Transnistria that are aligned with its interests.[802] Notably, Nagorno-Karabakh does not perfectly fit this pattern of Russian influence and cannot be directly compared with the others in this respect. As previously discussed, Russia's agenda has remained ambiguous in this conflict. Traditionally, it has been the protecting power of Armenia; however, it

795 Mälksoo (n 84) 172.

796 Ibid 172–173.

797 Ibid 136.

798 Mälksoo (n 7) 795.

799 See the relevant excerpt of Leonid Brezhnev's speech in: Stephen G Glazer, 'The Brezhnev Doctrine' (1971) 5 The International Lawyer 169, 169–170; See also Iain Scobbie, 'War' in Jean D'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar Publishing 2019) 911.

800 Mälksoo (n 84) 179–180.

801 Ibid 177.

802 Mälksoo (n 84); Mälksoo (n 7); Wittke (n 76).

has sold weapons to both Armenia and Azerbaijan[803] and successfully brokered the ceasefire agreement in 2020. However, the cases of the Donetsk People's Republic and the Luhansk People's Republic in eastern Ukraine are comparable to South Ossetia, Abkhazia, and Transnistria. With Russia's support, these two regions were de facto states between 2014 and 2022, thus violating Ukraine's territorial integrity. Shortly before it invaded Ukraine in 2022, Russia recognized their independence. The pattern is basically the same as in South Ossetia, Abkhazia, and Transnistria, though in the cases of Donetsk and Luhansk, Russia went further by declaring their merger into Russia. The war against Ukraine is another instance of Russia's approach to international law, albeit one of unprecedented audacity: president Putin has attempted to justify the full-scale war with the protection of Russian citizens from genocide.[804] Russia neglects the fact that the former Soviet Republics are international legal subjects that can make choices themselves, such as joining NATO or the EU, and that it should not be the one giving guarantees for them.[805] Mälksoo also stressed the fact that Russia's approaches to international law are embedded in a wider opposition to the West that is bigger than communism as an ideology ever was.[806] It is this wider political background against which frozen conflicts must be examined also when taking an international law perspective.

C. Other Approaches and the Language of International Law

Whereas substantial research has been conducted by Western legal scholars on Russia's instrumental approach to using or 'vulgarizing' the language of international law in frozen conflicts and when annexing Crimea in 2014,[807] little research has focused on other post-Soviet states' stances in relation to it. In contrast with Russia, Georgia and Ukraine, for example, have been regarded as 'passive objects rather than active subjects'; thus how these states re-

803 ICG, 'Digging out of Deadlock in Nagorno-Karabakh, Europe Report No 255 – 20 December 2019' (n 437).

804 See 'Full Text: Putin's Declaration of War on Ukraine' *The Spectator* (24 February 2022).

805 Mälksoo (n 84) 176.

806 Ibid 192.

807 Cindy Wittke, 'The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia "Speak" International Law in International Politics Differently?' (2020) 72 Europe-Asia Studies 180, 183; Examples of such analysis are: Anna Dolidze, 'The Non-Native Speakers of International Law: The Case of Russia' (2015) 15 Baltic Yearbook of International Law Online 77; Anne Peters, 'Das Völkerrecht der Gebietsreferenden: Das Beispiel der Ukraine 1991-2014' (2014) 64 Osteuropa 101; Waters, 'Plucky Little Russia' (n 143); Wittke (n 76).

spond to Russia's lines of legal argument has often been overlooked.[808] Wittke filled this research gap when finding that, as a response, these states have pursued another strategy: they turned to 'lawfare' as a form of self-defence by referring aspects of the conflicts to bodies of international organizations such as the UNSC, UNGA, ICJ, and ECtHR in a quest for confirmation of their equality as sovereign states.[809] In contrast, Russia has never applied to the ICJ; neither did its predecessor, the Soviet Union.[810] This strategy of Georgia, Moldova, Azerbaijan, and Ukraine can be regarded as partly successful, because international bodies have repeatedly confirmed their territorial integrity and have also judged Russia responsible for human rights violations in the disputed and occupied regions given its effective control.

Although they follow different approaches, both parties use the language of international law to frame their arguments in terms of rights, aiming to underline their objectivity. During the Georgian–Russian war of 2008, for example, unsurprisingly, 'all sides declared their own actions to be "defensive"'[811] and thus in accordance with international law, particularly the UN Charter. Russia and Georgia each accused the other of committing genocide or ethnic cleansing in South Ossetia and Abkhazia.[812] Thus, instead of providing a common language or instrument for settlement, law is used to continue politics and warfare.[813] Despite long-term efforts to settle frozen conflicts through international mediation and formalized political settlements, they remain unresolved.[814] However, Russia is not alone in exhibiting inconsistencies when translating policy into legal arguments. Other hegemonic powers could similarly be examined to identify such recurring patterns of inconsistency. For example, referring to Crimea in 2014, Milanovic wrote on the inconsistency in Western approaches to international law, stating that

> those same Western states that unlawfully invaded Iraq, and supported Kosovo's secession from Serbia while endlessly repeating that Kosovo was somehow a really super-special sui generis case, are now pontificating about the sanctity of the UN Charter and territorial integrity. On the other hand, that same Russia

808 Wittke (n 807) 181.

809 Cindy Wittke and Maryna Rabinovych, 'Troubled Nexuses between International and Domestic Law in the Post-Soviet Space' (2022) 47 Review of Central and East European Law 249, 252–253.

810 Wittke (n 807) 179.

811 'Civilians in the Line of Fire: The Georgia-Russia Conflict' [2018] *Amnesty International* 6.

812 Waters, 'Plucky Little Russia' (n 143) 204.

813 Wittke and Rabinovych (n 809) 260.

814 Ibid.

> that fought two bloody wars in the 1990s to keep Chechnya within its fold, that same Russia that to this day refuses to accept the independence of Kosovo, has now rediscovered a principle of self-determination that apparently allows for the casual dismemberment of existing states.[815]

According to Koskenniemi, expressing political preferences in the language of rights and duties is typical of hegemonic contestation, in which military actions are presented as universal and objective.[816] Having said this, some conclusions can be drawn: first, due to its selective approach to the *uti possidetis* principle and territorial integrity, Russia supports the de facto states of South Ossetia, Abkhazia, and Transnistria and thereby perpetuates their frozen conflicts. Although Nagorno-Karabakh has the same historical background, Russia's approach to this region cannot be shown to be exactly similar. Second, it is common for states, particularly hegemonic powers, to have their own approaches to international law, to formulate political preferences in the language of law, and to show inconsistencies in doing so. Frozen conflicts are thus merely an example of Kennedy's theory that international law is different in different places.[817]

V. Conclusion

The case study has presented four common legal characteristics that portray frozen conflicts. First, the core issue of the conflict remains unresolved and is about the status of the break-away territory. The claims to this specific territory are mutually exclusive and thus entail a deadlock. The separatists claim their right to self-determination and demand secession, while the parent state insists on the integrity of its territory. Although in theory international law upholds territorial integrity against secessionist movements, in reality de facto states have been established and persist to this day. In the absence of a full-scale war with daily casualties, it seems convenient and legitimate for the parties not to agree on compromises over the territory's status. Both parties

815 Marko Milanovic, 'Crimea, Kosovo, Hobgoblins and Hypocrisy' (*EJIL: Talk!*, 20 March 2014).

816 Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 Cambridge Review of International Affairs 197, 199; see also Jochen Bernstoff, 'Governing Hegemonic Spaces in Carl Schmitt: Colonialism, Anti-Imperialism and the Großraum Theory' (2023) 14 Humanity: An International Journal of Human Rights, Humanitarianism, and Development 369.

817 David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 Leiden Journal of International Law 9, 17.

have retained their maximalist legal positions for three decades, resulting in indefinite deferral of the status question.

Second, the time factor in the conflicts exacerbates their deadlocked nature. Frozen conflicts are often characterized by their protracted duration spanning three decades. While ceasefire agreements have repeatedly succeeded in ending phases of active armed hostilities, they have not resolved the underlying conflicts. The conflicts persist because international law does not set a time frame for dispute settlement. In frozen conflicts, the parties can play for time. The conflicts are further prolonged because without a rapidly evolving emergency situation, the international community does not intervene in frozen conflicts with timely and decisive actions. Furthermore, the passage of time widens the gap between the de jure and the de facto territorial situations: whereas the de jure territorial situation was fixed at the critical date and is resistant to factual changes over time, the de facto territorial situation consolidates further the longer it exists.

Third, the intensity of the conflicts underscores their status between war and peace. Frozen conflicts are characterized by a low intensity that distinguishes them from the violence of a full-scale war or armed conflict. For most of the time, no active armed hostilities occur. However, they are also distinct from positive peace, as violence is not completely absent. Some violence has been found to be present in three respects: first, the military occupation of the regions in question constitutes a permanent violation of international law and a constant threat of the use of force. Second, the human rights situation in the regions remains precarious, and as the de facto states cannot be held responsible for violations, those must be attributed to the parent state and/or the patron state, both of which tend to deny their responsibility. Third, hundreds of thousands of people have been displaced over decades and prevented from returning to their homes, which has resulted in the denial of their property rights and significantly changed the demographic composition of the regions.

Fourth, the proliferation of such conflicts in the post-Soviet space suggests that they should be viewed against a specific historical and political background. Contrary to the trend of applying the concept of frozen conflicts universally, there are arguments for narrowing its application to the specific post-Soviet temporal and spatial context. In fact, the dissolution of the Soviet Union and Russia's waning influence on the former Soviet Republics have led Russia to develop specific approaches to international law. These include a permissive stance on the use of force and changes of territorial titles in its near abroad and the decisive support to the de facto states of South Ossetia, Abkhazia, and Transnistria at various levels. Russia's approaches to inter-

national law have contributed to the perpetuation of frozen conflicts. In response to these approaches, the affected states of Georgia, Moldova, Azerbaijan, and Ukraine have partially succeeded in employing lawfare strategies to assert their legal positions. However, the law has not proven capable of resolving the conflicts. These conflicts are embedded in global geopolitics, which contributes to their deadlocked nature.

Part IV: Situating the Concept within the Legal Landscape

The relationship between international law and frozen conflicts can be approached from different angles. Part I deals with the term 'frozen conflicts', Parts II and III with the cases referred to as frozen conflicts, and Part IV now situates frozen conflicts as a concept within the legal landscape. Due to their inherent ambiguity, frozen conflicts do not fit neatly into dichotomous categories. Instead, they are situated, firstly, between the categories of war and peace and, secondly, between those of law and politics. This reflects a broader issue in international law, where rigid dichotomies struggle to capture complex realities. Frozen conflicts exemplify such challenges. To illustrate this further, frozen conflicts will be compared with other ambiguous concepts in international law that lack clear legal definitions but are nevertheless relevant to the discipline. Analogies will be drawn with the concepts of *jus post bellum* and asymmetric war. This Part will conclude with an examination of strengths and weaknesses of frozen conflicts as a legal concept.

I. Between Dichotomies

Law is famous for its foundational dichotomies, its strict either-or approach, also described as an 'on-off switch approach'.[818] Dichotomies are endemic across the entire discipline. Famous dichotomies exist, for example, between states and nonstates, legal and illegal, international and non-international armed conflicts, the presence and absence of armed attack, combatants and civilians, and *jus ad bellum* and *jus in bello*.[819] The clear-cut dichotomies certainly correspond with the need to determine which rules are applicable to a situation or case; rules, again, may be applicable or not, but nothing in between. Yet, such improved legal clarity and efficiency entails an oversimplification of

818 Richard H Fallon and Daniel J Metzler, 'Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror' (2008) 120 Harvard Law Review 2029, 2049.

819 Eyal Benvenisti, 'Rethinking the Divide between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors' (2009) 34 Yale Journal of International Law 541, 541.

ambiguous cases.[820] Sharp distinctions might have been suitable for traditional wars in the nineteenth century but are less so for the conflict scenarios of today.[821] The world has become more complex, and borderline cases appear to have become typical.[822] In response, the legal landscape has also undergone some changes.[823] New phenomena in the real world lead to the emergence of new legal concepts that can soften all-too-rigid dichotomies.

Although still foundational in theory, these dichotomies have been challenged. The dichotomy between state and nonstate has been complemented by the concept of de facto states: in certain situations, such as protection against the use of force,[824] de facto states might be treated like states, but in others they remain nonstates, for instance when seeking accession to international organisations. The dichotomy between legal and illegal has been softened in one prominent case: NATO's intervention in Kosovo 1999 was considered illegal but legitimate.[825] Furthermore, the dichotomy of the presence or absence of an armed attack, which determines the lawfulness of the use of force in self-defence, has been challenged by the concept of imminent attack[826] and by humanitarian catastrophes.[827] The dichotomy of international and non-international armed conflicts has been softened by the constant assimilation of the second type of conflict into the first and the recognition that both humanitarian and human rights obligations are relevant to both types.[828] The dichotomy of combatants and civilians has been blurred in recent decades in cases of terrorists fighting against a state. The dichotomy be-

820 Yuval Shany, 'Binary Law Meets Complex Reality: The Occupation of Gaza Debate' (2008) 41 Israel Law Review 68, 73.

821 Ibid 75.

822 Ibid.

823 Benvenisti, 'Rethinking the Divide between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors' (n 819) 541.

824 Tomuschat (n 623) n 31.

825 Koskenniemi, 'Speaking the Language' (n 11) 33-34; See also Martti Koskenniemi, '"The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law' (2008) 65 The Modern Law Review 159; Lieblich (n 439) 380-381; Aaron Schwabach, 'The Legality of the NATO Bombing Operation in the Federal Republic of Yugoslavia' (1999) 11 Pace International Law Review 405.

826 See e.g. Karl Zemanek, 'Armed Attack', *Max Planck Encyclopedias of International Law* (Oxford University Press 2013) nn 4, 12.

827 W Michael Reisman, 'Hollow Victory: Humanitarian Intervention and Protection of Minorities' (1997) 91 Proceedings of the ASIL Annual Meeting 431; See also Benvenisti, 'Rethinking the Divide Between Jus Ad Bellum and Jus in Bello in Warfare Against Nonstate Actors' (n 819) 541.

828 Benvenisti, 'Rethinking the Divide between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors' (n 819) 542.

tween *jus in bello* and *jus ad bellum* has been complemented by the proposition of *jus post bellum*, as will be discussed below, and by *jus in bello* compliance that influences *jus ad bellum* considerations.[829] In fact, over time, many legal dichotomies have evolved towards continua.[830] Frozen conflicts follow this trend of eschewing dichotomies; which dichotomies they affect will be outlined next.

A. War and Peace

1. From Formalist to Functionalist Distinction

Frozen conflicts are situated, firstly, between the states of war and peace. The relationship between war and peace has passed through different periods, always mirrored in how the law treated them. It was only in the late nineteenth century that war and peace were strictly separated and war obtained a distinct legal status that altered the rights and powers of public actors.[831] The state of war was easily identifiable by a formal declaration, which triggered the application of a precise set of rules.[832] This approach developed from the concept of a sovereign authority that was allowed to wage wars.[833] The clear distinction of war from peace sought to limit the carnage of war and was accompanied by the legal demarcation of the battlefield, the definitions of combatants and noncombatants, neutrals and belligerents, and the separation of the public sphere of war from the private one.[834] This rigid distinction faced significant challenges in the twentieth century as both the nature of warfare and the frameworks of law underwent profound changes.[835]

Warfare evolved through the twentieth century, first with the global scale and brutality of the two World Wars, and later with the emergence of asymmetric wars in the postcolonial era.[836] New technologies, the increased involvement of civilians and economies, the merging of peacetime politics with wartime strategy, and the emergence of 'hot' and 'cold' wars all differed markedly from the wars of the nineteenth century.[837] The traditional concept

829 David Kennedy, *Of War and Law* (Princeton University Press 2009) 156.

830 Benvenisti, 'Rethinking the Divide between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors' (n 819) 541.

831 Kennedy (n 829) 63–64.

832 Charles Garraway, 'War and Peace: Where Is the Divide?' (2012) 88 International Law Studies Series US Naval War College 93, 93.

833 Kennedy (n 829) 102.

834 Ibid 65–66.

835 Ibid 111.

836 Ibid.

837 Ibid 112.

of war, fought on clearly demarcated battlefields by uniformed soldiers in stark contrast to peace, has increasingly become an illusion. The possibility of constant surveillance and communication among different actors irrespective of the physical distance between them has further blurred the lines between war and peace.[838] War has been transformed into something asymmetric, chaotic, nonlinear, and increasingly characterized by its gradual transition to peace.[839] Moreover, states have lost their monopoly on warfare due to the involvement of warlords, drug lords, freelance terrorists, and private agencies.[840] Of course, such transformations are ongoing. Recently, warfare through information and data has become especially common. Another observation confirming the decline of the dichotomy of war and peace has been made regarding multilateral treaties. In the past, consequences of the state of war included the interruption of diplomatic and other relations, the termination or modification of treaties, and the application of the laws of war,[841] but today, international obligations are to be respected irrespective of all circumstances, including war.[842]

The frameworks of law in relation to war have undergone similar profound changes. Concerns about the overly simplistic dichotomy between the legal statuses of war and peace were expressed as early as the mid-twentieth century. Ideas of a status in between, a '*status mixtus*'[843] or 'state of intermediacy',[844] were introduced by Schwarzenberger and Jessup. Jessup described the legal necessity of 'fitting every situation into one of the two traditional categories of peace and war' as 'difficult'.[845] He considered the dichotomy risky and not representative of the facets of international life.[846] Yet, these two concepts, '*status mixtus*' and 'state of intermediacy', have not been formally adopted in international law. Although the approach to defining war within the legal framework has evolved, the dichotomy persists. Key to new approaches to a definition were the UN Charter of 1945, the Geneva Conven-

838 Ibid.

839 Ibid 112-113.

840 Ibid 19.

841 Anikó Szalai, 'The Dichotomy of the Laws of War and Peace through the Lens of the Law of Treaties' (2020) 2020/11 Magyar Tudományos Akadémia Law Working Papers 1, 1-2.

842 Ibid 7.

843 Georg Schwarzenberger, 'Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law' (1943) 37 American Journal of International Law 460, 470 ff.

844 Philip C Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?' (1954) 48 American Journal of International Law 98.

845 Ibid 100.

846 Jessup (n 844).

tions of 1949, and its Additional Protocols[847] of 1977. This new legal framework aimed to provide a more flexible, practical, and functional approach to identifying and regulating situations of war.[848] Rather than being strictly formal, rule-oriented, and separated from politics and economics, the new legal framework was designed to be a practical tool for politics.[849] War became something to be managed by humanitarian lawyers and military professionals.[850] The UN Charter was drafted in broad strokes that needed to be interpreted, since it was not clear what 'aggression' or 'intervention' means, whether economic pressure would count, and so forth.[851]

As a result of these changes, the traditional concept of war has almost completely lost its legal relevance;[852] it has fallen into disuse and been substituted by the concept of armed conflict through the adoption of the Geneva Conventions of 1949. Instead of a formalist approach to defining war, the existence of an armed conflict was to be assessed based on the factual situation on the ground regardless of any formal declarations.[853] Rules moved away from an overly rigid dichotomy by being transformed into broader principles and standards: for example, the clear-cut distinction between combatants and civilians was expanded into the broader 'principle of distinction'.[854] Dichotomies enshrined in the Geneva Conventions of 1949 — such as public actors versus private actors, combatants versus civilians, or speaking of the wounded and sick 'in the field' and prisoners of war and civilians 'in time of war' — were softened again in the Additional Protocols of 1977 and 1980, which also blur the lines between international and non-international armed conflicts, addressing all 'victims' of conflict.[855] These protocols extended protections to guerrilla wars, internal conflicts, and all those affected by military violence.[856]

847 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

848 Kennedy (n 829) 77.

849 Ibid 44-45.

850 Ibid 45.

851 Ibid 79.

852 Berman (n 55) 16.

853 ILA (n 537) 2.

854 Kennedy (n 829) 87.

855 Ibid 84.

856 Ibid 112.

2. The Remaining Dichotomy and Its Instrumentalization

The adoption of the concept of armed conflict has softened the traditional dichotomy of war and peace by recognizing new forms of warfare. However, concerns have been raised that this approach still does not fit the fluidity of today's battlefields.[857] Ultimately, despite this nuanced approach, whether a situation qualifies as an armed conflict or not remains a binary question, and this question is still subject to debates. Difficulties arise, for example, when diverse actors are involved in a conflict and switch between acts typical of wartime and acts typical of peacetime. Instances include terrorists who perform war-like activities in times of peace and international authorities and 'rogue' states that circumvent the exceptionality of war by engaging in coercive actions over prolonged periods of time, leading to unpredictable and irregular phases of violence.[858] Actors engage in a range of activities: in the same place, troops can shift from engaging in active hostilities to stabilizing a zone after conflict, providing humanitarian aid, or promoting nation-building.[859] Difficulties can also arise in situations that do not exhibit the intensity of violence that is required to be classified as an armed conflict. Violent incidents, crimes, rioting, and civil unrest do not qualify as armed conflict and are treated as peace in international law.[860]

The classification of armed conflicts has no gradation, no ambiguity. Such a clear-cut distinction brings clarity inasmuch as certain rules, for instance IHL, are either applicable or not; they cannot be applied gradually to a situation of low- or medium-intensity violence. In theory, armed conflict is a legal construct that highlights certain forms of violent activities by certain actors.[861] Despite allegedly objective criteria to identify an armed conflict, the concept is not only legally but also socially constructed, which means that there is no objective 'litmus test' by which to classify an armed conflict.[862] Dividing lines and thresholds have underlying political choices and stalemates.[863] The legal construct of armed conflict is contingent and an object of political contestation. Why should struggles for democratic governance not

857 Martti Koskenniemi, 'Occupation and Sovereignty — Still a Useful Distinction?' in Ola Engdahl and Pål Wrange (eds), *Law at War: The Law as it Was and the Law as it Should Be* (Brill Nijhoff 2008) 163.

858 Berman (n 55) 7.

859 Kennedy (n 829) 113.

860 ILA (n 537) 2.

861 Berman (n 55) 5.

862 Ibid 1; ILA (n 537) 4.

863 Aurel Sari, 'Legal Aspects of Hybrid Warfare' (*Lawfare*, 2 October 2015).

benefit from the classification as an armed conflict?[864] For example, Veuthey has argued against this rigidity and advocated for a continuum of rules that correspond to a continuum of conflict situations to include conflicts that are spatially and temporally hard to define.[865]

Scholars discussing the challenges of classifying an armed conflict often seek to extend the application of IHL to atypical conflict situations.[866] If frozen conflicts were seen as ongoing armed conflicts under common article 2 of the Geneva Conventions, IHL would apply to them continuously throughout the decades. Yet, the application of IHL to frozen conflicts could also be argued for on the basis of belligerent occupation under article 42 of the Hague Convention IV of 1907. Furthermore, whether acknowledging the presence of an armed conflict, leading to the application of IHL, is regarded as beneficial or not largely depends on perspective and cannot be generalized.[867] The problem of frozen conflicts goes beyond the question of the applicability of IHL. The low intensity of these conflicts often does not include attacks or detention, upon which IHL would touch. The law of armed conflict is not particularly suited for nonkinetic operations.[868] Frozen conflicts are characterized by low-intensity violence and nonkinetic operations, violence that is more subtle and atypical of armed conflicts.[869] This includes the ideational dispute over the territory, the threat from the presence of military forces, human rights violations, forced displacement, political dependency, and the policies of 'passportization' and 'borderization'. The nature of frozen conflicts has become an instrument[870] of Russia's policy towards its neighbours. Violence is just one tool of war amongst many, according to Kennedy.[871] The Cold War, for instance, was fought commercially and culturally more often than militarily.[872] Psychological warfare and technological races, such as who would send the first person to the moon, of course also played a role. One

864 Berman (n 55) 28.

865 Michel Veuthey, 'Guérilla et droit humanitaire' (1983) 65 Revue Internationale de la Croix-Rouge 119; See also Myres S McDougal, 'Peace and War: Factual Continuum with Multiple Legal Consequences' (1955) 49 American Journal of International Law 63; Berman (n 55) 26.

866 Theodor Meron and Allan Rosas, 'A Declaration of Minimum Humanitarian Standards' (1991) 85 American Journal of International Law 375, 376.

867 Lewis (n 157) 1106.

868 Jack Brown, 'An Alternative War: The Development, Impact, and Legality of Hybrid Warfare Conducted by the Nation State' (2018) 5 Journal of Global Faultlines 58, 70.

869 Coyle (n 577) 9.

870 Fischer (n 90) 6.

871 Kennedy (n 829) 114.

872 Ibid 15.

consequence of frozen conflicts' not fitting neatly into the category of armed conflict, we think, is international law's blindness to them. This oversight—failure to recognize and address less violent, protracted conflicts—has also been described as 'law's vulgar silence'.[873]

The difficulties of classifying a situation as an armed conflict or not can be interpreted in many ways. According to Berman, they can be regarded as the necessity of creating a synthesis between the law of armed conflict and of peace; they can be interpreted as the abolition of one sphere by the other; or, finally, they can be interpreted as 'making the distinction between the two spheres available for strategic instrumentalization'.[874] Berman argues for the third interpretation and gives the examples of the 'war on terrorism' following the events of 9/11 in 2001 and the conflict of the US with Iraq since 1990.[875] In both cases, the US has often blurred the lines between war and peace. Their instrumentalization has involved alternating between military and police actions, treating terrorism as war at some times and as a crime at other times. These shifts are used to gain strategic advantages and influence public opinion.[876]

We argue that frozen conflicts are another example in which the war/peace dichotomy has been instrumentalized. Law's blindness or silence has been instrumentalized by Russia, which plays with the ambiguity and this grey area. In South Ossetia, Abkhazia, and Transnistria, Russia manoeuvres strategically within the ambiguous space between war and peace. The irregular phases of low-intensity violence, and even periods of no violence at all, make it difficult to see the situations as armed conflicts. The situations do not clearly meet the threshold for classification as armed conflicts, allowing them to disappear from the radar of international law. Consequently, they are often seen as political rather than legal issues. Indeed, a strategy may be inferred that aims to generate and maintain legal ambiguity specifically to avoid unified international reaction. This strategy has also been called hybrid warfare:[877] another term that lacks clear definition in international law. This term has been frequently associated with Russia and describes a strategy of obscuring the distinctions between various modes of warfare.[878] International law, with its binary logic, provides ample opportunities to follow such a strategy.

873 Nadia Kornioti, 'Law's Vulgar Silence' (*Völkerrechtsblog*, 28 June 2021).

874 Berman (n 55) 7.

875 Ibid.

876 Ibid 7–8.

877 See, e.g., Sari (n 863).

878 Aurel Sari, 'Hybrid Warfare, Law, and the Fulda Gap' in Christopher M Ford and William S Winston (eds), *Complex Battlespaces: the Law of Armed Conflict and the Dynamics of Modern Warfare* (Oxford University Press 2019) 174.

B. Law and Politics

1. A Dichotomy Constantly Challenged and Reaffirmed

Frozen conflicts are furthermore situated between the domains of law and politics. International law, like other disciplines, is constituted by its difference from other social and intellectual spheres, such as the economy or religion, but especially by its difference and separation from politics.[879] Often, an issue is understood as either legal or political, and it seems necessary to make a choice of one or the other.[880] International lawyers may argue that a particular issue is not a problem of law but rather one of politics, policy, or international relations.[881] This concern is valid for frozen conflicts as well: due to the lack of a clear legal definition and their fuzzy conceptualization in general, it is easy to refuse them as a legal topic. It is not necessary to conduct a comprehensive analysis of the relationship between law and politics here. It is a complex relationship; it can be examined from conceptual, research, and practical perspectives across various periods and alternates constantly between attraction and rejection.[882] What is important for the purpose of this thesis is that, despite shifting boundaries and criticisms, the separation between law and politics persists, and it seems legitimate to speak of a dichotomy. Even literature and practice that acknowledge the interplay of law and politics and the relevance of politics to law in fact reaffirm the underlying dichotomy.[883] This dichotomous framework often leads to boundaries that create blind spots and silences around certain topics,[884] which holds particularly true for frozen conflicts.

Engaging with the relationship between international law and politics raises the question of what determines the international community: law or politics. This question was discussed thoroughly in the interwar period by Morgenthau and Lauterpacht.[885] Morgenthau, founder of international relations as a discipline and highly critical of international law's limited capacities

879 Filipe Dos Reis and Janis Grzybowski, 'The Matrix Reloaded: Reconstructing the Boundaries between (International) Law and Politics' (2021) 34 Leiden Journal of International Law 547, 569.

880 Koskenniemi, 'Speaking the Language' (n 11) 22.

881 O Yasuaki, 'International Law in and with International Politics: The Functions of International Law in International Society' (2003) 14 European Journal of International Law 105, 106.

882 Dos Reis and Grzybowski (n 879) 547.

883 Ibid 549.

884 Ibid 551.

885 For a comparison of Morgenthau and Lauterpacht, see Dos Reis and Grzybowski (n 879); Koskenniemi, 'Speaking the Language' (n 11).

to resolve disputes, argued that the opposition of political and legal is inadequate, since all legal questions can be considered political or nonpolitical at the same time.[886] No subject can be regarded as political per se, given that no objective characteristics allow for such a clear classification.[887] Morgenthau argued that whether an issue is political or not is instead a quality or colouring that can be attached to any kind of question.[888] Therefore every allegedly legal question can also be dominated by politics. This is where Morgenthau identified the limits of international law and its mechanisms for settling disputes.[889]

Lauterpacht rejected this political realism and held the opposite view: that the nature of international affairs is ultimately legal.[890] Although he agreed with Morgenthau that disputes can be both legal and political at the same time,[891] eventually, Lauterpacht argued, it is law that is capable of resolving them. He stated that 'international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognized, they are capable of an answer by the application of legal rules'.[892] Instead of politicians and diplomats, Lauterpacht believed in courts and judges having the competence to determine the international sphere.[893] Politics can still influence this function, but it is not the power politics of states but a progressive extension of the legal sphere, which follows principles of universalism and humanity.[894]

In his comparison of these two scholars, Koskenniemi observed that for Morgenthau, 'the world is above all political, and law appears only as a marginal phenomenon, preoccupied with issues of minor interest', whereas for Lauterpacht, 'the world is above all legal and most things are determined by laws and courts that sometimes leave issues for politicians to decide'.[895] This permeability of both disciplines, irrespective of which is above the other, both challenges and reaffirms the dichotomy between law and politics. Although both Morgenthau and Lauterpacht rejected a simplistic dichotomy, a separation remains. Similar debates still take place today: raising the question of

886 Hans Joachim Morgenthau, *Die Internationale Rechtspflege, Ihr Wesen und ihre Grenzen* (Noske 1929) 62.

887 Ibid 67, 71-72.

888 Ibid 67.

889 Koskenniemi, 'Speaking the Language' (n 11) 24.

890 Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 139 ff.; See also: Dos Reis and Grzybowski (n 879) 560.

891 Dos Reis and Grzybowski (n 879) 561.

892 Lauterpacht (n 890) 158.

893 Dos Reis and Grzybowski (n 879) 562.

894 Ibid 563.

895 Koskenniemi, 'Speaking the Language' (n 11) 25.

whether an issue is political or legal entails deciding whether politicians or lawyers can better deal with the problem.[896] One famous example is the debate on the responsibility to protect. Whenever the topic comes up in academic treatises or in practice, the question is addressed whether it is a political or legal concept. A large number of publications has discussed this question,[897] and state officials debated it at the UNGA meetings in July 2009.[898] The arguments for and against a legal or political character of the concept have been abundantly examined by others, so it suffices at this point to emphasize the basic tenor of the binary approach: the responsibility to protect is either a legal or a political concept.

The dichotomy of law and politics is also noticeable in the activities of international bodies. Two examples are the Tadić decision by the ICTY in 1995[899] and the decision by the Pre-Trial Chamber of the ICC not to authorize an investigation of crimes committed in Afghanistan between 2003 and 2014.[900] Both decisions have been criticized as political and thus as failing to respect the supposed immunity of law from politics.[901] The Tadić decision was criticized for being political because the ICTY assumed the justiciability of non-international armed conflicts under international law, and in the case of Afghanistan, the decision not to open an investigation on the grounds that it was nonjusticiable was considered equally political.[902] Ideally, international law is resilient to the political caprices of states and fights against their

896 Ibid.

897 See, e.g., José E Alvarez, 'The Schizophrenias of R2P' in Philip Alston and Euan Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (Oxford University Press 2008); Alex J Bellamy and Ruben Reike, 'The Responsibility to Protect and International Law' (2010) 2 Global Responsibility to Protect 267; Mario Kresic, 'Is the R2P Norm a Legal Norm?' (2022) The 8th International Scientific Conference of the Faculty of Law of the University of Latvia 21-22 October 2021, Riga New Legal Reality: Challenges and Perspectives. II 356; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 7 The American Journal of International Law 99; Rachel VanLandingham, 'Politics or Law: The Dual Nature of the Responsibility to Protect' (2012) 41 Denver Journal of International Law & Policy 63.

898 UNGA, 'Official Records (23 July 2009), UN Doc A/63/PV.97'; UNGA, 'Official Records (24 July 2009), UN Doc A/63/PV.98'; UNGA, 'Official Records (24 July 2009), UN Doc A/63/PV.99'; UNGA, 'Official Records (28 July 2009), UN Doc A/63/PV.100'; for an excellent overview on the debate and the states' positions see Anne Peters, 'The Security Council's Responsibility to Protect' (2011) 8 International Organisations Law Review 15.

899 *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (n 646).

900 *Situation in the Islamic Republic of Afghanistan* (ICC Pre-Trial Chamber II ICC 02/17 (12 April 2019)).

901 Dos Reis and Grzybowski (n 879) 568.

902 Ibid.

self-interested motives,[903] because politics is ultimately about power and lacks any universally valid truth or ethics.[904] More examples could be listed in which international law has been criticized for being influenced by politics, such as the case of Kosovo's independence. However, the point is clear: frequently, a matter is considered either legal or political, or at least one domain is viewed in relation to the other, which also reaffirms the dichotomy.[905]

2. Question of Perspective

Koskenniemi presented some remarkably insightful thoughts on the relationship between law and politics.[906] He rejects the view that a matter is either legal or political depending on its intrinsic properties; instead, he argues, it can be both at the same time, depending on perspective. To illustrate this point, he refers to an optical illusion that challenges one's perception. The image shows the head of an animal that can be interpreted as a duck with its pronounced beak but also as a rabbit with its long, furry ears (Figure 3).[907] The drawing became famous through Wittgenstein's Philosophical Investigations, published in 1958.[908] Whether the image is of a rabbit or of a duck depends completely on

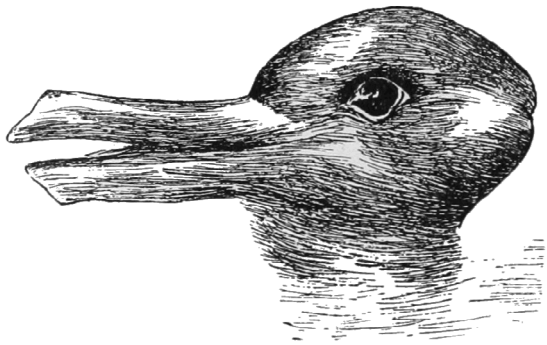


Figure 3: Duck-Rabbit Illusion.[909]

903	Martti Koskenniemi, 'The Politics of International Law' (1990) 1 European Journal of International Law 4, 5.
904	Dos Reis and Grzybowski (n 879) 554.
905	Yasuaki (n 881) 106.
906	Koskenniemi, 'Speaking the Language' (n 11).
907	The image was first published in 'Welche Thiere gleichen einander am Meisten? Kaninchen und Ente' (1892) Nr. 2465 Fliegende Blätter 147; see also Joseph Jastrow, 'The Mind's Eye' (1899) 54 Popular Science Monthly 299.
908	Ludwig Wittgenstein, *Philosophical Investigations* (Basil Blackwell 1958).
909	'File: Duck-Rabbit Illusion.jpg' (*Wikimedia Commons*).

the observer's mind. Neither objective criteria nor objective reality can determine whether the drawing depicts one animal or the other. Both the duck and the rabbit can be seen in one and the same image, and an observer can even shift from seeing a rabbit to seeing a duck or vice versa.

Koskenniemi explained that 'what we see depends on what we are inclined to see, or, technically, our cognitive bias'.[910] What one sees is thus determined by the way one looks at it; in fact, the subjective perspective is decisive. The same is true, Koskenniemi stated, for law and politics: 'The question about whether something is "really" law or "really" politics is as meaningful or meaningless as the question of whether Wittgenstein's image is really that of a duck or a rabbit'.[911] The answer is that it is both. A single topic can be seen as both legal and political, or, in other words, from a legal and a political point of view. Whether some matter is considered legal or political is therefore not determined by the relationship of the topic to the world but by its effect on the observer's mind.[912] The meaning of a specific matter depends on the lens one looks through, on the conceptual framework. A single topic, like the image, conveys multiple messages, and one needs the ability to recognize the law or the politics in it.

Whether one sees the law or the politics in a topic is influenced by the institutional context. Accordingly, at the ICJ or ICC people see the law in a specific issue and speak the language of law, whereas in a foreign ministry's political department, or the UNSC, people see the politics in a specific issue and speak the language of politics.[913] Lawyers focus on what the law says, politicians on what the right political solution is.[914] The comparison with the duck-rabbit image illustrates how the relationship between law and politics is more complex than a simple separation, contradiction, or dichotomy, all of which would mean that they are mutually exclusive. Instead, law and politics must be viewed as overlapping in 'nested opposition',[915] interdependent, or co-constitutive. However, they cannot be fully merged either.[916] In Wittgenstein's ambiguous image, one recognizes either the whole duck or the whole rabbit but not a mix of them, a half-duck, half-rabbit monster, as Koskenniemi clarified.[917]

910 Koskenniemi, 'Speaking the Language' (n 11) 26.

911 Ibid.

912 Ibid.

913 Ibid 27.

914 Ibid.

915 JM Balkin, 'Nested Oppositions' (1990) 99 The Yale Law Journal 1669; Dos Reis and Grzybowski (n 879) 550.

916 Dos Reis and Grzybowski (n 879) 569.

917 Koskenniemi, 'Speaking the Language' (n 11) 28.

3. Frozen Conflicts between Law and Politics

Frozen conflicts raise the question whether they are a legal concept or whether they belong to the political domain.[918] Grant offers three reasons why frozen conflicts are not a legal concept: first, the juridical characteristics of frozen conflicts are too diffuse and have 'little or no necessary juridical connection to one another';[919] second, the term is not neutral, suggesting that there is no hope for conflict resolution, whereas lawyers have the duty to find solutions and act as problem-solvers without prejudging the situation; and third, the concept is inappropriate because it represents legal fragmentation, implying that there is a regional international law emanating from Russia as opposed to the general international law.[920] In what follows, these arguments are put into perspective.

Grant's first argument, that frozen conflicts have too diffuse juridical characteristics and lack a single readily identified core phenomenon, assumes that it is the nature of frozen conflicts and their intrinsic properties that prevents them from being a primarily legal concept. Following Koskenniemi's approach, however, the nature of frozen conflicts should not lead to their dismissal as a legal concept, because the question whether they are legal is not the right one to ask. Accordingly, despite their diffuse nature, frozen conflicts can be both legal and political, because ultimately this is a question of perspective. The present thesis argues that frozen conflicts are a legal concept, because they can be seen from a legal perspective.

Grant's second and third arguments against classifying frozen conflicts as a legal concept operate at a different level. These arguments include the lack of neutrality of the term and the implication of legal fragmentation. They do not refer to the nature or intrinsic properties of frozen conflicts but depend on the question of what makes a good legal concept. This aligns with Koskenniemi's further elaboration on the relation between law and politics: instead of focusing on whether a matter is legal or political, he emphasizes the issue of whether the matter is best treated by law or by politics.[921] Applying this wording to Grant's arguments, international law is not best suited to treat frozen conflicts, because frozen conflict as a concept is not neutral and suggests legal fragmentation. Indeed, as has been discussed above, law has not been able to resolve frozen conflicts. Parties use the language of law as a tool

918 Grant (n 4).

919 Ibid 411.

920 Ibid 411-412.

921 Koskenniemi, 'Speaking the Language' (n 11) 28.

for the continuation of politics and warfare.[922] Doubts about whether frozen conflicts are best treated by law are therefore justified.

Two conclusions can be drawn from this discussion. The first refers to the nature of frozen conflicts. Given their diffuse nature and the fact that they do not neatly fit into traditional legal categories such as armed conflict, it may be tempting to judge them a nonlegal concept and assign them to the political domain. However, this conclusion is based on the nature and inherent properties of frozen conflicts. Whether frozen conflicts constitute a legal concept is a matter of perspective. As shown in Part III, these conflicts are characterized by various legal aspects. Dismissing frozen conflicts as a legal concept due to their nature is unimaginative and inadequate. Excluding an issue from the legal realm assumes that the discipline is not meant to address or explore some specific problems, which means waiving professional responsibility.[923] Therefore, like the duck-rabbit image, the concept of frozen conflict can simultaneously be political and legal.

The second conclusion addresses whether law or politics is best for treating frozen conflicts. It must be emphasized that the law has so far proven incapable of resolving frozen conflicts. In fact, it has been incapable of resolving any conflicts. In contrast, if politics were to address frozen conflicts with the willingness to resolve them, it might succeed. Thus, instead of excluding frozen conflicts as a concept from the legal sphere due to their ambiguous nature, a more nuanced conclusion is that law may not be the best discipline to address or resolve the problem of frozen conflicts. Yet, this finding reveals more about the limitations of international law than about the nature of frozen conflicts. It shows that the discipline has its limits when dealing with ambiguity and grey tones. Consequently, frozen conflicts are simultaneously legal and political, because they can be examined from both perspectives. However, it remains uncertain whether law is the best approach for addressing frozen conflicts. This is why overall the concept of frozen conflicts can be placed between law and politics.

II. Analogies with other Ambiguous Concepts

With the concept of frozen conflicts situated both between armed conflict and peace and between law and politics, this chapter will draw analogies with two other ambiguous concepts. These are the concepts of *jus post bellum* and asymmetric warfare. Neither concept fits neatly into existing legal categories.

922 Wittke and Rabinovych (n 809) 260.

923 Yasuaki (n 881) 106.

In fact, *jus post bellum* is situated between *jus ad bellum* and *jus in bello*, and asymmetric warfare blurs the boundaries between armed conflict and peace. In order to infer analogies for the relationship between international law and frozen conflicts, the two concepts will be examined in terms of their emergence, legal content, and added value for the discipline.

A. *Jus Post Bellum*

1. Origin of the Concept

The idea of *jus post bellum* emerged in two different contexts that, nevertheless, overlap to some extent. Its origin can, firstly, be traced back to the just war tradition and the call for rules that apply when a war has terminated. Secondly, it originated in the call for a third category to complement the oversimplistic dichotomy of war and peace and apply to situations between war and peace or in transition from war to peace.

The first origin, the just war theory, is a long-standing aspect of moral and political philosophy that offers a framework of principles to systematically assess the morality of acts during wartime.[924] Just war theory traditionally distinguished between the questions of what constitutes a just cause for waging war and in what way war may be justly conducted, even though sometimes these two aspects have also been connected to each other.[925] With most scholars thinking in these two categories, the termination phase of war was mostly ignored.[926] Yet scholars of the modern just war tradition that arose in the 1500s and 1600s, such as Vitoria, Suarez, Grotius, and Vattel, expanded the concept of just war and reflected on justice after the end of war.[927] Ultimately, Kant coined the idea of just war theory after war.[928] He regarded justice after war as the third aspect of the just war theory. Together with the right to wage war and rights during war, it formed the tripartite conception of warfare. Although Kant did not use the term '*jus post bellum*', he outlined the concept *avant la lettre*, writing of the right after war ('*Recht nach dem*

924 Orend, '*Jus Post Bellum*' (n 536) 571-572.

925 Jens Iverson, *Jus Post Bellum: The Rediscovery, Foundations, and Future of the Law of Transforming War into Peace* (Brill Nijhoff 2021) 29. On just war theory see the classic modern work Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, Basic Books 2015).

926 On the reasons for this ignorance see Orend, '*Jus Post Bellum*' (n 536) 573-574.

927 For an overview see Iverson (n 925) 25, 50-58; Carsten Stahn, '"Jus Ad Bellum", "jus in Bello" ... "Jus Post Bellum"? — Rethinking the Conception of the Law of Armed Force' (2006) 17 European Journal of International Law 921, 934.

928 Brian Orend, *War and International Justice: A Kantian Pespective* (Laurier University Press 2000) 63 (note 22).

Krieg').[929] The novelty of Kant's idea lies in his linkage of the rules of war and after war with the overarching aim of achieving perpetual peace.[930]

The second origin of *jus post bellum* is the fundamental dichotomy between the legal states of war and peace. Because war was outlawed and was defined by a factualist approach in the twentieth century, the idea of *jus post bellum* was situated between the concepts of *jus ad bellum* and *jus in bello*.[931] The traditional war-peace dichotomy is, to some extent, reflected in today's *jus ad bellum-jus in bello* dichotomy.[932] The clear-cut distinction between the two regimes of *jus ad bellum* and *jus in bello* was questioned, and some scholars began to argue for a state in between as early as the 1940s. As mentioned previously, Schwarzenberger proposed the term '*status mixtus*'[933] and Jessup the 'state of intermediacy',[934] both concepts that better correspond to the realities of situations between war and peace. The wording of *jus post bellum* clearly marks the connection to the concepts of *jus ad bellum* and *jus in bello*. The different contexts of origin impart different meanings and consequences to the concept, as will be outlined next.

2. Legal Content, Added Value, and Critics

Jus post bellum, often described as 'law after war' or the 'law of transition from war to peace',[935] is obviously closely linked to its sister concepts, *jus ad bellum* and *jus in bello*. Despite this obvious link, *jus post bellum* remains ambiguous and has therefore even been rejected by some scholars.[936] Instead of one authoritative or consolidated meaning, the term has a matrix of definitions, depending on who uses it.[937] Consequently, its legal implications are highly controversial as well. Even supporters of the concept are aware of definitional problems. For example, Stahn admits that the concept is imprecise, stating that

929 Iverson (n 925) 88; Stahn, '"Jus Ad Bellum", "Jus in Bello" … "Jus Post Bellum"?' (n 927) 935.

930 Stahn, '"Jus Ad Bellum", "Jus in Bello"… "Jus Post Bellum"?' (n 927) 935.

931 Ibid 923.

932 Ibid 926; on the origin of the two concepts see Robert Kolb, 'Origin of the Twin Terms "Jus Ad Bellum/Jus in Bello"' (1997) 37 International Review of the Red Cross 553.

933 Schwarzenberger (n 843) 470.

934 Jessup (n 844) 100.

935 Iverson (n 925) 128.

936 See, e.g., Eric De Brabandere, 'The Responsibility for Post-Conflict Reforms: A Critical Assessment of Jus Post Bellum as a Legal Concept' (2010) 43 Vanderbilt Journal of Transnational Law 119, 119, 134.

937 Robert Cryer, 'Law and the Jus Post Bellum: Counseling Caution' in Larry May and Andrew Forcehimes (eds), *Morality, Jus Post Bellum, and International Law* (Cambridge University Press 2012) 224; Iverson (n 919) 129.

> [it] is unsatisfactorily narrow and overly broad at the same time … [it] is so broadly used that it means different things to different communities, sometimes even within the same discipline… As it stands, jus post bellum is thus still more a metaphor than a fully developed moral or legal concept.[938]

The empirical findings on the references to *jus post bellum* in a large number of journals presented by Iverson underscore that 'with the expansion of references there has been an increase of ambiguity, not a consolidation around a consensus definition'.[939] The reasons for this lack of definition are manifold.

First, the term has been fundamentally ambiguous from its very beginnings.[940] To some, *jus post bellum* is the law to apply after a war, whereas to others, it is the aspiration to transition from war to peace. Thus, Iverson distinguishes between the temporal and functional understandings of the concept: the definition of 'law after war' implies a temporal understanding, whereas 'the law of transition from war to peace' implies a functional one.[941] The temporal understanding focuses on the temporal distinction from the sister concepts *jus ad bellum*, at the beginning of a war, and *jus in bello*, during the war. The functional understanding focuses on what the various law regimes regulate, not when they apply.[942] Iverson explains that the temporal understanding of *jus post bellum* is simple but not very useful:[943] *Jus post bellum* would apply from the moment a conflict has ended, thus in an early state of peace.[944] It clearly distinguishes between the state of war and the state of peace. In contrast, the functional understanding acknowledges that the distinction between war and peace might be unclear, and that in such diffuse situations *jus post bellum* has the function of transitioning out of war into peace.[945] However, the differentiation between the temporal and functional understanding of *jus post bellum*, which would have brought more clarity to the concept, has not prevailed, and authors even switch from one understanding to the other without noticing.[946]

938 Carsten Stahn, 'The Future of Jus Post Bellum' in Carsten Stahn and Jann K Kleffner (eds), *Jus Post Bellum: Towards a Law of Transition from Conflict to Peace* (TMC Asser Press 2008) 233.

939 Iverson (n 925) 136.

940 Ibid 129 ff.

941 Ibid 130.

942 Ibid 115-116.

943 Ibid 8.

944 Ibid 129.

945 Ibid.

946 Ibid 131; see Brian Orend, 'Jus Post Bellum' (2000) 31 Journal of Social Philosophy 117, 118, who refers, on the one hand, to the termination phase of a war (functional understanding) and, on the other hand, to 'justice after war' (temporal understanding).

Second, the concept remains ambiguous because it is not clear what the *jus* in *jus post bellum* actually entails. To some it means 'law', but to others 'justice' or 'morality'.[947] The meaning that is ascribed correlates with the community that uses the term. While to moral theorists, *jus post bellum* is a moral concept that determines the overall justice of the war by assessing its outcome,[948] to lawyers such moral considerations are taboo, due to the absolute prohibition of the use of force: bringing democracy or stability after war cannot render it legal. Legal scholars suggest that the *jus* in *jus post bellum* means 'law' and understand the concept as a legal framework to deal with post-conflict peacebuilding and enable transition to peace.[949] Opinions vary on whether it means an existing body of law combined under a new label, a new body of law that should be created, or an interpretative tool or framework. For example, Österdahl and van Zadel argue that *jus post bellum* is at the minimum an area of law that mixes IHL, international human rights law, international criminal law, national criminal law, national administrative law, national constitutional law, and national military law, and should also include new rules that are to be developed.[950] Orend argues for the development of new rules for the post-conflict phase and even suggests a new Geneva Convention for this purpose.[951] Similarly, Bamigboye and Ayeni suggest creating a fourth additional protocol to the Geneva Conventions that specifically deals with *jus post bellum*.[952] However, De Brabandere stresses that the ambition to add new legal obligations will face the usual difficulties of law-making: the lack of political will for treaties and the lack of developed customary law.[953] Fleck suggests *jus post bellum* to be a partly independent legal framework but completes it with nonlegal rules, explaining that it should be addressed by a flexible creativity of formal and informal approaches.[954] Moreover, Stahn proposes six organiz-

947 Cryer (n 937) 224.

948 Michael Walzer, *Arguing About War* (Yale University Press 2004) 162–168; see also Walzer (n 925).

949 Eric De Brabandere, 'The Concept of Jus Post Bellum in International Law, A Normative Critique' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum, Mapping the Normative Foundations* (Oxford University Press 2014) 126.

950 I Osterdahl and E van Zadel, 'What Will Jus Post Bellum Mean? Of New Wine and Old Bottles' (2009) 14 Journal of Conflict and Security Law 175, 182.

951 Orend, '*Jus Post Bellum*' (n 536) 591.

952 Ebunoluwa Bamigboye and Victor O Ayeni, 'Laying the Foundations for Jus Post Bellum: The Conservationist Principle in the Law of Occupation as a Foundation for a Fourth Additional Protocol to the Geneva Conventions' (2022) 4 International Journal of Comparative Law and Legal Philosophy 61.

953 De Brabandere (n 949) 136.

954 Dieter Fleck, 'Jus Post Bellum as Partly Independent Legal Framework' in Carsten Stahn, Jens Iverson and Jennifer S Easterday (eds), *Jus Post Bellum — Mapping the Normative Foundations* (Oxford University Press 2014) 55.

ing rules and principles for the transition from conflict to peace, such as fairness and inclusiveness of peace settlements and humanization of reparations and sanctions.[955] Iverson similarly discusses eight core areas of *jus post bellum*, building on Stahn's idea.[956]

These different approaches to *jus post bellum* accompany different ambitions for its conceptualization. Conceptualizing it as a system or body of norms is ambitious and requires a maximalist perspective of the idea.[957] A more minimalist perspective[958] defines it merely as an interpretative framework that helps apply the existing legal norms to transitions from conflict to peace. Overall, there is 'no agreement nor any uniform view on what *jus post bellum* is or should be.'[959] Accordingly, opinions vary on the concept's added value for the discipline. Supporters of the concept consider it useful, because it places the post-conflict phase of reconstruction in the spotlight of international attention.[960] They believe that this phase of transition needs its own legal realm within the landscape of the laws of armed conflict[961] that focuses particularly on protecting civilians.[962] Compared to the beginning and middle of armed conflicts, the time after is under-regulated, creating a gap that needs to be addressed by international law.[963] This legal gap is also evident because the existing law, especially the law of occupation, aims to maintain the status quo, and thus does not enable large-scale societal changes.[964] In his comprehensive work on *jus post bellum*, Iverson emphasizes two key strengths of the concept: the broad and increasing interest in the topic and its solid foundation in an ancient ethical tradition as well as in modern legal tradition.[965]

Conversely, critics reject the concept of *jus post bellum* and do not assign any added value to it. The arguments for this standpoint vary, again depending on exactly how *jus post bellum* is conceptualized. If it is merely a label re-

955 Stahn, '"Jus Ad Bellum", "Jus in Bello" … "Jus Post Bellum"?' (n 927) 938 ff.

956 Iverson (n 925) 232 ff.

957 Jennifer S Easterday, Jens Iverson and Carsten Stahn, 'Exploring the Normative Foundations of Jus Post Bellum: An Introduction' in Carsten Stahn, Jennifer S Easterday and Jens Iverson (eds), *Jus Post Bellum Mapping the Normative Foundations* (Oxford University Press 2014) 5–6.

958 De Brabandere (n 949) 124; Easterday, Iverson and Stahn (n 957) 10–11.

959 De Brabandere (n 949) 124.

960 Osterdahl and van Zadel (n 950) 185.

961 Stahn, '"Jus Ad Bellum", "Jus in Bello" … "Jus Post Bellum"?' (n 927) 929; See also Fleck (n 954).

962 Osterdahl and van Zadel (n 950) 185.

963 Stahn, '"Jus Ad Bellum", "Jus in Bello" … "Jus Post Bellum"?' (n 927) 943; See also Bamigboye and Ayeni (n 952).

964 Cryer (n 937) 226, 233.

965 Iverson (n 925) 302–306.

ferring to the existing body of law that applies to post-conflict situations and transitions out of conflict, it is merely a descriptive legal concept. This might be the least controversial conceptualisation, yet it changes little and can be regarded as useless.[966] If *jus post bellum* aims to fill alleged legal gaps with obligations for peace-building exercises,[967] the added value would be obvious. However, it has been argued that in fact, no such gap exists: De Brabandere emphasizes the existing legal rules that apply after an armed conflict and in transition to peace, considers it an exaggeration to speak of a 'legal void', and mentions for example international human rights law, IHL, the law of occupation, and the Vienna Convention on the Law of Treaties, which regulates the fairness of peace settlements.[968] Additionally, there is the concept of transitional justice that deals with past crimes and the transition to peace.[969] According to De Brabandere, the problem is the lack of implementation rather than a lack of legal rules, which cannot be solved by creating new legal rules for *jus post bellum*.[970] Iverson sees *jus post bellum*'s key weaknesses in the lack of consensus, even among supporters of the concept, which leads to challenges in harmonizing various sources.[971]

3. Parallels to Transitional Justice

Jus post bellum cannot be addressed without mentioning transitional justice. There are parallels between these two concepts, not only in terms of their content but also in their somewhat unclear status as concepts in international law for lack of clear definitions. Transitional justice has been described as the 'conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes'.[972] It is also understood as the transition within democratic systems;[973] however, the relationship between democracy and transitional justice has not been conclusively clarified.[974] Moreover, it has also been defined

966 Cryer (n 937) 225; see in the same vein in general De Brabandere (n 949).

967 De Brabandere (n 949) 130.

968 Ibid 136–137.

969 Ibid 135.

970 De Brabandere (n 936); see also Antonia Chayes, 'Chapter VII1/2: Is Jus Post Bellum Possible?' (2013) 24 European Journal of International Law 291.

971 Iverson (n 925) 306–311.

972 Ruti Teitel, 'Transitional Justice Geneology' (2003) 16 Harvard Human Rights Journal 69, 69.

973 See e.g. Colm Campbell and Fionnuala Ni Aolain, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 Human Rights Quarterly 172.

974 Oliver Diggelmann, '"Transitional Justice": Entstehung – Erkenntnisse – Kritik' in Ahmed Ajil and others (eds), *Alternativen: Von der alternativen Sanktion zur alternativen Kriminologie* (Helbing & Lichtenhahn 2023) 236.

as 'transition from war to peace', which implies a radically distinct idea and might be confused with *jus post bellum*.[975] The origin of transitional justice is the transition to democracy of various states from the 1970s to the 1990s.[976] The purpose is to build a sustainable peace with justice for human rights violations that occurred under the past regime and that are to be prevented in the future. The emphasis is on the aspiration for a transition towards justice in line with a political order that prevents human right violations.[977] The assumption of an armed conflict is not substantial to transitional justice; neither is its absence.[978] In contrast, *jus post bellum* can only be viewed in the context of an armed conflict, like its sister concepts of *jus ad bellum* and *jus in bello*. Nevertheless, in many cases transitional justice may overlap with *jus post bellum*,[979] and it is regarded as a part of the latter.[980] What is remarkable is the fact that, despite criticism, the concept of transitional justice is much more firmly established in international law than that of *jus post bellum*. In addition, there is a broad normative framework at the UN addressing transitional justice, for instance in the 2004 Report of the UN Secretary General, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies',[981] and the 2010 Guidance Note on the 'United Nations Approach to Transitional Justice'.[982]

What is of interest for this work is not the detailed content of transitional justice but the emergence of this new field in international law and the fact that some scholars even reject the notion that transitional justice constitutes a field.[983] The concept of transitional justice emerged at the end of Argentina's military dictatorship and during the subsequent criminal prosecutions by the new, democratically elected government.[984] Other states went through similar shifts from authoritarian regimes to democracies, for example Uruguay, Chile, South Africa, Greece, Algeria, and Bulgaria. Scholars engaged with

975 Iverson (n 925) 135.

976 Ibid 139.

977 Ibid 145.

978 Ibid.

979 Ibid 178.

980 Osterdahl and van Zadel (n 950) 191.

981 UNSC, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (23 August 2004), UN Doc S/2004/616'.

982 UN Secretary General, 'Guidance Note of the Secretary General, United Nations Approach to Transitional Justice (March 2010), UN Doc ST/SG(09)/A652'.

983 See Christine Bell, 'Transitional Justice, Interdisciplinarity and the State of the "Field" or "Non-Field"' (2008) 3 International Journal of Transitional Justice 5.

984 Andrew G Reiter, 'The Development of Transitional Justice' in Olivera Simić (ed), *An Introduction to Transitional Justice* (2nd edn, Routledge 2020) 34.

these complex transitions and organized conferences at the end of the 1980s and beginning of the 1990s, so that soon an expert pool existed for the new field.[985] Although there are various examples in history of similar transitions and attempts at coping with past crimes,[986] the term 'transitional justice' became fashionable only in the 1990s.[987] The term and the concept were appealing, at the beginning especially within the human rights movement,[988] and later within international law in general. Around 2000 and thereafter a self-conscious field of practice and study emerged, consistently termed 'transitional justice' and dealing with transitions in a range of societies.[989] The UN increasingly adopted the role of monitor and sponsor of transitional justice[990] and created a 'Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence' in 2011.[991] The concept's fast rise in international law within just a few decades is remarkable, and the idea has spilled over into disciplines other than law, including anthropology, cultural studies, development studies, economics, education, ethics, history, philosophy, political science, psychology, sociology, and theology.[992]

However, transitional justice, like *jus post bellum*, has faced intense criticism concerning its status and its added value for international law. One critical argument is that the concept is too vague, given the lack of a legal definition and uncertainty over what international law specifically permits or requires of which actors during transition.[993] Due to its popularity, the idea of transitional justice broadened over time and became less defined. The popularity of a concept certainly offers opportunities,[994] but nevertheless results in vagueness.[995] The field also overlaps with the UN's peace and security mandate for accountability, justice, and reconciliation.[996] A second criticism is that power

985 Diggelmann (n 974) 220.

986 Ibid 222-224.

987 Bell (n 983) 7; Guillaume Mouralis, 'The Invention of "Transitional Justice" in the 1990s' in Liora Israël and Guillaume Mouralis (eds), *Dealing with Wars and Dictatorships* (Springer International Publishing 2013) 89 ff.

988 Diggelmann (n 974) 225.

989 Bell (n 983) 8.

990 Diggelmann (n 974) 228.

991 Renewed Resolution: UNGA, 'Res 54/8 (12 October), UN Doc A/HRC/RES/54/8'; Former Resolution: UNGA, 'Res 18/7 (13 October 2011), UN Doc A/HRC/RES/18/7'.

992 Bell (n 983) 9.

993 Ibid 16; Diggelmann (n 974) 236.

994 Iverson (n 925) 135.

995 Diggelmann (n 974) 237.

996 Leena Grover, 'Transitional Justice, International Law and the United Nations' (2019) 88 Nordic Journal of International Law 359, 378.

has shifted from the originally affected communities to a specialized, elitist field of experts: instead of self-determined transitions, they are directed by others through the neutral language of international law.[997] The turn to legal hegemony and UN managerialism may have marginalized some of the most pressing concerns of people attempting to overcome past crimes.[998] Furthermore, the concept has been criticized for being overly inclusive, because the term classifies situations together that seem too distinct to be addressed in one category.[999] The question arises how the consequences of Latin America's military juntas, South Africa's apartheid system, Southern European dictatorships, and Soviet communism can be compared to one another.[1000]

4. Analogies with Frozen Conflicts

Treatises on *jus post bellum* allow analogies to be drawn to the concept of frozen conflicts and its position within the legal landscape. Primarily, both concepts challenge the boundaries of existing categories. *Jus post bellum*, at least according to some approaches, has been created to overcome the dichotomy of *jus ad bellum* and *jus in bello*, which reflects the original dichotomy of peace and war. To overcome this dichotomy, a third category is introduced that addresses diffuse situations somewhere in transition from war to peace. Frozen conflicts consist of such diffuse situations, where war has terminated but peace has not been established. Both concepts are attempts at greater nuance, not simplification. However, because they exist beyond the boundaries of well-established categories, both concepts remain ambiguous. Neither *jus post bellum* nor frozen conflict has a consolidated definition. Instead, these concepts are associated with various meanings, depending on the community that employs the term. Furthermore, neither concept has clear legal implications, which raises the question of whether they have any added value for international law.

Despite these deficits, *jus post bellum*, frozen conflicts, and transitional justice have witnessed a steady increase of interest and expansion of references in recent decades. There seems to be a need to conceptualize the ambiguity in order to compensate for the oversimplification inherent to the binary

997 Diggelmann (n 974) 237–239.

998 Grover (n 996) 375–379; See also Martti Koskenniemi, 'Hegemonic Regimes' in Margaret A Young (ed), *Regime Interaction in International Law* (Cambridge University Press 2012).

999 David Restrepo Amariles, 'Reassessing the Boundaries of Transitional Justice: An Inquiry on Political Transitions, Armed Conflicts, and Human Rights Violations' in Liora Israël and Guillaume Mouralis (eds), *Dealing with Wars and Dictatorships: Legal Concepts and Categories in Action* (TMC Asser Press 2014) 230; Diggelmann (n 974) 239.

1000 Diggelmann (n 974) 239–240.

logic of law. The expanded use of these terms provides leverage, but also dilutes their meaning.[1001] *Jus post bellum* and transitional justice have both been deemed overly inclusive. In the same vein, we think that the expanded application of the term 'frozen conflict' to situations beyond the post-Soviet context is overly inclusive, watering down its original meaning. Even within the post-Soviet context, the term can be criticized for comparing situations that are too different from each other.

Differences between the concepts of *jus post bellum*, transitional justice, and frozen conflict concern the intentions behind them. *Jus post bellum* and transitional justice both pursue the objective of establishing certain obligations and aim to trigger specific actions by particular actors: often the international community, dominated by the West. In contrast, the concept of frozen conflict is neutral in the sense that it does not require action or imply claims directed towards a specific goal, such as transitioning out of conflict, bringing democracy, or protecting human rights. It remains at a factual level and does not imply a risk of hegemony in international law nor UN managerialism, because the concept does not mandate any action. Instead, frozen conflict implies a certain inactivity by the international community; the latter has given up on these situations. Overall, the concepts of *jus post bellum* and frozen conflict face an uncertain future in the discipline. Iverson states that it is impossible to foresee the longevity of a concept, because it largely depends on its future usage and the coherence of its use by experts.[1002]

B. Asymmetric Warfare

1. Origin of the Concept

Asymmetric warfare, also termed asymmetric war, refers to warfare in which the parties have highly unequal strategies and capabilities. Of course, warfare between unequal parties has occurred throughout history; indeed, in every war, the parties' aim is to create asymmetry and thus establish superiority over the enemy.[1003] Two and a half millennia ago, Sun Tzu described the asymmetric strategy of an army like flowing water: avoiding the heights, meaning the opponents' strengths, and hastening to the lowlands, meaning their weaknesses.[1004] The phenomenon of asymmetric warfare is neither new nor particularly surprising. In fact, any war can be characterized as asymmetrical, because

1001 Iverson (n 925) 136.

1002 Ibid 139.

1003 Eyal Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' (2010) 20 Duke Journal of Comparative & International Law 339, 339.

1004 Schmitt (n 714) 2.

belligerents are never identically strong, equipped, organized, persistent, and so forth.[1005] Asymmetry can thus refer to various factors shaping a war, such as power, means, methods, organization, values, and time.[1006]

Apart from some rudimentary references to distant history, speaking of 'asymmetric warfare' is usually intended to stress a contemporary phenomenon that contrasts with 'old' or 'traditional' wars.[1007] There seems to be a consensus that 'asymmetric warfare' crystallized as a concept in international law in the 1990s.[1008] Besides lawyers, scholars of peace and conflict studies, military strategy, and political science have engaged with the concept.[1009] Traditionally, warfare has been perceived as armed hostilities between armies of centralized states, an assumption upon which the law of war is built,[1010] yet by the end of the Cold War, irregular forms of warfare emerged due to the new political landscape and new technological means. Because of technological innovations such as hand-held missiles, undetectable explosives, improved communication tools, and low-cost effective weaponry, irregular forces became able to confront states and challenge even the strongest of powers.[1011] These irregular forces and loosely organized groups of fighters differ from their state opponents in their objectives, methods, and strategies.[1012]

Berglund and Souleimanov showed how scholars and government-affiliated strategists rushed to find appropriate labels and to categorize this emerging form of conflict.[1013] Various terms attempting to capture this new phenomenon have appeared in publications since the 1990s. Examples include 'fourth-

1005 Wolff Heintschel Von Heinegg, 'Asymmetric Warfare', *Max Planck Encyclopedias of International Law* (Oxford University Press 2012) n 1; Toni Pfanner, 'Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action' (2005) 87 International Review of the Red Cross 149, 151; Michael n Schmitt, 'Asymmetrical Warfare and International Humanitarian Law' (2007) 62 Air Force Law Review 1, 2.

1006 Pfanner (n 1005) 151.

1007 See, e.g., Robin Geiss, 'Asymmetric Conflict Structures' (2006) 88 International Review of the Red Cross 757. On 'new' and 'old' wars in general, see Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn, Cambridge University Press 2012); see also Herfried Münkler, *Der Wandel des Krieges: von der Symmetrie zur Asymmetrie* (3rd edn, Velbrück Wissenschaft 2014).

1008 Eyal Benvenisti, 'The Law On Asymmetric Warfare' in Mahnoush H Arsanjani and others (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Brill 2010) 932; Berglund and Souleimanov (n 12) 87; Jolicoeur and Campana (n 65) 503.

1009 See, e.g., Berglund and Souleimanov (n 12).

1010 Von Heinegg (n 1005) n 2.

1011 Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' (n 1003) 339; Benvenisti, 'The Law On Asymmetric Warfare' (n 1008) 932.

1012 Pfanner (n 1005) 150.

1013 Berglund and Souleimanov (n 12) 87.

generation warfare',[1014] 'small wars',[1015] 'protracted social conflicts',[1016] 'new wars',[1017] 'non-linear wars',[1018] and 'asymmetric wars'.[1019,1020] The latter became the 'catch-phrase *du jour*' in the 2000s.[1021] Many articles were also published on the topic during that decade.[1022]

The asymmetry between the parties to a conflict is of particular interest to international lawyers, especially in the case of terrorism. The latter concept was shaped by the attacks of 9/11 in 2001, in which a handful of terrorists killed thousands of people on a superpower's territory in very little time and thus demonstrated the vulnerability of the US and the West in general.[1023] International terrorism is commonly regarded as the paradigmatic case of asymmetric warfare.[1024] Another example is a series of terrorist attacks in Russia in 2004. The hostage-taking and massacre in North Ossetia, carried out by Chechen suicide attackers, spotlighted the strategy of weaker military forces seeking to exert influence in conflicts. They choose targets in peripheral war zones, potentially leading to spirals of violence.[1025] It was in this context of escalating terrorist attacks in the 2000s that the concept of asymmetric warfare gained widespread recognition. However, one could argue that terrorist acts are nothing new and had already triggered wars in the past.[1026] Instead, the novel characteristic might be that these terror attacks are an integral part of asymmetric warfare and more structured and systematic than

1014 William S Lind and others, 'The Changing Face of War: Into the Fourth Generation' [1989] Marine Cops Gazette 22.

1015 William Olson, 'The Concept of Small Wars' (1990) 1 Small Wars & Insurgencies 39.

1016 Edward E Azar, *The Management of Protracted Social Conflict: Theory and Cases* (Dartmouth Publishing Company 1990).

1017 Kaldor (n 1007); the book was first published in 1999.

1018 Geiss (n 1007) 759.

1019 Christopher R Mitchell, 'Classifying Conflicts: Asymmetry and Resolution' (1991) 518 The Annals of the American Academy of Political and Social Science 23.

1020 David L Buffaloe, 'Defining Asymmetric Warfare' (2006) 58 *The Land Warfare Papers, Institute of Land Warfare* 2; on the development of new characteristics of wars, see Wilmshurst (n 138) (Part I).

1021 Schmitt (n 1005) 2.

1022 See, e.g., Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' (n 1003); Benvenisti, 'The Law On Asymmetric Warfare' (n 1008); Geiss (n 1007); Schmitt (n 1005).

1023 Pfanner (n 1005) 150.

1024 Geiss (n 1007) 758.

1025 Pfanner (n 1005) 150.

1026 Ibid.

ever before.[1027] Asymmetric warfare entails a strategy by which the weaker party attempts to overcome its disadvantage by attacking soft targets and consequently causing great damage.[1028]

2. Legal Content, Added Value, and Critics

The appearance of this new phenomenon in the world, followed by its conceptualization as asymmetric warfare, raises the question of what the law says about asymmetric wars. The answer depends on how asymmetric warfare is defined. According to a US Army Major, Buffaloe, in its heyday the phrase 'asymmetric warfare' meant everything from the 9/11 terrorist strikes to roadside bombs to computer viruses to nuclear proliferation.[1029] According to the journal *Dynamics of Asymmetric Conflicts* that was first published in 2008, the definitions range from terrorism to genocide, marking the two most extreme forms of asymmetric conflicts.[1030] Possible asymmetric aspects of war include power, means, methods, organization, values, time, techniques, applicable norms, and doctrines.[1031] Some scholars distinguish between asymmetric warfare levels (strategic, operational, and tactical) and asymmetric warfare forms (technological, doctrinal, normative, participatory, and moral).[1032] Legal and political scholars frequently 'offer a laundry list of associated characteristics and sporadic examples, thus forcing readers to engage in text exegesis'[1033] to understand the term. Consequently, some qualify 'asymmetric conflict' as an umbrella term referring to all imbalances and differences between the parties to a conflict.[1034] Indeed, the term means different things to different speakers and therefore has been described as ambiguous and even useless.[1035] Due to its several meanings, its legal implications vary, too.

One approach to the concept emphasizes that international law is completely indifferent to asymmetries.[1036] *Jus in bello*, for example, applies as soon as a situation amounts to an armed conflict, irrespective of asymmetries

1027 Geiss (n 1007) 758; Pfanner (n 1005) 151.

1028 Pfanner (n 1005) 151.

1029 Buffaloe (n 1020) 2.

1030 Anthony Lemieux, Clark McCauley and Anthony Marsella, 'Editors' Welcome to the Inaugural Issue of "Dynamics of Asymmetric Conflict (DAC)"' (2008) 1 Dynamics of Asymmetric Conflict 1, 1 ff.

1031 Schmitt (n 1005) 16.

1032 Ibid 5; Pfanner (n 1005) 151.

1033 Berglund and Souleimanov (n 12) 93.

1034 Ibid 88; Schmitt (n 1005) 62.

1035 Berglund and Souleimanov (n 12) 88; Buffaloe (n 1020) 2.

1036 Von Heinegg (n 1005) n 2.

in military strength, political goals, or the lawfulness of the use of force.[1037] Accordingly, a confrontation with a superior enemy does not allow the weaker party to use prohibited means of warfare. Moreover, the asymmetries in the motives for waging war or strategic goals are important to understand but irrelevant from a legal perspective.[1038] In this understanding of asymmetric warfare, the concept has little legal relevance. To some lawyers, asymmetric warfare is thus nothing but a description of a fact of life and 'by no means a legal term of art';[1039] it entails no legal implications and consequently presents no added value to the discipline.

However, other understandings of the concept are not indifferent to international law. Often, lawyers define asymmetric warfare narrowly by referring specifically to the inequality between the actors involved in the conflict. This typically means confrontation between the regular military forces of a state and nonstate groups. This understanding equates asymmetric warfare with the well-established category of non-international armed conflict according to common article 3 of the Geneva Conventions. These conflicts are defined by the participation of nonstate groups.[1040] Consequently, asymmetric wars have the same legal consequences as non-international armed conflicts. These implications can be briefly outlined. Despite the parallels with international armed conflicts, some differences remain in the applicable IHL rules.[1041] To non-international armed conflicts, only a limited set of rules applies. In essence, non-international armed conflicts are ruled by common article 3 of the Geneva Conventions, the provisions of Additional Protocol II of 1977, and article 8(2) (c) and (e) of the Rome Statute.[1042] Whereas in international armed conflicts the law acknowledges the statuses of combatants, civilians and other persons who are *hors de combat*, the wounded, sick and shipwrecked, and

1037 Ibid 7; see, however, Pfanner (n 1005) 158–159; Schmitt (n 1005) 48–49. Pfanner and Schmitt both argue that the discussion on the legality of war (just war) is returning, and that especially the weaker party tends to claim moral or religious motivations for war.

1038 Von Heinegg (n 1005) n 4.

1039 Ibid 1.

1040 See, e.g., Allen S Weiner, 'Just War Theory and the Conduct of Asymmetric Warfare' (2017) 146 Daedalus, The Changing Rules of Law 59.

1041 Akande (n 154) 34–37; see also S Sivakumaran, 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 European Journal of International Law 219. Sivakumaran identifies three phases in the development of the regulation of non-international armed conflicts: analogy to the law of international armed conflicts, resort to international human rights law, and resort to international criminal law.

1042 Akande (n 154) 50 ff.; Thilo Marauhn and Faustin Zacharie Ntoubandi, 'Non-International Armed Conflict', *Max Planck Encyclopedias of International Law* (Oxford University Press 2016) nn 3–5.

prisoners of war,[1043] in non-international armed conflicts there is no equivalent protection based on status.[1044] Not carrying the status of combatants means that members of an irregular armed group do not enjoy combatant immunity or prisoner-of-war status when they fall into the hands of the enemy.[1045] Cases discussed within this understanding of asymmetric warfare take place in non-international armed conflicts and include Turkey versus the Kurdistan Workers' Party (PKK), Colombia versus the Revolutionary Armed Forces of Colombia (FARC), and Russia versus Chechnya.[1046] This understanding of asymmetric warfare helps address difficulties of international law when regulating internal conflicts.

Another approach to the concept of asymmetric warfare is to not restrict it to the category of non-international armed conflicts. For a conflict to qualify as a non-international armed conflict, the nonstate group needs to meet the criteria of an organization with a hierarchical command structure that exercises control over a part of the state's territory in the sense of article 1 Additional Protocol II of the Geneva Conventions. However, asymmetric war can also refer to the involvement of a conflict party that is poorly organized, without any command structure or control over a territory, and that ignores both domestic law and IHL.[1047] In some cases, the activities of such parties might not even qualify as armed conflict because they do not meet a certain threshold of intensity of violence. In such situations, 'asymmetry' refers to the fact that a state fights using its regular army, bound by the laws of armed conflict, while the nonstate party is only bound by the domestic rules of a state that it usually does not recognize.[1048] The actions of the nonstate group can only be prosecuted under criminal law. Authors who understand the term 'asymmetric warfare' in this way also use the term 'transnational asymmetric warfare' and 'transnational warfare' to refer to conflicts between state military forces and foreign nonstate actors that take place beyond state borders.[1049] Transna-

1043 RULAC, 'Classification of Armed Conflicts' (n 155).

1044 Ibid.

1045 Ibid.

1046 Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' (n 1003) 341; Weiner (n 1040) 62.

1047 Andreas Paulus and Mindia Vashakmadze, 'Asymmetrical War and the Notion of Armed Conflict—a Tentative Conceptualization' (2009) 91 International Review of the Red Cross 95, 109.

1048 Ibid.

1049 Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' (n 1003) 341.

tional terrorism and the 'global war on terror' are frequent examples.[1050] This understanding of the concept of asymmetric war offers an opportunity to discuss the limits to the scope of applicability of IHL to irregular war actors.

Asymmetric warfare has also been conceptualized more broadly. Schmitt presents a very broad understanding to grasp all of its legal consequences and stresses that asymmetry always has ramifications and operates across the entire spectrum of a conflict.[1051] In his approach, the term 'asymmetric warfare' means normative, technological, doctrinal, and moral asymmetry, which all cause repercussions in law. These aspects of asymmetry can also be interconnected. For instance, normative asymmetry between the legal status of a state actor and that of a nonstate one is intertwined with asymmetries in technological capabilities, doctrinal strategies, and moral standing, all of which impact compliance with IHL.[1052] For example, when nonstate actors disguise themselves as civilians, the opposing state may well argue for a lower threshold of proportionality because the principle of distinction has been misused.[1053] Another example is the unequal technological resources of states and irregular forces: the attacker is obliged to take all feasible precautions to avoid incidental loss of life, injury to civilians, and damage to civilian objects (article 57(2) Additional Protocol I). Which precautions may be feasible depends on what is feasible for each party, which is likely to differ. Thus, the norm imposes different obligations on the parties depending on their technological means.[1054] In other words, different standards of feasibility apply to states, which are usually technologically superior to nonstate groups; this results in privileging nonstate groups because they face a lower threshold of compliance with the law.[1055] Doctrinal asymmetry involves war tactics designed to exploit the enemy's weaknesses, which can lead to systematic attacks on civilians that undermine the principle of distinction and create a cycle of reciprocal IHL violations.[1056] Finally, moral asymmetry, also termed *ad bellum* asymmetry, refers to the differing moral justifications behind the use of force, which can influence the parties' willingness to comply with IHL because, despite the strict legal distinction between *jus ad bellum* and *jus in bello*,

1050 Von Heinegg (n 1005) n 34.

1051 Schmitt (n 1005) 3.

1052 Berglund and Souleimanov (n 12) 91.

1053 Geiss (n 1007) 764-766.

1054 Ibid 761.

1055 Von Heinegg (n 1005) n 25.

1056 Schmitt (n 1005) 32-33.

in reality, differences in moral reasoning behind a war matter.[1057] In a conflict between a state and a nonstate group, the first usually presents itself as retaining the moral upper hand compared to the irregular entities of 'terrorists'.[1058] Thus, such conflicts suddenly bring *jus ad bellum* considerations into the assessment of the lawfulness of certain military actions.[1059]

To summarize, asymmetric warfare is a popular topic in legal research and practice. However, there is no authoritative definition with exact legal consequences. Instead, conceptualizations vary, so that its meaning remains ambiguous. Therefore, some neglect the legal content of the term, regarding it as purely descriptive, whereas others simply equate it with the undisputed legal category of non-international armed conflict. A third group sees asymmetric wars as exactly the type of conflict that does not qualify as non-international armed conflict and sometimes adds the word 'transnational' to specify this.[1060] A fourth group understands the term very broadly and identifies a range of consequences with indirect impacts on IHL. Consequently, the added value of the concept of asymmetric warfare for the discipline is either modest or potentially considerable.

3. Analogies with Frozen Conflicts

Treatises on the concept of asymmetric warfare allow analogies to be drawn with frozen conflicts. Both concepts address the phenomenon of new forms of wars that have proliferated since the 1990s, sharply contrasting with traditional wars between states that have clear beginnings and ends and are fought by traditional military forces with typical war equipment. The new and complex realities of warfare require a vocabulary to address these phenomena. Although asymmetric warfare is a popular concept in legal research and practice, its meaning remains ambiguous. In fact, definitions of the term vary. Most commonly, asymmetry refers to the parties involved in a conflict: states against nonstate groups. This understanding raises questions of the applicability of IHL rules to the nonstate actors, who often are terrorists. Their strategy entails blurring the boundaries of IHL dichotomies, such as the distinction between combatants and noncombatants. As in the case of frozen conflicts, such dichotomies are vulnerable to instrumentalization. For example, in asymmetric wars, terrorists instrumentalize the dichotomy of combatants

1057 Ibid 41-42.

1058 Pfanner (n 1005) 160.

1059 Benvenisti, 'Rethinking the Divide between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors' (n 819) 544.

1060 See, e.g., Benvenisti, 'The Legal Battle to Define the Law on Transnational Asymmetric Warfare' (n 1003).

and noncombatants, and the dichotomy of war and peace in general, by using civilian infrastructure such as airplanes, trains, and computers to attack the opponent.

Moreover, like frozen conflicts, the concept of asymmetric warfare has, at least by some, been regarded as purely descriptive rather than a legal term of art. However, descriptive concepts can provide opportunities to address a bundle of legal problems and reveal the limits of traditional categories. Such terms still contribute to explaining the factual nature of the hostilities concerned, which is also important for lawyers.[1061] Moreover, the term 'asymmetric warfare' is neutral, as is 'frozen conflict'. Unlike *jus post bellum* and transitional justice, it does not (aim to) trigger action by the international community. Asymmetric warfare also remains at the factual level and thus, like frozen conflict, does not imply the risk of hegemonic claims in international law or UN managerialism.

To conclude the analogy, the question whether asymmetric warfare and frozen conflicts are connected must be addressed. Do frozen conflicts entail asymmetrical warfare or vice versa? In general, the two concepts are not congruent and not related. The phenomena they refer to may occur in the same conflict, but the terms refer to distinct aspects of the situation. In fact, frozen conflicts are fought rather traditionally, usually by the armies of the parent state, the patron state, and the de facto state. Therefore, frozen conflicts are not typically cases of asymmetric warfare.[1062] Instead, the term that has been connected with frozen conflicts is 'hybrid warfare', which means a mix of traditional and asymmetric warfare.[1063]

III. Frozen Conflicts as Legal Concept?

A. Preliminary Thoughts on Concepts in Law

The position of frozen conflicts within the legal landscape can be examined from various angles. Previous chapters have situated them between war and peace and between law and politics. Subsequently, the examination of two further concepts has illustrated that other ambiguous concepts exist in international law and face problems similar to those of the term frozen conflict. This chapter assesses the strengths and weaknesses of frozen conflicts as a

1061 Steven Haines, 'The Nature of War and the Characteristics of Contemporary Armed Conflict' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 21.

1062 Jolicoeur and Campana (n 65) 503.

1063 Brown (n 868) 60.

legal concept. Therefore, firstly, we need to address some preliminary considerations regarding concepts in law. There are different kinds of concepts, each raising specific expectations, which may be evaluated as beneficial or useless to the discipline. A legal concept can help identify applicable law, mark a party's position in court, or derive rights or actions. For example, responsibility to protect, although highly debated as discussed above, triggers humanitarian intervention. The concept is used to elicit certain actions, or rather reactions towards a situation of human suffering. In contrast, the concept of frozen conflict does not entail any action or reaction by the international community yet. Instead, it rather describes inactivity vis à vis a certain situation. Is it, therefore, a useless concept?

What defines a legal concept and what distinguishes a useful legal concept from a poor one is not as straightforward.[1064] Neither is the definition of 'concept', a question that has been addressed throughout centuries and by various disciplines.[1065] Lawyers have studied concepts only marginally and often using the approaches of social science.[1066] Although to some a useful legal concept permits no ambiguity—for instance, in this view, there has to be a set of characteristics that pertains only to the concept of frozen conflicts and does 'not describe any situation that is not a frozen conflict'[1067]—, to others the very fluidity of a concept also has value, especially when thinking of concepts as a family.[1068] Within such family resemblance approaches, also called prototype theory,[1069] not all members of a concept have the exact same characteristics. They can be ambiguous. Wittgenstein gives the example of games: although games vary from board games to ball games to the Olympic games, they still have a whole series of similarities and relationships.[1070] In *Concepts for International Law*, D'Aspremont and Singh stress their distinctness from words and also their ambiguity.[1071] The book distinguishes between concepts that designate important actors, concepts used in legal argu-

1064 Tom Ginsburg and Nicholas Stephanopoulos, 'The Concepts of Law' (2017) 84 University of Chicago Law Review 147, 147.

1065 See on the meaning of words and concepts in general Alf Ross, 'Tu-Tu' (1957) 70 Harvard Law Review 812.

1066 Ginsburg and Stephanopoulos (n 1064) 152.

1067 Grant (n 4) 376.

1068 Wittgenstein (n 908) nn 65-67.

1069 See, e.g., Eric Margolis and Stephen Laurence, 'Concepts' in Edward n Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy Archive* (Metaphysics Research Lab Stanford University 2022) ch 2.2.

1070 Wittgenstein (n 908) 66.

1071 Sahib Singh and Jean D'Aspremont, 'Introduction: The Life of International Law and Its Concepts' in Sahib Singh and Jean D'Aspremont (eds), *Concepts for International Law* (Edward Elgar Publishing 2019) 22.

ment and judicial reasoning, concepts that designate influential and dominant projects, and core temporalized concepts in international law.[1072] For example, the book addresses concepts such as authority, individual, civilization, democracy, rule of law, and war. Ginsburg and Stephanopoulos distinguish legal concepts both from words and from rules.[1073] They follow Gerring's social-scientific approach[1074] and measure legal concepts according to the criteria of resonance, domain, consistency, fecundity, differentiation, causal utility, and measurability or operationalizability.[1075] Yet, according to Frändberg, in theory, any concept whatsoever can be a legal concept when used in a law or legal material, for example man, woman, nuts, and percent, but the context decides whether considering these terms as legal concepts is desirable and useful.[1076] He distinguishes between three types of legal concepts: law-stating concepts that state legal material content, juridical-operative concepts that regulate the use of the legal content, and mixes of both.[1077] To Von der Pfordten, concepts may be descriptive, such as road; evaluative, such as good manners; and normative, such as obligations.[1078] He stresses the importance of all three types of concepts in law and compares them to the norms to which legal reasoning is often reduced. He considers concepts to be mental representations decisive for understanding the world.[1079] In addition to these ideas about concepts, there is certainly also a temporal component, because concepts are not fixed once and for all: new concepts can emerge while others disappear or change due to new interpretations.[1080] *In short, international law is a messy world of ideas and institutions.*[1081]

1072 Ibid 23.

1073 Ginsburg and Stephanopoulos (n 1064) 150.

1074 John Gerring, *Social Science Methodology: A Unified Framework* (2nd edn, Cambridge University Press 2012) 117.

1075 Ginsburg and Stephanopoulos (n 1064) 152-155. In short, they explain that resonance is whether the concept 'makes sense' to the public and is understood; the domain is the realm to which it is applied, in this case law; consistency means that the concept conveys the same meaning in distinct contexts; fecundity is the content, the informativeness that the concept carries; differentiation signifies how the concept is distinct from other, neighbouring concepts; casual utility means the usefulness of the concept—in the legal domain this can be seen as how effectively it can be applied for example by judges when deciding whether an act is unlawful or lawful.

1076 Åke Frändberg, 'An Essay on Legal Concept Formation' in Francisco J Laporta and others (eds), *Concepts in Law* (Springer Netherlands 2009) 1-2.

1077 Ibid 2.

1078 Dietmar Von der Pfordten, 'About Concepts in Law' in Francisco J Laporta and others (eds), *Concepts in Law* (Springer Netherlands 2009) 18-19.

1079 Ibid 33.

1080 Singh and D'Aspremont (n 1071) 2.

1081 Koskenniemi, 'Speaking the Language' (n 11) 40.

For the purpose of this evaluation, it suffices to understand concepts in a broad sense. As it has become clear throughout this work that frozen conflicts do not entail rights, obligations, or actions, expectations for frozen conflict as a legal concept ought to be modest. Its potential appears to be limited. Most likely it can function as an analytical category or descriptive framework. Very pragmatically and convincingly, Frändberg supposes that a legal concept is likely one that is found in glossaries for law students.[1082] This might be a realistic yardstick for the concept of frozen conflict, similarly to the concept of asymmetric warfare, which frequently appears in students' textbooks of international law. Having said this, the next section will present four key strengths and two key weaknesses of frozen conflicts as a legal concept that could be found in glossaries for law students.

B. Key Strengths and Opportunities

Frozen conflict as a distinct concept in the legal landscape comes with four key strengths and opportunities. First, the concept mirrors the increasing interest in the topic. Part I of this work has shown that the term became fashionable in the 1990s and has attracted even more attraction since 2000, according to the empirical analysis of UN documents. Moreover, research on the subject has been conducted in other disciplines and even specialized research programmes have been founded, such as the frozen conflict dataset of the Peace Research Centre Prague. Furthermore, after the war in Georgia in 2008, interest in the topic increased, because it became clear that a frozen conflict may thaw at any time. Russia's war against Ukraine since 2022 has raised interest in and awareness of frozen conflicts even further. The phrase has since been used particularly to describe future scenarios for Ukraine, and a risk has been identified of a spillover of the war into South Ossetia, Abkhazia, or Transnistria. Finally, the events in Nagorno-Karabakh in 2023 underscored the inherent risk of frozen conflicts: not only did a one-day war occur in September 2023, but in the months leading up to it, a humanitarian crisis developed in the region, and thousands of people were forced to flee.

Second, the concept creates visibility for the inherent risk of the outbreak of major violence, and for the underlying and constant suffering of the people living in the affected regions. Although interest in the topic is increasing, as explained above, frozen conflicts still seem to be a marginal topic in international law, perhaps due to their amorphous and subtle appearance not fitting traditional legal categories. Again, in 2023 Nagorno-Karabakh went through a humanitarian crisis and a one-day war with almost no reaction by the interna-

1082 Frändberg (n 1076) 2.

tional community. Frozen conflicts can be considered a constant although somehow hidden threat to peace because the use of force is possible at any moment. Frozen conflict as a legal concept correlates with understanding these conflicts as a legal problem and taking professional responsibility.

Third, the concept raises awareness of particularities. Recognizing the distinct nature of frozen conflicts by taking into account the combination of legal aspects and their sometimes-atypical manifestations can help interpret the applicable law. For example, the use of force by Azerbaijan against Nagorno-Karabakh in 2020 and 2023 must be viewed in its broad context. Solely from the perspective of territorial integrity, Azerbaijan has a monopoly on the use of force within its boundaries. Furthermore, human rights violations that occur in the regions and that have been alleged at the ECtHR must be seen in relation to the overall situation of frozen conflicts. The ECtHR incorporated this broad view by establishing a responsibility for human rights shared by both the parent state and the patron state in frozen conflicts. The concept sharpens consciousness of a situation that is not a typical occupation, nor a typical case of a people exercising self-determination, nor a typical international or non-international armed conflict, nor a typical situation that could be described as peace.

Fourth, the concept helps overcome dichotomies. As has been outlined, there is a tendency for rigid dichotomies in international law to be softened by introducing new concepts. Frozen conflicts can be regarded as another example and as an opportunity to reflect on existing categories. Easterday, Iverson, and Stahn offer a perspective on what the concept of *jus post bellum* could be:

> Jus post bellum might serve as an instrument to overcome some of the existing normative and disciplinary biases in the international order. One of its strengths is that it creates the space to rethink entrenched dichotomies—for example, the interplay between security and human rights, law and politics, and peace and justice.[1083]

We think the same holds true for frozen conflicts as a legal concept. It might likewise function as 'an instrument to overcome some of the existing … biases'[1084] in international law. It can also provide a space in which to rethink existing dichotomies and reflect on the limits of international law.

1083 Easterday, Iverson and Stahn (n 957) 11.

1084 Ibid.

C. Key Weaknesses and Threats

Two key weaknesses and threats can be identified in frozen conflicts as a legal concept. First, there is a lack of consensus on a definition for frozen conflicts. Despite the use and appeal of the term, no consolidated meaning has crystallized. What the metaphor and the word 'frozen' refers to remains ambiguous. To some, it is the violence that has halted; to others, the peace negotiations; to yet others, it means belligerent occupation. Moreover, there is no consensus on which situations may be labelled frozen conflicts. What is clear is solely that the term was originally used for conflicts that arose after the dissolution of the Soviet Union, but its application has expanded beyond the post-Soviet context, for example to Kosovo, South Sudan prior to the present humanitarian crisis, and Northern Cyprus. The expansion can be seen as a gain of importance and attraction, but it waters down the power of the concept. Moreover, the fact that various disciplines and institutes take their siloed approaches to examine frozen conflicts can confuse and fragment the concept.[1085] Because there is no single salient characteristic that frozen conflicts have in common but a bundle of legal problems, sometimes even subtle or hidden, the term is sufficiently flexible to be applied to diverse situations, and researchers from different fields can focus on different aspects.

Second, there is a lack of legal implications. The relevance of frozen conflicts as a concept in international law is not obvious if such a concept is meant to entail rights and obligations. In contrast to the concepts of international armed conflict, non-international armed conflict, and armed attack, which help identify the law applicable to a certain situation, the concept of frozen conflict does not trigger the application of any rules. There is no automatism, if A, then B; if a situation is a frozen conflict, then XY. Nor can the concept be used in court to claim a concrete right or to found judicial reasoning. It is thus not easy to apply the concept when deciding a case because it is not effective in differentiating lawful from unlawful behaviour.[1086] The nature of the concept remains descriptive—which can be viewed as a weakness as well as a strength, depending on what is required of a legal concept. Compared to other descriptive concepts that are used in international law and are similarly fuzzy, such as asymmetric warfare, frozen conflict is not as widely used yet.

1085 See also the evaluation of the concept of Jus Post Bellum with the same problem: Jennifer S Easterday, Carsten Stahn and Jens Iverson, 'Epilogue: Jus Post Bellum—Strategic Analysis and Future Directions' in Jennifer S Easterday, Carsten Stahn and Jens Iverson (eds), *Jus Post Bellum Mapping the Normative Foundations* (Oxford University Press 2014) 544.

1086 See on this point Ginsburg and Stephanopoulos (n 1064) 155.

IV. Conclusion

To depict the relationship between international law and frozen conflicts, this part of the thesis situated the concept of frozen conflicts within the wider legal landscape. This position is determined by foundational dichotomies that persist despite being challenged by complex realities. First, the dichotomy of war and peace was examined. This dichotomy has evolved from a formalist to a factualist approach to defining the state of war, with the term 'war' being replaced by 'armed conflict'. However, the binary approach distinguishing between armed conflict versus no armed conflict persists. This dichotomy has been shown to be vulnerable to instrumentalization. In frozen conflicts, Russia plays on this ambiguity by waging war without using the typical war materiel. Instead of kinetic operations, a more subtle form of warfare is applied that is not really an armed conflict, but not true peace either, which makes it difficult for international law to consider such situations.

Furthermore, frozen conflicts straddle the boundary between law and politics. Using the landscape metaphor, frozen conflicts lie at the periphery of the legal landscape that borders the political landscape. Although the relationship between law and politics is complex and has not been addressed in detail here, the important finding is that the dichotomy between law and politics remains. Law and legal decisions should ideally be resilient to the political caprices of states. Concerns have been raised that frozen conflicts are a political matter and not a legal one. However, the question whether a matter is legal or political has been demonstrated to be obsolete because it can be both simultaneously. Thus, the nature of frozen conflicts does not determine whether they are a legal or a political matter. They can be examined from either perspective. In fact, the better question is whether law or politics is better suited for dealing with frozen conflicts. It must be acknowledged that the law has its limits in resolving frozen conflicts. This is not only because the ambiguity of frozen conflicts does not fit neatly into binary categories but also because of weak enforcement mechanisms. However, we think that this reveals more about international law than about frozen conflicts. In contrast, if politics were to address these conflicts with the willingness to resolve them, it might succeed. Therefore, overall, the concept of frozen conflicts rests somewhere between law and politics.

Comparing the notion of frozen conflicts with the concepts of *jus post bellum* and asymmetric warfare has also contributed to placing them within the legal landscape. Both concepts are used in international law, increasingly figuring as research objects. *Jus post bellum* aims to compensate for the oversimplification of the binary logic in international law and to account for com-

plex realities that are no longer armed conflicts but not true peace either. Like frozen conflict, *jus post bellum* is thus located somewhere between existing dichotomous categories. Asymmetric warfare describes a phenomenon that emerged in the 1990s and does not neatly fit the existing legal categories of international and non-international armed conflicts. As in frozen conflicts, in asymmetric warfare at least one party instrumentalizes international law's dichotomies and benefits from the fact that it acts in grey areas. The concept of asymmetric warfare, similarly to frozen conflict, implies no risk of hegemony or UN managerialism because it is descriptive and does not trigger any actions by the international community. *Jus post bellum*, asymmetric warfare, and frozen conflicts all remain ambiguous concepts lacking consolidated definitions and clear legal implications. However, this ambiguity is inherent to the aim of transgressing rigid binary categories. As counterparts to such rigidity, they cannot but be ambiguous.

The analysis of frozen conflicts' placement within the legal landscape concluded with an evaluation of frozen conflicts as a legal concept. For the purpose of this work, a legal concept has been considered one that is likely to be found in glossaries for law students. Both strengths and weaknesses were identified. The strengths are, firstly, the increasing interest in the topic. Specialized research programmes on frozen conflicts and the war in Ukraine have both contributed to this development. Secondly, the concept enhances visibility. Despite growing interest in frozen conflicts, they remain largely overlooked in international law, probably due to the absence of a single and easily identifiable legal problem. Instead, they present a bundle of more subtle and sometimes hidden legal problems. Thirdly, the concept raises awareness of particularities, as has been shown by the ECtHR's dealing with cases in the context frozen conflicts. Finally, it can help overcome existing dichotomies in international law and reveal limitations of the law's binary logic. The weaknesses of the concept are its lack of a consolidated definition and the lack of legal implications. Overall, we think therefore that frozen conflicts should be viewed as a legal concept and that it would be beneficial to include them in glossaries for law students.

Summary and Outlook

This thesis explored international law's relationship with the ambiguous concept of frozen conflicts. It therefore addressed different levels: the term 'frozen conflict' (Part I), the actual cases called frozen conflicts (Part II and III), and international law when placing the concept within the wider field (Part IV). Part I of the thesis pursued investigations of the term 'frozen conflict'. These investigations showed that although the date of first use remains unclear, most authors situate its emergence in the 1990s. The empirical analysis of the use of the term in UN documents indicates that it emerged in 1998 and that it gained momentum only in the 2000s because only after a certain amount of time are conflicts perceived as frozen; moreover, Russian policies underwent changes in this decade. Since then, the term has always been in use and has never fully disappeared, despite some variation in the frequency of its use. The empirical analysis also revealed that the four conflicts in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh have most frequently been referred to as frozen conflicts. This finding both suggested and justified the thesis's focus on the post-Soviet context. While many authors have regarded these four conflicts as the original frozen conflicts, until today no empirical data has been provided to support this assumption. Part I also presented attempts at conceptualizations and definitions of frozen conflicts in various disciplines. The Peace Research Centre Prague offers a definition and has identified 42 cases of frozen conflicts between 1946 and 2011. They apply the concept universally and reject a restriction to the post-Soviet context. In the realm of international law, Grant has offered a legal definition of frozen conflicts that follows a classical concept structure in which a situation is either a frozen conflict or not, with no grey areas. In the end, he asserts that the concept is not relevant to international law. This thesis chose a different approach and followed what cognitive science calls the family resemblance concept structure: instead of 'yes or no', concepts are understood gradually. This is legitimate, because from the beginning it has been acknowledged that frozen conflict is a descriptive concept that does not entail direct legal consequences. Additionally, this approach is valuable because it has been shown that thinking of frozen conflicts as a rigid category with clear boundaries misses the essence of the phenomenon, which inherently blurs conceptual boundaries due to its ambiguity.

To grasp this ambiguity, Parts II and III presented a case study of the four frozen conflicts in South Ossetia, Abkhazia, Transnistria, and Nagorno-Karabakh. Part II provided an overview of their history and recent developments, and Part III analysed their common characteristics in which the frozenness can be seen. The quality of frozenness, in other words, the deadlock, has been illustrated by four common elements: the conflicts' core issues, time factor, intensity, and proliferation. Parts II and III showed that the core issue in each of the conflicts is the status of the break-away territory and that it remains unresolved. This is because the parties' territorial claims to the region are mutually exclusive and thus imply a deadlock. The separatists claim their right to self-determination and demand secession while the parent state requires the integrity of its territory. Both parties have retained their maximalist legal positions for three decades, resulting in the perpetual deferral of any resolution to the issue. The time factor in the conflicts is dominated by this strategy, playing for time, which is facilitated by the fact that international law does not set a time frame for dispute settlement. Additionally, due to the absence of rapidly evolving emergency situations in frozen conflicts, the international community has been shown not to intervene with timely and decisive actions. Thus, the conflicts are prolonged, and the passage of time further widens the gap between the de jure and the de facto territorial situations: while the de jure territorial situation is resistant to any factual changes over time, the de facto territorial situation becomes more consolidated the longer it persists. By pulling in these two opposing directions, the time factor exacerbates the deadlock. Furthermore, frozen conflicts have been characterized by their generally low intensity. They are distinguished from the intensity and violence of full-scale war or armed conflict by the fact that most of the time no active armed hostilities take place. Nevertheless, they are also distinct from positive peace, because violence is not completely absent either. The low intensity of frozen conflicts is evident in three respects: in the military occupation of the regions, which amounts to a permanent violation of international law and a constant threat of the use of force; in the human rights situation, which presents challenges for both procedural rights and substantive rights; and in the displacement of thousands of people over the decades, which has significantly changed the demographic composition of these regions. Finally, the thesis has emphasized that the proliferation of these conflicts in the post-Soviet space must be included in the analysis, and that we consider frozen conflicts not as something universal. A particular political and historical climate has been key to freezing these conflicts. The dissolution of the Soviet Union and Russia's waning influence on the former Soviet Republics led Russia to develop specific approaches to international law. The theory that it has

a permissive stance on the use of force and changes to territorial titles in its near abroad explains Russia's support of the de facto states in frozen conflicts. Only with this support can the de facto states persist, and as long as Russia follows this approach, the frozen conflicts will continue.

Part IV located the concept of frozen conflicts within the legal landscape. The concept has been situated between two dichotomies: between the states of war and peace, and between the realms of law and politics. First, the dichotomy of war and peace has been shown to have evolved from a formalist approach to a factualist one and the term 'war' has been substituted by 'armed conflict'. Although this approach is more dynamic and flexible, it nevertheless still implies a binary approach: a situation is either an armed conflict or it is not. This oversimplification is challenged in diffuse situations such as frozen conflicts. Moreover, the possibilities of not fitting into the binary logic of international law can be instrumentalized by conflict parties. In frozen conflicts, Russia instrumentalizes the dichotomy of war or armed conflict and peace and plays on this ambiguity. It benefits from international law's difficulties to recognize and act appropriately vis à vis such diffuse situations. In the dichotomy of law and politics, frozen conflicts can be a matter of both realms. Criticisms that frozen conflicts are a purely political matter have been dispelled because the question whether a matter is legal or political is not determined by the nature of the object. Instead, it is determined by the perspective taken, and frozen conflicts can be viewed from both legal and political perspectives. The more interesting question is whether law or politics can deal better with frozen conflicts. The law has been acknowledged to have its limits in dealing with or resolving frozen conflicts. However, if politics were to address these conflicts with the willingness to resolve them, it might succeed. Overall, the concept of frozen conflicts has therefore been located between law and politics. In the next step, the similarity of frozen conflicts with other ambiguous concepts was presented. The analogy with *jus post bellum* has shown that other concepts aim to overcome the oversimplistic binary logic of international law and enhance the discipline's sensitivity to complex realities, particularly in situations that are no longer armed conflicts but not true peace either. The comparison with the concept of asymmetric warfare has shown other examples in which binary categories of international law are instrumentalized by conflict parties. In asymmetric wars terrorists often exploit the binary categories of combatants and noncombatants, and the boundaries between war and peace become blurred. Like frozen conflicts, asymmetric warfare has also been shown to be a descriptive concept that, consequently, triggers no action by the international community. Both *jus post bellum* and asymmetric warfare remain ambiguous concepts that lack

consolidated definitions; however, a remarkable interest in the topics has been noted, and they can prove useful not only in addressing cases but in reflecting on the discipline's patterns and limits. Finally, the localization of frozen conflicts within the legal landscape concluded with an evaluation of the concept. Its strengths and weaknesses have been outlined. Strengths include the increasing interest in the topic and particularly its current salience, the enhancement of the visibility of these conflicts in international law, the growing awareness of particularities, and the opportunity to overcome dichotomies in international law and reflect on its limits. Weaknesses of the concept are its lack of a consolidated definition and of legal implications. Overall, we think it valuable to consider frozen conflicts as a legal concept and, for instance, to include the term in glossaries for law students.

By investigating the overall relationship of frozen conflicts and international law, this thesis has explored new research directions. Unlike much existing literature, which primarily focuses on frozen conflicts themselves, the present thesis has used these conflicts to reflect on international law. To thoroughly investigate a relationship such as that between frozen conflicts and international law, it is essential to consider both entities involved in the relationship. Thus, the thesis touched on several legal topics relevant in frozen conflicts and on questions about international law itself. This is both a strength of the work and, simultaneously, one of its limitations. Each theme—such as territorial claims, the time factor affecting the de facto states, the human rights situations, Russia's approaches to international law, the break-away regions' dependence on Russia, and the recent developments in Nagorno-Karabakh—is worth exploring in greater depth; each presents an independent research topic. Moreover, the scope of this work excluded deeper analysis of the geopolitics in the post-Soviet space. By providing a wide-ranging overview, the thesis thus sacrificed the depth that could be achieved by focusing on a specific aspect in more detail. Another limitation of the thesis is inherent to the concept of frozen conflicts. As has been discussed throughout the thesis, its ambiguity remains its key feature: bringing absolute clarity to frozen conflicts is like trying to square the circle. This ambiguity presents both opportunity and limitation. It allows awareness to be raised of atypical cases transgressing the well-established legal categories, but not fitting these categories lowers the concept's power and leverage and will continue to do so.

Future research on the concept of frozen conflict in international law could explore a range of directions. It could delve deeper into various aspects that have been discussed above. For example, the empirical analysis of the use of the term 'frozen conflict' in UN documents could be complemented by an analysis of the documents of other international and regional organizations

and bodies, various states' documents of legislative process, military strategy, political speeches and so forth, and scientific literature. Additional information could be collected from these documents, such as the most dominant collocates of the term, similar to Lukin and Garcia Marrugo's corpus-linguistic studies of the term 'war' in legal documents, where they found that 'person/s', 'prisoner/s of war', 'belligerent/s', 'forces', 'enemy', 'civilian/s', and 'combatant/s' are the terms most frequently used together with 'war'.[1087] This would generate more precise insights into the use and meaning of the term 'frozen conflicts'. Furthermore, characteristics portraying the frozenness of the conflicts could be examined in greater detail. For instance, breaches of ceasefire agreements could be analysed to provide detailed information on how the intensity of violence in frozen conflicts may shift. It would be insightful to quantify the spirals of violence by counting and classifying instances of violence per region. Furthermore, further studies on human rights violations in the regions would help better understand the violence occurring in the regions: which human rights have most frequently been violated and by which state, and how does this contrast with other frozen and nonfrozen conflicts in the world?

Certainly, the development of the concept of frozen conflict is another potential area for research. Depending on its use in future legal sources and policies, the concept could evolve significantly. For example, if the term 'frozen conflict' were to appear in a formal judgement by the ICJ to describe a situation or perhaps even to help interpret or apply the law, such an appearance could have far-reaching implications on the relationship between international law and frozen conflicts that would require further research. The same is true if the UN suddenly appropriates the concept and derives certain actions from it—a scenario that is feasible, similarly to the UN's sponsoring of the concept of transitional justice. Finally, the ongoing war in Ukraine presents another critical area for future research. Depending on the war's outcome, it could impact the use and meaning of the term 'frozen conflict' and its status in international law. If the situation in Ukraine were to become a frozen conflict, perceptions of the concept might well shift: when compared to the full-scale war that has been ongoing since 2022, a frozen conflict might be seen as preferable to active warfare, leading to a more positive connotation of the term 'frozen conflict'. In conclusion, we think that research on frozen conflicts is still in its early stages and holds significant potential for further exploration.

1087 Annabelle Lukin and Alexandra García Marrugo, 'War in Law: A Corpus Linguistic Study of the Lexical Item War in the Laws of War' (2024) 4 Applied Corpus Linguistics 100088.

A new morning was dawning grey outside the window.

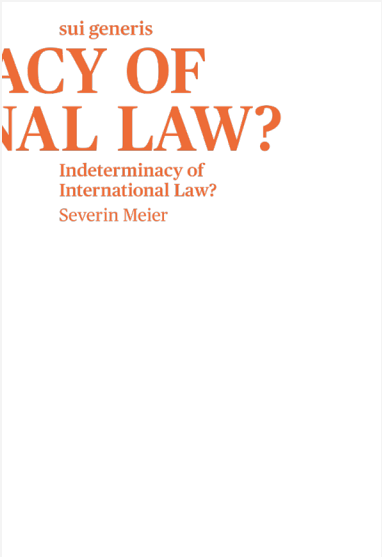
Andrey Kurkov,
Grey Bees

About the Author

Livia Enzler studied Law at the University of Zurich. Prior to her legal studies, she earned a Bachelor of Arts in French and Russian Linguistics and Literature, studying at both the University of Zurich and the University of Lausanne. She also completed an exchange semester in Odesa, Ukraine. During her PhD, she conducted research at Stanford University and the University of Cambridge, and received the UZH Candoc Grant.

Currently, she is working at the Directorate of International Law within the Federal Department of Foreign Affairs.

025 –Severin Meier. **Indeterminacy of International Law?**
The most important (in)determinacy theses in international law since the 1920s are scrutinised in this book. As Severin Meier demonstrates, the extent of legal determinacy depends neither on some linguistic essence found in the text nor on theories that allegedly stand above practice. Instead, the (in) determinacy of law is shown to arise purely from practice. This reconceptualisation of a key discussion in legal philosophy provides a new perspective on the frame of meaning of legal norms.



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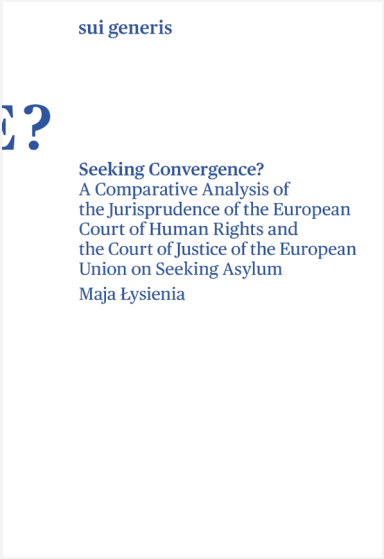
027 –Maja Łysienia: **Seeking Convergence?**
A Comparative Analysis of the Jurisprudenceof the European Court of Human Rights and the Court of Justice of the European Union on Seeking Asylum?

Since 2009 two courts have been shaping human rights of asylum seekers in Europe: the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR). Side by side, the courts examined who is protected from refoulement, when and how asylum seekers can be detained and what remedies they should have access to. Did they seek convergence in their asylum case-law or paid no attention to each other's jurisprudence? Did they establish a coherent standard of the asylum seekers' protection in Europe? Judicial dialogue between the ECtHR and CJEU in the area of asylum is at the heart of this study. The book offers also a comprehensive overview of the asylum case-law of the two courts and identifies the main convergences and divergences in their approach to protection against refoulement, immigration detention and effective remedies.



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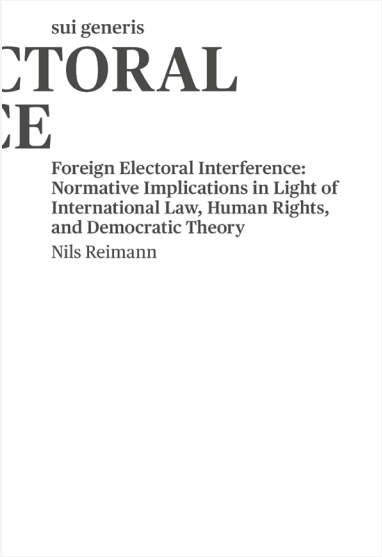
037 – Nils Reimann: **Foreign Electoral Interference: Normative Implications in Light of International Law, Human Rights, and Democratic Theory**

Foreign interference in elections may have attracted increased public attention since 2016, but it is a practice virtually as old as modern electoral democracy itself. This book offers the most comprehensive account of its normative implications yet. It discusses relevant standards of international law, human rights, and democratic theory, thereby casting a net wide enough to address the fundamental value of human dignity as well as the conditions of real political autonomy. Ultimately, the book identifies potential deficits of legality, accountability, and legitimacy ensuing from certain types of foreign electoral interference, and it provides ideas on what can and should be done in response.



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edited by Marc Thommen.

1st edition, 20 December 2025

This thesis was accepted as a doctoral thesis by the Faculty of Law of the University of Zurich on 2 April 2025, upon the recommendation of Prof. Dr. Oliver Diggelmann and Prof. Dr. Urs Saxer, and was awarded the distinction *magna cum laude*.
Print of the dissertation approved by the Faculty of Law of the University of Zurich.

The pre-press stage of this publication was supported by the Swiss National Science Foundation.

ISBN: 978-3-907297-71-1
DOI: 10.38107/071
Proofreading: Sandra Ujpétery
Design: Müller+Hess, Basel
Print: Ebner & Spiegel, Ulm
Central distribution warehouse in the EU is GVA Göttingen,
Anna-Vandenhoeck-Ring 36, 37081 Göttingen, info@gva-verlage.de

sui generis Verlag, Viaduktstrasse 21, 8005 Zurich
www.suigeneris-verlag.ch, info@suigeneris-verlag.ch

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IN INTERNA

The term “frozen conflict” is commonly understood as a blurred state between war and peace. It typically refers to disputes in the post-Soviet space, namely South Ossetia and Abkhazia in Georgia, Transnistria in Moldova, and Nagorno-Karabakh in Azerbaijan. However, it remains an ambiguous concept with no uniform definition. This book explores the relationship between International Law and frozen conflicts by examining the term, analysing the four cases mentioned, and situating the concept within the wider legal landscape. Frozen conflicts challenge the discipline’s binary logic by blurring the boundaries of war and peace, international and non-international armed conflicts, states and nonstates, and law and politics. The book offers a critical reflection on the limitations of International Law when addressing such ambiguous phenomena.

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ISBN 978-3-907297-71-1
DOI 10.38107/071